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JUDGE DOUGLASS BOARDMAN

FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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AN
ANALYTICAL DIGEST

OF THE CASES PUBLISHED IN THE
NEW SERIES OF THE
LAW JOURNAL REPORTS

AND
OTHER REPORTS
OF DECISIONS IN THE
COURTS OF COMMON LAW AND EQUITY,

In the Ecclesiastical and Admiralty Courts,
BY THE HOUSE OF LORDS, THE PRIVY COUNCIL,
AND ELECTION COMMITTEES OF THE HOUSE OF COMMONS,
AT NISI PRIUS,

And in Bankruptcy,
FROM MICHAELMAS TERM 1845 TO TRINITY TERM 1850,

INCLUSIVE.

By FRANCIS TOWERS STREETEN, Esq.
AND
HENRY JOHN HODGSON, Esq. BARRISTERS-AT-LAW.

LONDON :

Printed by James Holmes, 4, Took's Court, Chancery Lane.
PUBLISHED BY EDWARD BRET INCE, 5, QUALITY COURT, CHANCERY LANE.

1852.

M7720.

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<i>Abbreviations.</i>	<i>Reports.</i>	<i>Courts, &c.</i>
Bar. & Ar.	Barron & Arnold's Reports	{ Election Cases and Cases on Appeal from Revis- ing Barristers.
Beav.	Beavan's Reports	Chancery.
Car. & K.	Carrington & Kirwan's Reports	Nisi Prius.
Cl. & F.	Clark and Finnely's Reports	House of Lords.
Coll. C.C.	Collyer's Chancery Cases	Chancery.
Com. B. Rep.	Common Bench Reports	Common Pleas.
De Gex	De Gex's Reports	Bankruptcy.
De Gex & S.	De Gex & Smale's Reports	Chancery.
Den. C.C.	Denison's Crown Cases	Crown Cases Reserved.
Dowl. & L. P.C.	Dowling & Lowndes's Practice Cases	{ Queen's Bench, Common Pleas and Exchequer.
Exch. Rep.	Exchequer Reports	Exchequer.
Hall & Tw.	Hall & Twells's Reports	{ Chancery.
Hare	Hare's Reports	{ Chancery.
H.L. Cas.	House of Lords' Cases	House of Lords.
Law J. Dig.	Law Journal Digest.	
Law J. Rep. (N.S.) Chanc.	Law Journal Reports, New Series	Chancery.
Law J. Rep. (N.S.) Bankr.	_____	Bankruptcy.
Law J. Rep. (N.S.) Q.B. .	_____	Queen's Bench.
Law J. Rep. (N.S.) C.P. .	_____	Common Pleas.
Law J. Rep. (N.S.) Exch.	_____	Exchequer.
Law J. Rep. (N.S.) M.C. .	_____	{ Magis- trates' Cases } Queen's Bench, Common Pleas, and Exchequer.
Law J. Stat.	Law Journal Statutes	Abridgment of Statutes.
L. M. & P.	{ Lowndes, Maxwell, & Pollock's Practice Cases }	{ Queen's Bench, Common Pleas, and Exchequer.
Mac. & G.	Macnaghten & Gordon's Reports	Chancery.
Mee. & W.	Meeson & Welsby's Reports	Exchequer.
Moore In. App.	Moore's Indian Appeals	{ Privy Council.
Moore P.C.	Moore's Privy Council Cases	{ Privy Council.
Ph.	Phillips's Reports	Chancery.
Q.B. Rep.	Queen's Bench Reports	Queen's Bench.
Rob.	Robinson's Reports	Admiralty.
Robert.	Robertson's Reports	Ecclesiastical.
Sim.	Simons's Reports	Chancery.

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AN
ANALYTICAL DIGEST

OF THE
CASES REPORTED AND PUBLISHED

From TRINITY TERM 1845 to MICHAELMAS TERM 1850,

AND CONTAINED IN
THE LAW JOURNAL REPORTS,

And other Contemporary Reports;

WITH
REFERENCES TO STATUTES AND RULES OF COURT WITHIN THE SAME PERIOD.

ABANDONMENT.

[See PRACTICE.]

ABATEMENT.

[See ACTION, Consolidation of Actions—BANKRUPTCY—ERROR—PLEADING and PRACTICE, IN EQUITY; Bills, Revivor—PRISONER; Discharge of.]

(A) OF SUIT.

- (a) *By Death of Parties.*
- (b) *Effect of, as to Costs.*

(B) PLEAS IN ABATEMENT.

- (a) *Time for Pleading after Oyer.*
- (b) *After Demurrer and Amendment.*
- (c) *To the Jurisdiction.*
- (d) *To Damages or Part of Causes of Action.*
- (e) *Non-joinder of Co-contractor.*
- (f) *Non-joinder of Assignee of Insolvent.*
- (g) *Auter Action pendent.*
- (h) *Coverture of Plaintiff.*
- (i) *Special Demurrer to.*
- (k) *Affidavit of Truth of Plea.*
 - (1) *Form and Requisites of.*
 - (2) *Waiver of by Plaintiff.*

(A) OF SUIT.

- (a) *By Death of Parties.*

Appeal from Lower Canada to Judicial Committee of Privy Council abated by the death of the
Digest, 1845—1850.

respondent, whose heirs renounced the succession, and, a curator having been appointed by the Court below to the vacant succession, the appeal was revived against such curator. *Ermatinger v. Gugy*, 5 Moore, P.C. 1.

Where a cause was by order of Nisi Prius referred to a barrister to state a special case, and the case was stated after the death of one of the parties, the Court refused to set it aside. *James v. Crane*, 15 Law J. Rep. (N.S.) Exch. 232; 15 Mee. & W. 379; 3 Dowl. & L. P.C. 661.

On a monition having been granted to shew cause why a beneficed clergyman, who was under suspension at the death of the promotor of the suit, but had not paid the costs in which he had been condemned, should not pay those costs to the administratrix of the promotor; it was held, after argument, that the suit did not abate by the death of the promotor, and that the monition for payment should be issued. *Brookes v. Cresswell*, 1 Robert. 612.

(b) *Effect of, as to Costs.*

The trial of a cause at an assizes was postponed by order of Nisi Prius, on payment by the defendant of the costs of the day, "to be taxed." The defendant died before any verdict in the cause, and before the order of Nisi Prius was made a rule of Court. The suit having abated (17 Car. 2. c. 8. s. 4), the Court discharged a rule calling on the defendant's executrix to shew cause why the costs should not be taxed; the remedy for recovering the costs under 1 & 2 Vict. c. 110. s. 18. not being clear as against an executrix. *Hill v. Brown*, 16 Mee. & W. 796.

(B) PLEAS IN ABATEMENT.

(a) Time for Pleading after Oyer.

The rule that where oyer has been demanded, the defendant has as much time for pleading after it is granted as he had when he demanded it, is applicable as well to a plea in abatement as to a plea in bar. *Kerfoot v. Edwards*, 17 Law J. Rep. (n.s.) Exch. 203; 2 Exch. Rep. 196; 5 Dowl. & L. P.C. 748.

(b) After Demurrer and Amendment.

[See *Esdaile v. Truswell*, (k) Affidavit of Truth of Plea.]

(c) To the Jurisdiction.

A plea in abatement to the jurisdiction of the Court of the Judicial Committee of the Privy Council must point out another Court before which the matter is cognizable. *Spooner v. Juddow*, 6 Moore, P.C. 257.

(d) To Damages or Part of Causes of Action.

To an action by A for words imputing insolvency in the way of his trade, which he carried on in partnership with B and C, the declaration stating, by way of special damage, that one C S had withdrawn his account from plaintiff and his co-partners,—a plea, that plaintiff carried on his said trade jointly with B and C and not otherwise, and that all the damage accrued to B and C jointly with plaintiff, and not to plaintiff alone, held bad. *Robinson v. Marchant*, 15 Law J. Rep. (n.s.) Q.B. 135; 7 Q.B. Rep. 918.

To counts for work, money paid, and interest, defendant pleaded in abatement “as to part of the monies mentioned in the declaration and the causes of action in respect thereof” the non-joinder of a co-contractor:—Held, that the plea was good though not pleaded to any particular count or sum. *Rhodes v. Turner*, 3 Exch. Rep. 607.

(e) Non-joinder of Co-contractor.

A plea in abatement for non-joinder of co-contractor should pray judgment of the writ and declaration. *Davies v. Thompson*, 14 Mee. & W. 161; 3 Dowl. & L. P.C. 49; s. p. *Whitling v. Desange* or *Des Anges*, 16 Law J. Rep. (n.s.) C.P. 159; 3 Com. B. Rep. 910; 4 Dowl. & L. P.C. 678.

[See (k) Affidavit of Truth of Plea.]

(f) Non-joinder of Assignee of Insolvent.

In actions of contract by assignees of bankrupts or insolvents, the non-joinder of another assignee is ground of nonsuit, and the proper mode of taking advantage of the non-joinder is by a traverse that the plaintiffs are assignees, and not by plea in abatement. *Jones v. Smith*, 18 Law J. Rep. (n.s.) Exch. 145; 1 Exch. Rep. 831.

(g) Auter Action pendente.

In assumpsit for work done, &c., a plea that another action is pending for the same cause against a third party, is a bad plea. *Henry v. Goldney*, 15 Law J. Rep. (n.s.) Exch. 298; 15 Mee. & W. 494; 4 Dowl. & L. P.C. 6.

Defendant pleaded in abatement that plaintiff issued a writ of summons out of Common Pleas

against defendant for same identical causes of action as those in the declaration mentioned, *prout patet per recordum*; and that the parties in said suit and in the present suit were the same parties, and that said suit was still pending at commencement of the present suit, concluding with a verification. Plaintiff replied that said former suit was not pending at the time of commencement of the present suit, concluding to the country:—Held, that the replication was properly concluded. *Boyce v. Webb*, 19 Law J. Rep. (n.s.) Q.B. 312; 15 Q.B. Rep. 84.

(h) Coverture of Plaintiff.

Case against the sheriff for escape of H in execution upon judgment at suit of plaintiff. Plea in bar, the coverture of plaintiff at the time of the accruing of the debt for which judgment was recovered against H, and thence hitherto:—Held, bad as being properly pleadable in abatement. *Morgan v. Cubitt*, 18 Law J. Rep. (n.s.) Exch. 288; 3 Exch. Rep. 612.

(i) Special Demurrer to.

It is not necessary to demur specially to a defective plea in abatement. *Davies v. Thompson*, 8 Dowl. & L. P.C. 49.

Though 27 Eliz. c. 5. and 4 Anne, c. 16. do not apply to pleas in abatement, yet at common law duplicity in such pleas can only be taken advantage of on special demurrer. *Ryalls v. Bramall*, 1 Exch. Rep. 734; 5 Dowl. & L. P.C. 753.

(k) Affidavit of Truth of Plea.

(1) Form and Requisites of.

If the affidavit verifying a plea in abatement professes to give the particulars of the residences of the persons named therein, and in fact misdescribes them, the defendant is bound by such description, and the plea will be set aside, although the misdescription occurred merely by mistake, or was such that the proper residence could have been easily ascertained.

In assumpsit defendant pleaded in abatement that the contract was made jointly with several persons (one of whom was described as “A. W. Hillary, whose Christian names are to defendant unknown,” and another as “— Stokes, whose christian name is to defendant unknown”), who were stated to be resident within the jurisdiction; and also with several other persons (also named), who were stated to be resident out of the jurisdiction, and complained of the non-joinder, as defendants, of the former set of persons. The affidavit in verification of the plea gave the residences of the parties who, it was alleged, ought to have been joined, but described one as of 20, instead of 22, Gower Street, Bedford Square, and another as of High Street, instead of Watling Street, Canterbury. The Court set aside the plea in abatement.

Quære—Whether the plea was correct in including the names of all the co-contractors, both those within and those without the jurisdiction. *Newton v. Stewart*, 15 Law J. Rep. (n.s.) Q.B. 384; 4 Dowl. & L. P.C. 89.

The affidavit verifying a plea in abatement for non-joinder of co-contractor should state correctly his place of residence; and the Court will set aside the plea on motion, if it appears on affidavit that

ABATEMENT—ACCORD AND SATISFACTION.

such place has not been correctly stated. It is not sufficient to state the place where the co-contractor carries on his business. *Maybury v. Mudie*, 17 Law J. Rep. (N.S.) C.P. 95; 5 Com. B. Rep. 283; 5 Dowl. & L. P.C. 360.

A plea in abatement of non-joinder of some of co-contractors is not good. The plea must be of non-joinder of all; and, consequently, if defendant is not able to comply with the provisions of 3 & 4 Will. 4. c. 42. s. 8, either because one of those who contracted along with him is not resident within the jurisdiction, or because he is unable to verify his residence, he is deprived of his plea in abatement altogether. *Gell or Joll v. Curzon*, 16 Law J. Rep. (N.S.) C.P. 172; 4 Dowl. & L. P.C. 810; 4 Com. B. Rep. 249.

An affidavit verifying a plea in abatement, stated the residence of A to be at 43, Lowndes Street, Belgrave Square. A was at that time travelling abroad for his health, and the house and furniture, which really belonged to A, were in the actual occupation of a friend who was endeavouring to let the house furnished, for A, until he returned:—Held, that the word “residence” in the 8th section of the 3 & 4 Will. 4. c. 42, means home or domicile, and that the above affidavit was in that particular a sufficient compliance with the terms of the act. *Lambe v. Smythe*, 15 Law J. Rep. (N.S.) Exch. 287; 15 Mee. & W. 433; 3 Dowl. & L. P.C. 712.

In the affidavit required to be given under 3 & 4 Will. 4. c. 42. s. 8, in support of a plea in abatement for the non-joinder of persons as co-defendants it is not sufficient to state the residences of such persons at the time of the commencement of the suit; but such affidavit must give their residences at the time of plea pleaded. *White v. Gascoyne*, 18 Law J. Rep. (N.S.) Exch. 110; 3 Exch. Rep. 36.

Declaration in *scire facias* stated that J E, the public officer of a banking co-partnership called the L. and W. Bank, recovered against G S, the public officer of a banking co-partnership called the L. and W. R. Banking Company, the sum of 51,373*l.* 12*s.* 7*d.*, and that the defendant was a member of the said last-mentioned banking company. The declaration having been demurred to, the plaintiff amended; and within two days after the amendment the defendant pleaded in abatement, that at the very same time when the writ issued, and before the said J E declared, the said J E, public officer, &c. issued a writ of *sci. fa.* (setting it out). The writ stated that the said J E, public officer, &c. had recovered judgment from the said G S, public officer, &c. for the sum of 51,373*l.* 12*s.* 7*d.*; and that one J D was at the time of such judgment a member of the last-mentioned banking co-partnership. The plea then stated a declaration in *sci. fa.* by the said J E against the said J D; and that the judgment against J D and that against the present defendant were one and the same judgment; that at the time of the judgment against J D and the issuing of the writ of *sci. fa.* against the defendant, J D was a member of the banking co-partnership; and it averred the identity of the two companies described in the two writs as the L. and W. R. Banking Company, and that G S was the public officer of the latter company at the time of the judgment; that J D was still living, and that the writ and the suit against J D were still depend-

ing against him. The affidavit in verification of the plea stated that the paper writing thereunto annexed was a true copy of the issue in the action between J E and J D; and that judgment was signed in such action by the said J E against the said J D on &c. for 51,373*l.* 12*s.* 7*d.*:—Held, that judgment signed by the plaintiff on this plea was regular, inasmuch as the affidavit did not state even the defendant's belief that the two writs issued at the same time. But *semble*, that defendant was entitled to plead in abatement. *Esdaile v. Truswell*, 17 Law J. Rep. (N.S.) Exch. 294; 2 Exch. Rep. 312.

(2) Waiver of by Plaintiff.

The 4 Anne, c. 16. s. 11, requiring pleas in abatement to be verified by affidavit is an enactment for the sole benefit of plaintiffs, and may be waived by them. *Graham v. Ingleby*, 1 Exch. Rep. 651.

ABORTION.

On trial of an indictment on the 1 Vict. c. 85. for using an instrument with intent to procure the miscarriage of a woman, it is immaterial whether the woman was pregnant or not. *Regina v. Goodchild or Goodhall*, 2 Car. & K. 293; 1 Den. C.C. 187.

ACCIDENTAL DEATH.

[See ACTION—CASE.]

ACCORD AND SATISFACTION.

[See ANNUITY—BILLS AND NOTES—COVENANT.]

(A) WHAT AMOUNTS TO.

- (a) *Agreement by Creditors to accept Composition.*
- (b) *Acceptance of Negotiable Instrument.*
- (c) *Agreement to forego Balance of Mortgage.*
- (d) *Payment of Balance of Account in Satisfaction of larger Sum.*
- (e) *Retaining Goods seized for Rent in Satisfaction of Debt.*
- (f) *Accord without Satisfaction.*

(B) PLEADINGS.

- (a) *Traversal of Agreement.*
- (b) *Must be formally pleaded.*
- (c) *Issuable Plea.*

(A) WHAT AMOUNTS TO.

[*Gifford v. Whittaker*, 5 Law J. Dig. 3; 6 Q.B. Rep. 249.]

(a) *Agreement by Creditors to accept Composition.*

To counts by drawer against acceptor of two bills of exchange for 30*l.* and 41*l.* 16*s.*, defendant pleaded as to 13*l.* 3*s.* 2*d.*, parcel of the 30*l.* in the first count, and also, as to the second count, that he, defendant, was in embarrassed circumstances, and indebted to plaintiff in respect of the causes of action in the introductory part of the plea mentioned in the sum of 54*l.* 19*s.* 2*d.*, and to one B in a certain other sum

of money, and was unable to pay plaintiff and B their debts in full, and thereupon defendant agreed with plaintiff and B to pay them respectively; and plaintiff and B then mutually agreed with each other and defendant to accept of him 10s. in the pound as a composition upon and in full satisfaction and discharge of their respective debts. The plea then averred readiness and willingness to pay, with a tender of the amount of the composition, and concluded with payment of it into court. The plaintiff replied, traversing the agreement to accept the composition of 10s. in the pound in satisfaction and discharge; upon which issue was joined. At the trial the agreement proved was to accept a composition of 10s. in the pound, payable in *certain sums on certain days*. It also appeared that default had been made in payment of the instalments. The learned Judge, at the request of defendant's counsel, amended the plea accordingly:—Held, that the plea, as amended, was bad, even after verdict, for not stating that the payments were made at the precise times agreed on, or at least a tender made of them.

Semble—That, if the plea had been that a new mutual agreement between plaintiff, defendant, and other creditors, binding on each at the time when it was made, was given as a substitution for, or in satisfaction of, the debt due from the defendant to the plaintiff, such plea would have been good; and in that case it would have been for the jury to decide whether the plaintiff agreed to accept the agreement itself, not the performance of it, as a satisfaction for his debt. *Evans v. Powis*, 1 Exch. Rep. 601.

(b) *Acceptance of Negotiable Instrument.*

To assumpsit on a promissory note for 50*l.* with counts for 1,000*l.* money had and received, and on an account stated, defendant pleaded as to 500*l.*, parcel of said sum in the second and last counts mentioned, that the said account stated was stated of and concerning that sum; and that after the causes of action arose, plaintiff commenced an action of debt for recovery of said sums of 500*l.* and 500*l.* in the Tolzey Court at Bristol; that defendant disputed the debt, and denied that he owed or was liable to pay, or that plaintiff could recover the same; that thereupon to terminate the said dispute and the claim and demand of plaintiff, and finally to determine the said action, plaintiff and defendant agreed that the said action should be settled by defendant making and delivering to plaintiff three promissory notes for 125*l.*, 125*l.*, and 50*l.*; and that plaintiff should accept and receive the same in full satisfaction for and discharge of the sums of 500*l.* and 500*l.* and all damages and costs, and that plaintiff should discontinue the said action. Replication, that no such agreement was ever made *modo et forma*, and issue thereon. It was proved that the action in the Tolzey Court was for 500*l.*, and that it was agreed between plaintiff and defendant that defendant should give plaintiff, in discharge of the 500*l.*, three promissory notes, two for 125*l.* and the third for 50*l.* The notes were given, and the following agreement was indorsed by plaintiff's attorney on the process served on defendant:—"This action is settled by the defendant giving three promissory notes, viz., one at three months, 125*l.*, one at four months, 125*l.*, and one at twelve months, 50*l.*

Upon payment of which several promissory notes, I undertake to deliver to S (the defendant's attorney) the several papers and letters in my possession, in reference to this action:"—Held, first, that the real meaning of the parties was to put an end to the action, and for the larger sum claimed therein to substitute a smaller secured by three promissory notes; and that the plea was proved. Secondly, that although payment of part of a liquidated and ascertained sum cannot be satisfaction of the whole, yet that upon a mere simple contract a negotiable security may be a satisfaction of a claim for a larger amount; and that the plaintiff was not entitled to judgment *non obstante veredicto*. *Sibree v. Tripp*, 15 Law J. Rep. (N.s.) Exch. 318; 15 Me. & W. 23.

To declaration in debt with three counts in 40*l.* each for goods, work, and on an account stated, the defendant pleaded to the first and last counts, except as to 10*l.* and 9*l.* 15*s.* 6*d.*, parcel, &c., that the said debts, except so far as they related to 9*l.* 15*s.* 6*d.* accrued to plaintiff for the delivery of clothes by him to defendant, and that it was afterwards agreed between them that in consideration that defendant would deliver to plaintiff an acceptance of the Earl of M. for 25*l.*, with a blank space for the signature of the drawer, plaintiff would discharge defendant from all claim for clothes, if the acceptance should be paid in six months, and if it should not be paid in that time defendant should be *liable* to pay to plaintiff the sum of 10*l.* only on account of the clothes, and that the acceptance should be a full discharge of so much of the claim as should exceed 10*l.*; that defendant delivered the acceptance, and that the same was not paid:—Held, on special demurrer, that the plea was good. *Curlewis v. Clark*, 18 Law J. Rep. (N.s.) Exch. 144; 3 Exch. Rep. 375.

(c) *Agreement to forego Balance of Mortgage.*

Debt upon two indentures, whereby defendants' testator covenanted to pay plaintiff the respective sums of 1,300*l.* and 700*l.*, with interest. Plea, in substance, that plaintiff was a mortgagee, by two mortgages, of an estate which was insufficient, upon an estimate of its value, to pay the mortgage money due from testator; that three other mortgagees were in the same situation, the estate realized to each being less in estimated value than the charge upon it; that defendants were devisees of the real estate, and executors of the deceased mortgagor; that they had received assets, which, after deducting the costs and expenses payable by them in the first instance, and in preference to the debts due from the testator, and also excepting some furniture, amounted to the deficiency on each mortgage; and thereupon it was agreed between plaintiff and defendant, and each of the mortgagees, as the common consent of all, and at the request of each, that no suit should be instituted for the administration of assets, and that the said balance of the assets, after deducting the furniture which should be given to the widow, should be divided rateably between the different mortgagees, and paid to them in satisfaction of the sums due to them over and above the estimated value of the estates; and that all the respective *rights and equities of redemption*, or other rights of the defendants, as executors and trustees to the mortgaged property, *should thenceforth be wholly barred, extinguished, satisfied, and discharged, and*

the mortgagees should thenceforth become absolute owners, both at law and in equity, of the mortgaged estates, and that the covenants in the declaration should be satisfied and discharged, in consideration of the premises. The plea then averred payment to each of his share of the assets, and that the several rights and equities of redemption were barred and extinguished. Replication, that it was not agreed, nor did defendants pay to plaintiff the sum of money in the plea mentioned, upon which issue was joined. The Judge, at the trial, having ruled that the plea could not be proved, except by an agreement in writing,—Held, that although an agreement to convey an equity of redemption must be in writing, this plea would have been good on demurrer, even though it had expressly stated the contract to have been by parol, inasmuch as the agreement by the plaintiff to forego the balance of his mortgage beyond the value of the estate upon receiving his share of the assets, was binding on him, and the receipts of his share of the assets was a satisfaction for the estate; because the agreement of the other mortgagees to take their shares of the assets also was a good consideration for giving up the claim for the residue of the debt against the defendants.

Quære, whether the plea, if proved, would be a good bar. *Massey v. Johnson*, 17 Law J. Rep. (N.S.) Exch. 182; 1 Exch. Rep. 241.

(d) *Payment of Balance of Account in Satisfaction of larger Sum.*

In *indebitatus assumpsit* for money due on an account stated, it is not sufficient to plead that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, defendant and plaintiff accounted together of and concerning the said causes of action, and all other claims and demands then being between plaintiff and defendant, amounting to a large sum, to wit, 1,000*l.*, and that on such accounting a small sum, to wit, 150*l.*, was then found to be due and owing from defendant to plaintiff, which defendant then promised plaintiff to pay, and afterwards, before the commencement of the suit, paid to plaintiff, who accepted it in full satisfaction of the sum due to him from defendant; for such a plea does not shew that, at the time of the second accounting relied on, any cross-demand by defendant against plaintiff existed, or that, if it existed, it had not been agreed to be given up by defendant in consideration of plaintiff's giving up some other demands of his on defendant, so as to make payment of the balance a satisfaction of the larger sum. *Smith v. Page*, 15 Mee. & W. 683.

(e) *Retaining Goods seized for Rent in Satisfaction of Debt.*

Action for use and occupation: pleas, first, that plaintiff seized goods of defendant sufficient to pay the rent and costs, and detained them for two years, and it was then agreed between them that plaintiff should retain the goods in satisfaction of the debt, and that he did so accordingly; second, that after a wrongful seizure by plaintiff of goods of sufficient value, &c., plaintiff and defendant agreed that plaintiff should retain the goods, and that they should relinquish their claims on each other; third,

that they agreed that plaintiff should retain the goods so seized, and that they should relinquish their claims, and defendant should give up possession:—Held, that these pleas were good pleas of accord and satisfaction. *Jones v. Sawkins*, 17 Law J. Rep. (N.S.) C.P. 92; 5 Dowl. & L. P.C. 353; 5 Com. B. Rep. 142.

(f) *Accord without Satisfaction.*

To an action by indorsee of a promissory note, a plea that the note was made by plaintiff and E; that whilst plaintiff was holder, defendant and E, his partner, delivered to him nineteen signed bills, which were referred to taxation; that it was agreed that the balance found due from plaintiff to defendant on such taxation should be applied in part payment of the note, and the balance of the note be secured by a judgment payable at certain times, which had elapsed before commencement of the suit; that the taxation was still pending, and the balance not ascertained; and that defendant and E had always been ready and willing to apply the balance due to defendant towards payment of the note, and on completion of the taxation to secure the balance of the note by a judgment:—Held, that the plea was bad, as being an accord without satisfaction; for that even if it were a good agreement to suspend the remedy, the lapse of time shewed performance to be impossible. *Carter v. Wormald*, 16 Law J. Rep. (N.S.) Exch. 231; 1 Exch. Rep. 81; 5 Dowl. & L. P.C. 131.

(B) PLEADINGS.

(a) *Traverse of Agreement.*

Where to an action of trespass the defendant pleaded an agreement for the mutual relinquishment of all disputes, &c., and for the payment by the defendant to the plaintiff of 5*l.*, as a satisfaction and discharge of all claims by the plaintiff against the defendant, and, amongst other things, of the damages sustained by the plaintiff, by reason of the trespasses in the declaration mentioned, and averred, that in pursuance, &c., the disputes were mutually relinquished, and the 5*l.* paid as satisfaction; and the plaintiff, by his replication, traversed the agreement only,—Held, that the replication tendered a material issue, and was properly pleaded. *Bainbridge v. Lax*, 16 Law J. Rep. (N.S.) Q.B. 85; 9 Q.B. Rep. 819.

(b) *Must be formally pleaded.*

To an action for a money demand, a plea that, after the accruing of the causes of action, one B was indebted to defendant in a larger amount than the sum claimed, and, B being a debtor in Scotland, defendant authorized plaintiff to receive the sum due to him, defendant, from B, and that plaintiff, instead of receiving the said sum, elected to take and took from B a bill of exchange for and on account of the said sum, and that he appropriated and retained the said bill of exchange for and in liquidation and discharge of the said debt, and discharged B therefrom according to the law of Scotland,—Held, bad on special demurrer, as not being properly pleaded either as payment or satisfaction. *Baillie v. Moore*, 15 Law J. Rep. (N.S.) Q.B. 169; 8 Q.B. Rep. 489.

(c) *Issuable Plea.*

To a declaration in assumpsit, containing a count on a bill of exchange, and a money count, defendant pleaded payment of money into court on the first count, which the plaintiff accepted in satisfaction, and pleaded to the residue of the declaration, as to 186*l.*, parcel, &c., a plea which stated an agreement that defendant should pay plaintiff interest at 5*l.* per cent. on the 186*l.*, and repay the principal as soon as his means should enable him, and that, in consideration thereof, the plaintiff should give time to the defendant until his means should enable him to pay, and that plaintiff accepted such promise by defendant in satisfaction, and alleged performance by defendant. There were two other pleas pleaded as to the same sum to the same effect, except that one stated the agreement to be that defendant should pay 4*s.* a week for interest on the 186*l.*, and should repay the principal when his means should allow him; and contained an averment that the interest so agreed to be paid exceeded 5*l.* per cent.; and the other stated the agreement to be, that defendant should pay interest at 5*l.* per cent., and repay the principal when his means should enable him, and in the mean time pay 4*s.* a week on account of the interest:—Held, that the above pleas were issuable.

Semble—that plaintiff was not precluded from signing judgment on the second plea, by having accepted in satisfaction the money paid into court. *Verbist v. De Keyser*, 15 Law J. Rep. (N.S.) Q.B. 28; 3 Dowl. & L. P.C. 392.

ACCOUNT.

1. AT COMMON LAW.

[See MORTGAGE—PARTNERS—PLEADING—SET-OFF.]

(A) ACTION OF ACCOUNT.

- (a) *By Tenant in Common against Co-tenant.*
- (b) *Against Representatives.*

(B) ACCOUNT STATED.

2. IN EQUITY.

[See COMPANY—RAILWAY.]

(A) IN GENERAL.

- (a) *When an Account will be decreed.*
- (b) *Conclusiveness of Account between the Parties.*

(B) BILL FOR AN ACCOUNT.

- (a) *In what Cases it may be filed.*
- (b) *At what Time.*
- (c) *Parties to the Suit.*
- (d) *Interest and Costs.*
- (e) *Decree.*

1. AT COMMON LAW.

(A) ACTION OF ACCOUNT.

- (a) *By Tenant in Common against Co-tenant.*

A tenant in common, who occupies and takes the whole produce derived from the culture of the common property, the whole expense of which is

sustained by himself, but receives no rent or any other profit in respect of the property, is liable to account to his co-tenant under 4 Anne, c. 16. s. 27. The receipt by one co-tenant of the whole profits is *prima facie* a receipt of more than his just share, and will render him liable to render an account to his co-tenant as bailiff, though on taking such account it may turn out that he is a creditor, not a debtor. *Eason v. Henderson*, 18 Law J. Rep. (N.S.) Q.B. 69; 12 Q.B. Rep. 986.

(b) *Against Representatives.*

A, being the clerk and manager of B, the sheriff of Montreal, received and paid in that capacity various sums of money on B's account, in the course of the business of the office. B brought an action against the representatives of A, for an account of the receipts and application of the monies which passed through A's hands while in B's office:—Held, in such circumstances, by the Judicial Committee, reversing the judgment of the Court of Appeals of Lower Canada, that such action would not lie against A's representatives. *Ermatinger v. Guggy*, 5 Moore, P.C. 1.

(B) ACCOUNT STATED.

The following memorandum,—“Mr. C, I beg you will not proceed against me, for A B, for the 100*l.* which I owe her, and I will pay her as soon as I am able,” signed by defendant, though it might be *prima facie* evidence, on a count for an account stated, yet held not to render the defendant liable, on such a count, when it appeared that the debt, in respect of which the memorandum was written, was due from the deceased husband of defendant to the former husband of plaintiff. *Petch v. Lyon*, 15 Law J. Rep. (N.S.) Q.B. Rep. 393; 9 Q.B. Rep. 147.

After contract executed a parol admission by defendant that he owes the 100*l.* to plaintiff is evidence of an account stated. *Cocking v. Ward*, 15 Law J. Rep. (N.S.) C.P. 245.

An I O U is evidence of an account stated between the holder and the party signing it, but not of money lent to him by the holder. *Fesenmayer v. Adcock*, 16 Mee. & W. 449.

[See ARBITRATION, Award—INTEREST.]

2. IN EQUITY.

(A) IN GENERAL.

- (a) *When an Account will be decreed.*

A & Co. at Calcutta, by a letter dated January, and received in London on the 11th of March 1841, directed S & Co. in London to hold a sum of money payable on the 19th of November following, out of remittances and consignments on the general account at the disposal of a creditor of A & Co. in Liverpool. A & Co. at the same time acquainted the Liverpool house with the directions which had been given. S & Co. informed the Liverpool house that they had received and registered the order, and after stating that they were in advance of A & Co. and declining to accept bills for any part of the amount, said that if remittances should come forward to enable them to meet the wishes of A & Co., they would lose no time in advising the Liverpool house. S & Co. in acknowledging to A & Co. the receipt of the order, said that the state

of their accounts did not then warrant them in meeting the requisition, but they would meet it if in a position to do so before November. A & Co. revoked the order by a letter of January 1842, received by S & Co. on the 12th of March 1842:—Held, that the effect of the whole correspondence entitled the Liverpool house as against S & Co. to an account in equity of the balance on the 12th of March 1841 on their general account with A & Co. (giving S & Co. credit for all liabilities incurred on account of A & Co. on that day) and of the consignments and remittances of A & Co. to S & Co. in the general account which came to the hands of the latter between the 12th of March 1841 and the 12th of March 1842.

S & Co. might have declined the appropriation, and returned the balance of the account to A & Co., but they could not as against A & Co. have retained any balance due to A & Co., except for the purpose which the latter had directed. *Malcolm v. Scott*, 6 Hare, 570.

A contract for railway works, after specifying certain works to be done for a gross sum, provided that extra works which the company or their engineer should by writing under his hand require to be executed, should be deemed to be included in the contract, and should be paid for at a certain rate; and that the contractor should not be entitled to make any claim for any alteration or addition which he might make without such written and signed instructions.

Held, by the Vice Chancellor of England (affirmed, on appeal, by the House of Lords—1 *House of Lords Cases*, 111) that a suit for an account of monies due to the contractor, in respect of works done under the contract, was a proper subject of jurisdiction in equity.

Held, by Wigram, V.C. (upon exceptions) that a direction for an account of extra works done by the plaintiff under and by virtue of the contract did not authorize any account to be taken of works (other than the specified works) done with the privity of the company without written instructions; but that the plaintiff might have leave to bring an action at law in respect of such works.

Whether, if the contractor could not in covenant recover for such extra works, he might not recover in assumpsit, *quare*. *Nixon v. Taff Vale Rail. Co.*, 7 Hare, 136.

A placed his son, who was addicted to intemperance, under the care of B, a relation by marriage, and at his death left his son an annuity of 500*l*. The son resided with B for several years after his father's death, and until a few months before his own death. B always accompanied him when he went to receive his annuity from his father's executors, and he, as soon as he had received it, handed it over to B to keep for him, and B from time to time gave him small sums and paid his bills:—Held, that B was accountable in a court of equity for what he had received from the son. *Terry v. Wachter*, 15 Sim. 447.

There may be circumstances under which the Court will, at the suit of universal legatees under a will, direct an account against a debtor to the testator's estate, without collusion being established between the debtor and the personal representative, or any evidence of insolvency on the part of the latter, or of his refusal to sue the debtor, other than

his omission to institute proceedings for a considerable period.

Quære—whether an honest refusal by an executor to institute a suit against a solvent person reasonably alleged to be equitably indebted to the testator, is sufficient of itself to enable the universal legatee to sue the debtor in equity, making the executor a party.

Quære—whether a party can read the cross-examination of the witness of his adversary, where the latter does not read the examination-in-chief. *Barker v. Birch*, 1 De Gex & S. 376.

(b) *Conclusiveness of Account between the Parties.*

E A, as administrator of G A, his brother, who left a widow and several children infants (of whom the plaintiff, W A, was one) surviving him, collected and received the personal estate and effects of G A, and dealt with them as he thought fit. E A also procured himself to be nominated the guardian of the plaintiff in the court of the lord of the manor, with reference to some estates to which the plaintiff was customary heir, and he procured the plaintiff to be admitted tenant. The plaintiff attained his majority in September 1823; and on the 7th of May 1825, being about one month after E A's settlement of accounts with the plaintiff's sister Mary, who was older than the plaintiff, the plaintiff wrote in a book of accounts kept by E A, and at the end of it, which contained the account of the plaintiff, shewing a balance of 17*l*. 12*s*. in favour of the plaintiff, a memorandum admitting that the plaintiff had had a satisfactory investigation of the accounts, and confirmed the same; and the plaintiff then affixed his name at the end of the memorandum. E A, who stood *in loco parentis* to the plaintiff, died in 1834. The plaintiff, who was a member of the bar, alleged, by his bill, filed on the 5th of September 1843, that having been allowed, for the first and only time, to examine E A's accounts, about two or three years before filing his bill, he therein discovered many errors, shewing intentional misrepresentations on the part of E A in the accounts. No evidence could be given of the circumstances under which the plaintiff wrote and signed the memorandum at the foot of the accounts of E A. The errors in the accounts of E A were, in fact, numerous, and some of the entries in the accounts were, in fact, misrepresentations wilfully made; and it did not appear that the plaintiff could have examined the accounts in the lifetime of E A, even if he had desired to do so:—Held, that the plaintiff was entitled to a declaration by the Court that he was not bound by the settlement of account with E A, and that the usual accounts ought to be taken of G A's estate possessed by E A, and of its application, &c.; but the Master was to be at liberty to state special circumstances as to loss of evidence and documents, &c.

In a case like the present, it was the duty of E A to preserve evidence that the errors, if such were the fact, were called to the attention of, and examined by, or were made known to, W A before he signed the memorandum. *Alfrey v. Alfrey*, 17 Law J. Rep. (N.S.) Chanc. 30; 10 Beav. 353; affirmed 1 Mac. & G. 87.

When a defendant, who is himself a solicitor, by a mistake in practice, allows an account to be taken

against him without objection, he is not entitled to have the accounts re-opened. *Wallace v. Patton*, 12 C. & F. 491.

(B) BILL FOR AN ACCOUNT.

(a) *In what Cases it may be filed.*

The relation between a banker and customer, who pays money into the bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank. The relation of banker and customer does not partake of a fiduciary character, nor bear analogy to the relation between principal and factor or agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent:—Held, therefore, that an account between bankers and their customer, not long nor complicated, but consisting of a few items and interest, is not a fit subject for a bill in equity. *Foley v. Hill*, 2 H. L. Cas. 28.

A builder contracted to build a workhouse on certain terms, but became bankrupt before it was completed, and it was finished by the guardians. A bill by the assignees to have an account taken of what had been done was dismissed, with costs, on the ground that it was not a proper subject for a suit in equity. *Ambrose v. Dummow Union*, 9 Beav. 509.

(b) *At what Time.*

After judgment at law finding payments, made to railway company, to be overcharges, a bill filed, pending a writ of error on that judgment, to restrain the company from continuing the overcharges, and for an account, &c., is not improper nor premature, and plaintiffs are entitled to the costs. *Barrett v. Stockton and Darlington Rail. Co.*, 1 H. L. Cas. 18.

(c) *Parties to the Suit.*

A party entering upon and taking the rents and profits of an infant's estate may be sued at law as a trespasser, or in equity as the bailiff, guardian and trustee of the infant, at the election of the plaintiff. Where several persons so entered and took the rents they must all be made parties to the suit in equity for an account of the rents and profits of the estate. *Wylie v. Ellice*, 6 Hare, 505.

(d) *Interest and Costs.*

Certain freehold and leasehold estates were absolutely conveyed and assigned by A, who was in embarrassed circumstances, to his brother B, in fee. In the deeds of conveyance and assignment no consideration was expressed, but it appeared that B had paid debts of A to the amount of 2,000*l.*, which was stated by B in his answer to the bill filed by A in 1832, seeking a re-conveyance and re-assignment of the estates by B, to be the consideration for the execution of the deeds. By the decree of the Court an account was directed to be taken of the dealings and transactions of the plaintiff and defendant. The Master, in taking the account, allowed no interest on either side; and by his report, made in 1838, found a balance of 78*l.* due to the defendant. The possession of the estates was delivered up to the plaintiff by the defendant in 1841;

and by an order, on further directions, in 1842, an account was directed to be taken of the rents received by the defendant during his possession of the estates, and the Master found the sum of 413*l.* due from the defendant to the plaintiff:—Held, that the defendant was not entitled to claim interest in respect of the balance found due to him in 1838; that being a defaulter he was not entitled to his costs of taking the accounts; and that he was bound to pay the balance due from him, and to re-convey and re-assign the estates to the plaintiff, and to deliver up the deeds of conveyance and assignment at the cost of the plaintiff. *Price v. Price*, 15 Law J. Rep. (N.S.) Chanc. 13.

(e) *Decree.*

A B, an executor of his father's will, sold out certain stock, and employed it in his business; but he afterwards replaced it in full. C D, his sister, was entitled to a life interest in part of the stock, with remainder to such of her children as should be living at her decease. On the death of A B, E F, a son of C D, threatened to take proceedings against the representatives of A B, to make his estate liable for the breach of trust in so using the stock, whereupon C D, who by her will had given certain benefits to E F, made a codicil thereto, and thereby declared her full approbation of A B's conduct as regarded the trusts of his father's will, and prohibited every person entitled to any benefit under her will from setting up any claim on account of any error or irregularity in the execution of those trusts; and she authorized her executors and trustees to give and receive such releases and discharges as might be proper for effecting the objects of such declaration and prohibition. On the death of C D, E F received the legacy given him by his mother, and signed the ordinary legacy receipt for it, but did not give a release, and afterwards instituted the threatened suit:—Held, that having accepted the gift under his mother's will, he was only entitled to have the common account, but not to make any claim against the estate of A B in respect of the employment of his testator's assets in his trade; and so much of the bill as sought to establish that claim was dismissed, with costs. *Egg v. Devey*, 16 Law J. Rep. (N.S.) Chanc. 509; 10 Beav. 444.

ACCUMULATIONS.

[See THELLUSSON ACT.]

A decree giving effect to allegations read from an answer, not proved nor admitted, was varied in that respect, and an inquiry on the subject was directed before the Master. Monies paid for the use of a railway, under protest as overcharges, were afterwards paid into court under an order made by consent, and vested in the public stocks, to abide final judgment in an action brought to try the legality of the charges, which the judgment declared to be illegal:—Held, that the party who paid the monies was entitled to the stocks and dividends and accumulations thereof. *Barrett v. Stockton and Darlington Rail. Co.*, 1 H. L. Cas. 18.

ACQUIESCENCE.

[See ACCOUNT, IN EQUITY—ADOPTION—BANKER.]

ACTION.

[See ACCOUNT, IN EQUITY; Bill for—CASE—COUNTY COURT—DEBT—MANDAMUS—PARTIES—PLEADING—STATUTE.]

- (A) WHEN MAINTAINABLE.
 - (a) *Notwithstanding Statutable Remedy.*
 - (b) *Right conferred by Statute.*
 - (c) *When founded on an Illegal Contract.*
 - (d) *Against the Hundred.*—[See MINE.]
 - (e) *Religious Ceremonies in India.*
- (B) PARTIES TO ACTIONS.—[See PARTIES.]
- (C) NOTICE OF ACTION.
 - (a) *In Name of Deceased Party.*
 - (b) *Change of Attorney.*
 - (c) *Stating Cause, without Form of Action.*
 - (d) *Statement of Place.*
 - (e) *For Distress, Action being in Trespass.*
 - (f) *Act done in pursuance of Statute.*
 - (g) *Bona Fides and Reasonable Belief.*
 - (h) *Want of, when to be pleaded.*
- (D) CONSOLIDATION OF ACTIONS.

Action to be maintainable against any person causing death through neglect or default in the name of the executor, &c. of the deceased; and provisions for applying the damages. 9 & 10 Vict. c. 93; 24 Law J. Stat. 217.

(A) WHEN MAINTAINABLE.

(a) *Notwithstanding Statutable Remedy.*

The Municipal Corporations Act, 5 & 6 Will. 4. c. 76. s. 60, which gives a summary remedy against a corporate officer who refuses to comply with the provisions of the act, as to giving up to the town council of the borough all documents in the custody of such officer, and paying over monies, &c., does not take away the right of action which the corporation have against such officer for the breach of duty so imposed by that section.

Sufficiency of averments in declaration of appointment of person to receive, and of duty of defendant to deliver up documents, &c. *Mayor, &c. of Lichfield v. Simpson*, 15 Law J. Rep. (n.s.) Q.B. 78; 8 Q.B. Rep. 65.

An act of parliament empowered a company to make and maintain a canal, and provided that it should be lawful for owners of lands within the distance of twenty yards from the canal to make a communication by pipes, &c. between the water therein and any steam-engine, and to draw from the canal such quantities of water as should be sufficient to supply the said engine with cold water for the sole purpose of condensing the steam, and for working any such engine as aforesaid, and for no other use or purpose; and there was a proviso that if any dispute should arise between the company and any person who should be desirous of taking water out of the canal for the purposes of any such engine, or who should be in the use of taking the same, such dispute should be finally

settled by the commissioners appointed under the powers of the act. In an action on the case the declaration alleged that defendants, owners of a steam-engine, who had laid down a pipe communicating with the canal, used the water which had been drawn off by means of the pipes for other purposes than for condensing the steam, and more than was necessary for condensing:—Held, first, that the special power of the commissioners did not take away the right of action. Secondly, that the action would lie though no specific damage was alleged. *Rochdale Canal Co. v. King*, 18 Law J. Rep. (n.s.) Q.B. 293.

[See ASSUMPSIT—CASE—DEBT; and the other forms of action.]

(b) *Right conferred by Statute.*

Where a statute confers a right and annexes certain penalties for its infringement, an action for damages will not lie against a party infringing the right by the party aggrieved. *Stevens v. Jeacocke*, 17 Law J. Rep. (n.s.) Q.B. 163; 11 Q.B. Rep. 731.

(c) *When founded on an illegal Contract.*

A declaration, in an action on the case, alleged that the plaintiff, having accepted a bill of exchange, indorsed to the defendant, in pursuance of an agreement with him to compound a felony, the defendant corruptly conspired with R, a pauper, that in order to deprive the plaintiff of costs he should sue the plaintiff upon the bill for the defendant's use, that the bill was indorsed to R by the defendant after it became due for that purpose, and he having sued the plaintiff upon it, the plaintiff, upon a plea setting forth the illegal consideration, and the indorsement after the bill became due, obtained judgment, but that R had no means of paying him the costs, and had since gone abroad:—Held, that the declaration was bad, inasmuch as the original illegal contract was the foundation of the present action, and the plaintiff having been a party to it, could not assert any valid claim by means of it. *Fivaz v. Nicholls*, 15 Law J. Rep. (n.s.) C.P. 125; 2 Com. B. Rep. 501.

(d) *Against the Hundred.*

[See MINE.]

(e) *Religious Ceremonies in India.*

Quære—Whether the Civil Courts in India have any jurisdiction to entertain a suit, not involving any civil rights, as a matter of law, and make a declaration of the right to perform, or have performed, any religious ceremonies. *Namboory Setapaty v. Kanoo-Colanoo Pullia*, 3 Moore's In. App. 359.

(B) PARTIES TO ACTIONS.

[See PARTIES.]

(C) NOTICE OF ACTION.

(a) *In Name of deceased Party.*

Trespass for breaking and entering the plaintiff's close and seizing his goods. Plea, not guilty by statute. The action was brought against the defendants as inspectors under the Lighting and Watching Act, 3 & 4 Will. 4. c. 90, for executing a distress warrant against the goods of the plaintiff and

Abraham P. for non-payment of a lighting rate. The 69th section of that act enacts that no action shall be commenced for anything done in pursuance of this act "until twenty-one days' notice has been given thereof," and that the defendant may plead the general issue and give the act and every special matter in evidence. The notice was in these terms: "I do hereby, as attorney for *Abraham P.* and *E. P.* (the plaintiff), and in pursuance of the said statute, give you notice that an action at law will be commenced against you for recovery of compensation in damages for such illegal service, seizure and distraint, and for the value of the property so seized as aforesaid." *Abraham P.* was dead at the time of the service of the notice:—Held, first, that the notice of action being in the name of a party who was dead was insufficient; and, secondly, that the 3 & 4 Will. 4. c. 90. was a public act, and therefore that the want of notice need not be pleaded.

Quære—Whether the notice of action was bad in not including a notice of trespass *quare clausum fregit*. *Pilkington v. Riley*, 18 Law J. Rep. (N.S.) Exch. 323; 3 Exch. Rep. 739.

[See *TITHE*.]

(b) Change of Attorney.

A notice of action was indorsed by Messrs. E & S as attorneys for plaintiff; but before action brought the partnership was dissolved, and the action was brought by Mr. E alone:—Held, to be no ground of objection. *Hollingworth v. Palmer*, 18 Law J. Rep. (N.S.) Exch. 409; 4 Exch. Rep. 267.

(c) Stating Cause, without Form of Action.

A notice of action to a magistrate, under 24 Geo. 2. c. 44, need not state the form of action: it is sufficient to state the cause of action.

"You having, on the 14th day of October 1843, caused me to be apprehended and committed to a certain common gaol in the borough of M, and to be there imprisoned, &c., I shall, &c. cause a writ of summons to be sued out, &c. against you for the said imprisonment,"—Held, sufficient. *Prickett v. Gratex*, 15 Law J. Rep. (N.S.) M.C. 145; 8 Q.B. Rep. 1020.

(d) Statement of Place.

A notice of action to Justices, under 24 Geo. 2. c. 44. stated the cause of action as follows:—"For that you, on the 10th day of May 1844, with force and arms, caused an assault to be made upon me, and then caused me to be beaten, &c., and to be forced and compelled to go along divers public streets and roads, &c. to a certain prison, to wit, at Louth, in &c., and to be unlawfully imprisoned, and kept in prison there, for forty days next following," &c. At the trial, the proof was confined to the imprisonment at Louth, under an invalid warrant of defendants:—Held, that the notice &c. sufficiently stated the place of injury to entitle plaintiff to recover in respect of such imprisonment. *Jacklin v. Fytche*, 15 Law J. Rep. (N.S.) Exch. 102; 14 Mee. & W. 381.

(e) For Distress, Action being in Trespass.

A notice of action stated that a writ would be issued against the defendant, for that he had, on &c., at &c., caused a distress to be levied at the plain-

tiff's office of business.. The declaration was in trespass for breaking and entering, and seizing plaintiff's goods:—Held, that the notice was sufficient. *Hollingworth v. Palmer*, 18 Law J. Rep. (N.S.) Exch. 409; 4 Exch. Rep. 267.

(f) Act done in pursuance of Statute.

Declaration in case charged that defendant was a surveyor appointed under 5 & 6 Will. 4. c. 50; that a quantity of gravel had been laid (not saying by whom) in a public highway, under the survey and care of defendant as such surveyor, by means of which the highway was obstructed, and the gravel had become a nuisance, of which defendant had notice, and was requested to remove it: breach, that the defendant did not, though a reasonable time elapsed after he had such notice, remove the gravel from the highway, but wilfully, and wrongfully, and in violation of his duty as such surveyor, allowed, suffered, and caused the said gravel to remain, continue and be in the highway, obstructing the same, for an unreasonable time, without taking any care to guard against damage to persons passing along the highway, contrary to his duty as such surveyor, by means whereof a carriage of the plaintiff was driven against the gravel and overturned:—Held, that defendant was entitled to notice of action, under the 5 & 6 Will. 4. c. 50. s. 109; the declaration charging him with a thing done in pursuance of the act. *Davis v. Curling*, 15 Law J. Rep. (N.S.) Q.B. 56; 3 Q.B. Rep. 286.

In assumpsit for money had and received against the Great Western Railway Company, who were bound by their act of parliament to charge all persons equally, brought to recover the difference between the sums the company charged the plaintiff, and those which they generally charged for the conveyance of goods on the railway,—Held, that this was an action for something done in pursuance of their Act of Incorporation, 5 & 6 Will. 4. c. cvii, or in the execution of the powers or authorities made or given by it, and that under s. 223. of that statute they were entitled to notice of action. *Kent v. Great Western Rail. Co.*, 16 Law J. Rep. (N.S.) C.P. 72; 4 Dowl. & L. P.C. 481; 3 Com. B. Rep. 714.

To give a defendant the benefit of a provision in a statute requiring notice of action, it is sufficient that the jury find that he intended to act in pursuance of such statute.

Plaintiff being in a field with a gun was required by defendant to give his name and address. Plaintiff produced a game certificate which defendant took from him, and forcibly turned him out of the field, and took away his gun. Trespass having been brought without notice of action, the jury found that the defendant intended to act under the 1 & 2 Will. 4. c. 32:—Held, that defendant was entitled to a verdict under sect. 47. *Cox v. Reid*, 18 Law J. Rep. (N.S.) Q.B. 216; 13 Q.B. Rep. 558.

[And see next title (g).]

(g) Bona Fides and Reasonable Belief.

Plaintiff was fishing near a spot where A had a private right of fishing. Defendants, who were the servants of A acting in pursuance of the 7 & 8 Geo. 4. c. 29. and *bonâ fide* and reasonably believing A to be the owner of a private fishery in the place where the plaintiff was fishing, although he was not

in fact the owner, apprehended him and took away his net:—Held, that the defendants were entitled to the protection of the 7 & 8 Geo. 4. c. 29, and therefore that the venue ought to be laid where the cause of action arose. *Hughes v. Buckland*, 15 Law J. Rep. (N.S.) Exch. 233; 15 Mee. & W. 346; 3 Dowl. & L. P.C. 702.

Plaintiff having brought trespass for being taken into custody under 7 & 8 Geo. 4. c. 30. s. 24, upon a charge of doing malicious damage to a house of which he was himself tenant, by order of defendant, who was the attorney to the mortgagee of the house, and the point being taken that no notice of action had been given pursuant to section 41, the Judge asked the jury whether the defendant acted *bonâ fide* or only colourably in giving plaintiff in charge:—Held, a misdirection, as the jury ought to have been asked whether the defendant was servant of, or had authority from the mortgagee to do the act complained of, or reasonably believed himself to be in either of those positions. *Kine v. Evershed*, 16 Law J. Rep. (N.S.) Q.B. 271; 10 Q.B. Rep. 148.

The defendants, who had been appointed surveyors of the highways, but in an informal manner, *bonâ fide* believing themselves to be such surveyors, and to have been duly appointed, cut down a tree which overhung the highway, and was a nuisance to it:—Held, that they were entitled to notice of action under the Highway Act, 5 & 6 Will. 4. c. 50. s. 109. as for a thing done in pursuance of the act. *Huggins v. Waydey*, 16 Law J. Rep. (N.S.) Exch. 136; 15 Mee. & W. 357.

Plaintiff, who was lessee for an unexpired term of years of a house of which defendant was the reversioner, being in prison, and a quarter's rent being in arrear, defendant took possession of the house; whereupon plaintiff's wife broke some of the windows for the purpose of obtaining admission. Defendant then gave her into custody, and charged her, under the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30. s. 24, with breaking four panes of glass:—Held, that defendant was entitled to notice of action if he *bonâ fide* believed that he was acting in pursuance of the statute.

Quære—Whether the reversioner of premises is to be deemed the "owner of the property injured," within the 28th section of the act. *Horn v. Thornborough*, 18 Law J. Rep. (N.S.) Exch. 349; 3 Exch. Rep. 846.

(h) *Want of, when to be pleaded.*

Where an act provided that a plaintiff should not recover in any action for anything done in pursuance of the act, unless twenty-one days' notice of action should be given,—Held, that defendant must plead want of such notice, or he could not avail himself of it. *Davey v. Warne*, 15 Law J. Rep. (N.S.) Exch. 253; 14 Mee. & W. 199.

[See (a) *In Name of Deceased Party*.]

(D) CONSOLIDATION OF ACTIONS.

A, B and C, possessed of a manor, under an ecclesiastical lease, agreed to grant M a copy of court roll of a tenement holden of the manor, and entered into a joint and several bond to perform the contract. A then conveyed his interest (subject to the agreement with M) to B, and died, having appointed the plaintiff his executor. The validity of

the lease to A, B, and C being afterwards impeached, pending the trial of their right to the manor, M brought three several actions on the bond against the plaintiff, B and C, who entered into a consolidation rule and consented to be bound by the verdict in one of the actions. The plaintiff then filed his bill against B, C, and M, for the specific performance of the contract by B and C, and to restrain his action:—Held, that the question as against M was the same at law and in equity, and that having consented to be bound by the verdict in the action, the plaintiff could not sustain the suit, and the bill was dismissed, without prejudice to any question of contribution or indemnity as between the plaintiff, B and C, the obligors in the bond. *Hole v. Pearce*, 5 Hare, 408.

ADMINISTRATION.

[See ADMINISTRATION OF ESTATE—CHARITY—EXECUTOR AND ADMINISTRATOR—PREROGATIVE.]

(A) WHEN AND TO WHOM GRANTED.

(a) *In Conformity with Grant of Foreign Court.*

(b) *During Absence abroad of Administrator.*

(c) *To Husband when no Executor appointed.*

(d) *Without citing sole surviving Executor who had renounced.*

(e) *After Renunciation of Executor unretracted.*

(f) *After Retracting of Renunciation.*

(B) LIMITED GRANT OF.

(C) REVOCATION OF GRANT OF, BY CONSENT.

(D) ADMINISTRATION BOND.

(a) *Suing on after Death of Ordinary.*

(b) *Application to put in Suit.*

(c) *To be attended with in Equity.*

(E) INTEREST OF NEXT-OF-KIN TO OPPOSE TESTAMENTARY PAPERS.

(F) JUSTIFYING SECURITY.

(G) LETTERS OF ADMINISTRATION.

(a) *Colonial.*

(b) *Stamp.*

(A) WHEN AND TO WHOM GRANTED.

(a) *In Conformity with Grant of Foreign Court.*

Administration, with a copy of the will annexed, of a party domiciled in Scotland, granted, in conformity with the grant of a Court of competent jurisdiction in Scotland, though the Judge of the Prerogative Court entertained great doubt as to the correctness of the grant in Scotland. *In the goods of Henderson*, 2 Robert. 144.

(b) *During Absence abroad of Administrator.*

Motion for an administration with a will annexed, during the absence from the country of the administrator, *refused* on the ground that the 38 Geo. 3. c. 87, applies to *executors alone*. *Hay v. Willoughby*, 2 Robert. 184.

(c) *To Husband when no Executor appointed.*

A *feme covert* having a power of appointment by will over a certain sum, appointed by her will that

sum to trustees, upon trust to pay the interest thereof to her sons during her husband's life, and at his death to divide the principal amongst her sons who survived her, but did not name an executor. Administration, with the will annexed, was granted to the husband, under the circumstances of the case, though the practice in the registry was to make such a grant to those having the interest. *In the goods of Dawson*, 2 Robert. 135.

(d) *Without citing sole surviving Executor who had renounced.*

A testatrix appointed two executors, one took probate, the other renounced by proxy, and, in addition, executed a deed of disclaimer of the trusts of the will. The executor who proved died, leaving goods unadministered; administration was granted to a residuary legatee, and the surviving executor was not cited previously to the grant.

On question raised whether the administration ought not to be revoked, it was held, that the grant had been made in conformity with the invariable practice of the Court, and that, though the surviving executor might have claimed probate prior to the grant, the Court was not bound to cite him. The administration was, therefore, confirmed. *Harrison v. Harrison*, 1 Robert. 406.

(e) *After Renunciation of Executor unretracted.*

Where two executors are appointed, one of whom duly renounces probate in the ecclesiastical court, and the other, after proving the will, dies intestate, letters of administration *de bonis non* of the testator are valid, although renouncing executor is living, and has not refused since the death of his co-executor, nor has been cited or convened for that purpose. A formal refusal of probate made in court at any time after the testator's decease is binding under the 21 Hen. 8. c. 5. s. 3, unless the executor so refusing, afterwards, on his own account, comes in and retracts his refusal. *Venables v. East India Company*, 18 Law J. Rep. (N.S.) Exch. 266; 2 Exch. Rep. 633.

(f) *After Retracting of Renunciation.*

A residuary legatee, who had renounced administration *de bonis non* of an alleged insolvent estate, permitted to retract that renunciation, and to take the administration in preference to a nominee of creditors representing a large amount of debt. *Dimes v. Cornwell*, *In the goods of Waters*, 2 Robert. 142.

(B) LIMITED GRANT OF.

A next-of-kin having renounced his right, and consented to the grant of an administration for a limited period, is not entitled, on retracting his renunciation, on the death of the administrator leaving goods unadministered, to a *de bonis non* grant, but must take the administration limited as before, until the event happen for which the original grant was made. *In the goods of Penny*, 1 Robert. 426.

In cases where the practice of the ecclesiastical courts prevents a party from obtaining a general administration to the estate of a deceased party, a grant of administration limited *ad litem* will constitute a sufficient representative for the purposes of a suit in equity; and any accounts or other pro-

ceedings in such a suit will be as binding as if a general administrator had been a party to it.

Where at the hearing of a cause, it is directed to stand over for want of parties, the plaintiff will not be precluded from appealing from that decision, by obtaining leave to amend by adding parties. *Davis v. Chanter*, 17 Law J. Rep. (N.S.) Chanc. 297; 2 Ph. 545.

(C) REVOCATION OF GRANT OF, BY CONSENT.

An administration being in the possession of one of the next-of-kin cannot, though no act may have been done by virtue of that administration, and all parties interested may be consenting, be revoked on a suggestion of convenience, (*ex. gr.* to avoid the expense of a Chancery suit), and a new administration granted to another of the next-of-kin. *In the goods of Heslop*, 1 Robert. 457.

(D) ADMINISTRATION BOND.

(a) *Suing on after Death of Ordinary.*

An administration bond taken under the Statute of Distributions (22 & 23 Car. 2. c. 10.) to the ordinary and his executors, administrators or assigns, passes on the death of the ordinary to his executor, and not to his successor. *Howley v. Knight*, 19 Law J. Rep. (N.S.) Q.B. 3.

(b) *Application to put in Suit.*

A died intestate in 1832, leaving B and C his only next-of-kin. B in 1833 took out administration of the effects, entered into the usual bond with sureties, did not distribute, but died insolvent in 1839. C, from 1809 a lunatic, continued such till his death in February 1847, but no commission of lunacy was sued out till after the death of B. D, the committee of the estate of C, and as such administrator *de bonis non* of A, established a debt in Chancery, as a simple contract creditor of the distributive share of A's estate, and was paid a small dividend. D on being cited by E, who became the administratrix of C, exhibited his inventory and account in the Prerogative Court, and was dismissed. E then cited the sureties of B's bond for the due administration of A's estate, to shew cause why the bond should not be put in suit. The application to allow the bond to be put in suit was granted. *Godwin v. Knight*, 1 Robert. 652.

(c) *To be attended with in Equity.*

W H W and W H became sureties in an administration bond for an administrator with a will annexed, who afterwards illegally converted to his own use the goods of the testator, and left the country. On behalf of a legatee, motion was made for a decree against the representative of W H W, then deceased, and W H, citing them to shew cause why the bond should not be permitted to be sued for at common law and attended with. A decree, with intimation, was issued and duly served, but no appearance was given. Leave was given for the bond to be attended with. Subsequently, the Court was moved to extend that permission to a court of equity, as well as common law, and, on an affidavit as to the necessity from the solicitor of the legatee, who had filed a bill in Chancery, the motion was granted. *Hay v. Willoughby*, *In the goods of Harrison*, 2 Robert. 184.

(E) INTEREST OF NEXT-OF-KIN TO OPPOSE
TESTAMENTARY PAPERS.

A next-of-kin, being assigned to declare whether, or not she opposed scripts A, B and C, (a will with two codicils), "or any or either, and which, if any," declared she opposed C, the second codicil, on the face of which she had no interest:—Held, on a suggestion, contained in her affidavit of scripts, that other intermediate papers had been executed by the testator, and were in existence, that she had interest sufficient to entitle her to oppose C, but she must declare whether she opposed A and B.

A next-of-kin, *qua* next-of-kin, cannot oppose a paper without some interest, however small or remote. *Baskcomb v. Harrison*, 2 Robert. 118.

(F) JUSTIFYING SECURITY.

Justifying security in a second grant is to be regulated by the amount of estate left unadministered, and in addition the ordinary security is to be given to the amount of the original estate. *In the goods of Penny*, 1 Robert. 426.

(G) LETTERS OF ADMINISTRATION.

(a) Colonial.

Colonial letters of administration are a good title to consols in which the intestate was interested. *M'Mahon v. Rawlings*, 16 Sim. 429.

(b) Stamp.

Letters of administration taken out to the leasehold estate of an intestate, which at the time of his death was under the value of 100*l.*, but between that time and the grant of administration had increased to a greater value than 100*l.*, in consequence of the erection of buildings on the property, are not sufficiently stamped with an *ad valorem* stamp, as for under 100*l.* value. *Doe d. Richards v. Evans*, 16 Law J. Rep. (N.S.) Q.B. 305; 10 Q.B. Rep. 476.

ADMINISTRATION OF ESTATE.

(A) IN GENERAL.

(B) UNDER THE COURT.

- (a) *What Debts may be claimed.*
- (b) *Refunding Debts wrongly paid.*
- (c) *Sale of real Estate.*
- (d) *Marshalling Debts.*
- (e) *Interest on Debts.*
- (f) *Marshalling Assets.*
- (g) *Practice.*

(A) IN GENERAL.

The fact of a fund in which a party takes a life interest under a will being transferred by the executors to the trustees of the fund appointed by the will, is not *per se* a severance of the fund from the bulk of the property, unless the executor has done all by such transfer that is incumbent on him in the administration of the fund.

Where there is no bequest of the corpus of the fund or one of doubtful validity, the trustees do not become by the transfer trustees for the residuary legatees or next-of-kin, but the corpus of the fund must be regarded as assets unadministered *ultra* the life estate.

The fact of the residue of the estate having been administered in equity and of the executor not being a party to the administration suit from lapse of time, does not affect the general principle. *Pennington v. Buckley*, 6 Hare, 451.

[See *Turner v. Newport*, 2 Ph. 14.]

(B) UNDER THE COURT.

(a) *What Debts may be claimed.*

A bond having been given for 2,000*l.*, the obligor died, and his executor and devisee in trust gave the obligee a fresh bond, and received back the original bond, with a memorandum indorsed upon it and signed by the obligee, in which he declared that he had accepted the fresh bond in lieu of the first:—Held, in a creditors' suit for the administration of the testator's estate, that the obligee could only claim under the second bond, and that the estate of the original obligor was discharged, so far as the obligee was concerned. *Shore v. Shore*, 17 Law J. Rep. (N.S.) Chanc. 59; 2 Ph. 378.

A, a surgeon dentist, carrying on his profession at a house held by him as tenant from year to year in the town of H, died, having appointed B, his widow, his executrix, who alone proved the will. Within a few days after A's death, two agreements were entered into between B and C, a surgeon dentist, in which B was described as one of the executors of A, the effect of which was that C should give B 500*l.* for the goodwill of the business of A, and the advantage of being introduced to the patients of A, and take A's house, and purchase his furniture and surgical instruments at a certain price. Evidence was entered into on B's behalf that the agreement as to the 500*l.* was not entered into by C in the character of executrix, and that it was the intention of the parties that the sum should be paid to her, for her own benefit, as the price of her personal influence with the patients of A and her personal exertions in introducing them to C. The Master having found that the whole of the 500*l.* belonged to B,—Held, on exceptions, that the whole or a part of the 500*l.* belonged to the estate of A; and it was referred back to the Master to review his report, with this declaration. *Smale v. Graves*, 19 Law J. Rep. (N.S.) Chanc. 157.

In 1772 real estates belonging to a husband and wife respectively were mortgaged to secure a debt of the husband. In 1782 the monies arising from the sale of estates of the husband were brought into court and accumulated. The husband died in 1776 and his heir-at-law entered into possession of his estates and bought up the incumbrances thereon at a low price. The wife died in 1805, and a suit was instituted for the administration of her estate. The mortgage creditor was paid out of the proceeds of the sale of her estates, and the amount arising from her real estate was exhausted in payment of the incumbrances prior in date to the plaintiff's:—Held, that the wife was only a surety for her husband under the deed of 1772; that, notwithstanding the lapse of time, the plaintiff was entitled to be paid his debt out of the fund in court, and that the personal representative and devisee of the husband's heir-at-law was only entitled to be allowed the sums actually expended in buying up the incumbrances on the estates of the husband. Held, also, that the plaintiff's claim was not barred by the Statute of

Limitations. *Lancaster v. Evors*, 16 Law J. Rep. (N.S.) Chanc. 8; 10 Beav. 154.

(b) *Refunding Debts wrongly paid.*

Where trustees, under an erroneous view of the effect of a will, pay to parties money to which they are not entitled, this Court, in administering the estate, will compel a restitution and repayment, and will give a lien on the other interests of such parties under the will even as against an assignee for valuable consideration. *Dibbs v. Goren*, 11 Beav. 483.

(c) *Sale of real Estate.*

The Court has no authority under the 1 Will. 4. c. 47, or the 2 & 3 Vict. c. 60, to direct money to be raised by mortgage of the testator's real estate, for the purpose of putting any part of such real estate into repair. *Hill v. Maurice*, 16 Law J. Rep. (N.S.) Chanc. 280; 1 De Gex & S. 214.

In a suit instituted by the heir and next-of-kin of the deceased for administering an estate consisting of real and personal property, where the personal property was only sufficient to pay the debts, but not the costs, it was held, that the personal estate must be applied first in payment of the costs, and then in discharge of debts as far as it would go; after which the real estate must be sold to pay the remaining debts. *Price v. Price*, 16 Law J. Rep. (N.S.) Chanc. 232; 15 Sim. 484.

The Court has jurisdiction to order the real estate of a deceased debtor to be sold for the payment of his debts in a suit instituted not by a creditor but by a third person interested under the will. *Rodney v. Rodney*, 16 Sim. 307.

In order to obtain a decree for the sale of a testator's real estate for payment of his debts under 3 & 4 Will. 4. c. 104, it is not necessary that the bill should be filed by a creditor. *Dinning v. Henderson*, 2 Coll. C.C. 330.

(d) *Marshalling Debts.*

In the administration of assets, a debt due for rent of land occupied by a tenant from year to year is of a higher class than simple contract debts. *Clough v. French*, 15 Law J. Rep. (N.S.) Chanc. 24; 2 Coll. C.C. 277.

A debt arising from a breach of trust, where the trusts are declared by a deed under seal, is a special debt of the trustee committing the breach of trust. *Wood v. Hardisty*, 15 Law J. Rep. (N.S.) Chanc. 328; 2 Coll. C.C. 542.

Under the 46th Order of August 1841, a debtor upon a voluntary bond, whose debt has been established before the Master, is entitled to payment of his principal in preference to the claim of the simple contract creditors for interest. *Garrard v. Dinorben*, 15 Law J. Rep. (N.S.) Chanc. 439; 5 Hare, 213.

A testator devised his real and personal estate to trustees on trust for sale, and directed them to pay a share of the produce to A: and a suit was instituted for the administration of his estate. By a deed dated December 1844 A assigned his share to B to secure advances, and B immediately gave notice of the assignment to the trustees. By an order in the cause in June 1845, the real estate was ordered to be sold and the produce paid into court and in-

vested: and a sum of stock in respect of the purchase-money was afterwards carried to the credit of the cause. In April 1846, C obtained judgment against A, and by a Judge's order the stock was ordered to stand charged with the amount for which judgment was obtained. The order was filed in the Accountant General's office in November 1848, at which time no other order had been filed:—Held, that C had not priority over B. *Bearcliffe v. Dorington*, 19 Law J. Rep. (N.S.) Chanc. 331.

Where an intestate and another had mortgaged a leasehold estate of which they were tenants in common to secure payments in respect of shares held by them in a benefit society, and had entered into a joint covenant to make the payments, but were not partners and had no joint estate, and the intestate's co-debtor was sworn to be in insolvent circumstances,—Held, that the covenantee was not entitled to prove as a specialty creditor under a decree for the administration of the intestate's estates. *Crossley v. Dobson*, 2 De Gex & S. 486.

(e) *Interest on Debts.*

A claimed a debt before the Master in an administration suit. The executors resisted the claim, and the Master disallowed it; but a suit was afterwards instituted in which the claim was established, and liberty was given to A to apply for payment of his debt in the administration suit:—Held, that as he had not established his debt in that suit he was not entitled to interest upon it, under the 41st General Order of August 1841. *Davis v. Cambermere*, 15 Sim. 394.

In the course of the administration of the estate of a testator, a debt in respect of a dishonoured bill of exchange, and nine years' interest on it, were found to be due from his estate to a creditor. It appeared that it was the practice in the Master's offices to deduct income tax in respect of the interest, and the Court refused to disturb such practice. *Dinning v. Henderson*, 19 Law J. Rep. (N.S.) Chanc. 273.

(f) *Marshalling Assets.*

A testator, by his will, gave certain specific legacies, and devised his real estate in manner therein mentioned. Previously to his death the testator had purchased an estate, but had left part of the purchase-money unpaid:—Held, that the specific legatees and devisees were to contribute proportionally to the payment of the unpaid purchase-money. *Gervis v. Gervis*, 16 Law J. Rep. (N.S.) Chanc. 422; 14 Sim. 654.

One of several executors, whilst the testator's assets were sufficient for payment of his debts and the several legacies given by his will (which were a charge on his real estate), appropriated two sums in favour of two legacies, and afterwards, becoming bankrupt, was found a defaulter to the testator's estate in a considerable sum of money in respect of assets wasted by him. A bill was afterwards filed by one of the residuary legatees against the several other parties interested in the testator's estate and effects, seeking the administration thereof, but containing no prayer for a direction that the legatees who had received their legacies in full should proportionally abate the same. The Master, on reference to him, had, by his report, which had

been duly confirmed, found that the two legacies in question had been appropriated by the executor:—Held, that the two legatees whose legacies had been appropriated, could not be ordered to contribute in respect of the deficiency of the testator's estate to answer the demands upon it. The bankrupt executor was ordered to be paid his ordinary costs incurred since the date of his bankruptcy; his assignees were dismissed from the suit without costs. *Knight v. Knight*, 15 Law J. Rep. (N.S.) Chanc. 363.

A testator, by his will, dated in 1840, devised all his manors, messuages, lands, tenements, hereditaments, and real estate, to certain uses, and gave specific and pecuniary legacies. The will did not contain a charge of debts, and no part of the testator's property was under mortgage, or specifically charged with debts. The testator's personal estate was sufficient to pay his simple contract debts, but not sufficient to pay his specialty debts. In a creditors' suit, held, that the specific legatees and devisees ought to contribute rateably towards payment of the specialty debts. *Toombs v. Roch*, 15 Law J. Rep. (N.S.) Chanc. 308; 2 Coll. C.C. 490.

Specialty creditors having exhausted their debtor's personal estate, a decree was made for marshalling his assets. A considerable time elapsed before the real estates could be made available for the purposes of the decree.

Held, that the simple contract creditors were not entitled to have the interest which would have accrued on the specialty debts if they had remained unsatisfied, as well as the amount of the personal estate raised out of the real estate and applied towards satisfaction of their debts. *Cradock v. Piper*, 15 Sim. 301.

Notwithstanding an order of the Court of Review for the consolidation of the estates of two firms, and the receipt by a creditor under that order of a dividend out of the Consolidated Fund on the amount of his debt, such creditor is entitled to require payment out of the separate estate of a deceased partner, of what remains due to him in respect of his original contract. *Harris v. Farwell*, 15 Law J. Rep. (N.S.) Chanc. 185.

(g) *Practice.*

A party entitled to or taking by assignment a legacy or share of a residuary estate, may institute a suit for the administration of such estate at any time before complete administration of assets, or before such legacy or share is withdrawn from its position as assets unadministered, and constituted a trust fund applicable to the specific trusts of the will. But *semble*, where the right is unnecessarily exercised, the Court may make the decree without costs. *Cafe v. Bent*, 5 Hare, 24.

On motion by the plaintiffs (residuary legatees), that the executor who was one of the pecuniary legatees under the will, should pay into court the amount admitted by his answer,—Held, that the executor was not entitled to retain the amount of his legacy before the accounts had been taken. *Harding v. Harding*, 16 Law J. Rep. (N.S.) Chanc. 179.

In a suit for administering the estate of one who had been the personal representative of another, the party entitled to a share of the residuary estate

of such other person carried in a claim for such shares as a debt before the Master, who disallowed it on the ground that it did not appear that the clear residue after payment of debts, &c. had been ascertained:—Held, that in such a case the claimant ought to have forthwith applied to the Court for a direction to the Master to receive the claim, or to be examined *pro interesse suo*, or for leave to file a bill for administration of the estate in question, or take some proceeding, and to stay the distribution of the representatives' estate in the mean time, and that he should not have delayed his claim until after the Master's report, and the order on further directions. *Barker v. Rogers*, 7 Hare, 19.

Two creditors' suits were instituted against the same defendant for administration of the same estate, and a decree was obtained in the suit secondly instituted. A motion, on the part of the defendants to stay the proceedings in the first suit was refused, on the ground that the first suit sought more extensive relief than the second. *Underwood v. Jee*, 19 Law J. Rep. (N.S.) Chanc. 171; 1 Mac. & G. 276; 1 Hall & Tw. 379; 17 Sim. 119.

[See also COSTS—Administration Suits.]

ADMIRALTY.

[See APPORTIONMENT—ATTACHMENT—COSTS—EVIDENCE—INJUNCTION—INSURANCE—INTEREST—PLEADING—PRACTICE—SALVAGE—SHIP AND SHIPPING.]

JURISDICTION OF COURT OF.

- (a) *Equitable Jurisdiction.*
- (b) *Pending Proceedings in Scotland.*
- (c) *In cases of hiring for specific Sum.*
- (d) *In Claims for Wages under 20l.*
- (e) *In Questions of General Average.*
- (f) *In Questions issuing out of Mortgage Deeds.*
- (g) *In Claims for Advances to Master of Foreign Ship.*
- (h) *In Claims for Salvage of Raft of Timber.*
- (i) *To enforce Bond given to Receiver of Droits.*

JURISDICTION OF COURT OF.

[See JUSTICES OF THE PEACE.]

(a) *Equitable Jurisdiction.*

Although in the decision of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have weight, yet that Court has not jurisdiction to do all that a court of equity might do, in suits instituted by persons, suing either for themselves or on behalf of themselves and others, for administration of assets or distribution of a common fund.

Where, therefore, the owners of a vessel and part of the cargo, lost in a collision, brought an action in the Admiralty Court against the damaging vessel, and obtained a decree for the condemnation of the ship, referring the amount of damages to the registrar and merchants who were to report them; and on the same day that the decree was

pronounced, the owners of the remaining portion of the cargo brought an action against the damaging vessel, and applied to the Court to be let in to participate rateably in the proceeds of the condemned ship remaining in the registry; it was held:—First, that the Admiralty Court in such circumstances had no jurisdiction to decree a rateable distribution, and thereby take away the priority of the *prior petens*; and, secondly, that the decree for damage and reference to the registrar and merchants was a definitive sentence.

The statute 53 Geo. 3. c. 159, was passed for the protection of owners of ships, and applies only to bills in equity, and suits or proceedings instituted by or on behalf of owners, and does not give equitable jurisdiction to the Court of Admiralty in a case where a proceeding is not taken under the statute by the owners of the ship.

Semble—That the 15th section of statute 53 Geo. 3. c. 159, may be applicable to suits for damage in the Admiralty Court, if accompanied by a proceeding on the part of the owners for their own protection, and may lead to a distribution *pro rata* of the proceeds of the ship among the claimants. *Bernard v. Hyne*, 6 Moore, P.C. 56.

(b) Pending Proceedings in Scotland.

A suit having been commenced against a vessel in the Court of Session in Scotland, for damages by collision in the river Humber, the vessel was arrested under process of that court, and was released upon bail. During the pending of the proceedings in the Court of Session, the vessel, having come to the port of Hull, was arrested under process of the High Court of Admiralty of England, and proceedings were commenced in that court for the same collision, instructions being sent to the law agents of the plaintiffs in the Court of Session to discontinue and abandon the proceedings in that court:—Held, that the proceedings in Scotland had been virtually abandoned by such intimation of the plaintiff's intention, although the cause before the Court of Session was not formally dismissed at the time of the second arrest of the vessel.

—Plea of *lis alibi pendens*, in objection to the Court's jurisdiction in the second action, overruled. *The Bold Buccleugh*, 3 Rob. 220.

(c) In cases of hiring for specific Sum.

An agreement between the master of a vessel and a mariner to proceed on a voyage to the Danube for the stipulated sum of 30*l.* held to be a special contract over which the Court of Admiralty has no jurisdiction. *The Debreacia*, 3 Rob. 33.

(d) In Claims for Wages under 20*l.*

Court of Admiralty not authorized to entertain a suit for wages where the claim is under 20*l.* unless it is apparent that, under the circumstances of the case, justice would not be efficiently administered by proceedings before a magistrate. *The King William*, 2 Rob. 231.

(e) In Questions of General Average.

Where portions of the cargo on board a ship are sold by the master during the voyage for the repairs of the ship, the owners of such cargo have no lien upon the ship, nor any *persona standi* to sue the

owners in the Court of Admiralty. The property so sacrificed is to be considered as the proper subject of general average, over which the Court of Admiralty has no jurisdiction. *La Constancia*, 2 Rob. 487.

(f) In Questions arising out of Mortgage Deeds.

Construction of the 3rd section of the statute 3 & 4 Vict. c. 65. The enabling power conferred upon the Court by the statute does not extend to all questions arising out of a deed of mortgage, but is confined to the ship itself being mortgaged. *The Fortitude*, 2 Rob. 217.

(g) In Claims for Advances to Master of Foreign Ship.

A claim for advances made to the master of a foreign ship, under statute 3 & 4 Vict. c. 65, pronounced against, with costs, upon the ground of fraudulent collusion between the master and the party making the pretended advances. *Semble*, an action is not maintainable under the statute in the Court of Admiralty, where there is an agent of the owners upon the spot ready to supply the necessary funds. *The Helena Sophia*, 3 Rob. 265.

(h) In Claims for Salvage of Raft of Timber.

Motion for a monition calling upon the owner of a raft of timber which was found flotsam in Yarmouth Harbour, to shew cause why salvage should not be awarded for the rescue and preservation of the same, rejected, upon the ground that the Court did not possess a jurisdiction over the subject-matter under the provision of stat. 3 & 4 Vict. c. 65. s. 6. *Raft of Timber*, 2 Rob. 251.

(i) To enforce Bond given to Receiver of Droits.

The Court of Admiralty has no jurisdiction to enforce a bond given to the receiver of droits for the release of a vessel from his custody under the provision of the 19th section of 9 & 10 Vict. c. 99. *The Bagnall*, 3 Rob. 112.

ADOPTION.

Review of the Hindoo law, relating to the validity of a second adoption by a Hindoo, during the lifetime of the first adopted son.

V, a *Zemindary* in the northern Cicars at Madras, of the *Soodra* caste, being childless, adopted, with the consent of his wife, a son, J. At the time of this adoption, he executed a deed with the natural father of J, by which he undertook to make him heir to his *Zemindary* and wealth. V subsequently married a second wife, and during the lifetime of his adopted son, J, adopted a second son, R. Both these adopted sons lived in V's house, who, while they were minors, made a division of his ancestral and other estate between them, in certain proportions. J, when he came of age, entered into possession of his share: but R being a minor, V managed his share for him, and died during his minority. At V's death, J claimed the right of succession to the whole of V's estate and property, insisting that V was precluded from alienating any portion of the estate to his, the first adopted son's, prejudice; and that the adoption of R during his lifetime was illegal and void. *The Sudder*

Dewanmy Adawlut at Madras decided that the second adoption was valid:—Held, upon appeal, by the Judicial Committee of the Privy Council, reversing that decree, — first, that, according to the Hindoo law, a second adoption of a son, the first adopted son being alive and retaining the character of a son, was an illegal and void act. — Secondly, that J's acquiescence in the division of the property, after he came of age, did not preclude his right to recover the ancestral estates, as V had no power to alienate any portion of the ancestral estate to J's prejudice. But, thirdly, that (upon the principle that a party cannot affirm and disaffirm the same transaction) effect must be given to the intentions of V, so far as V had power of disposing of his property, by an act *inter vivos*, and in which J had acquiesced; and that as J took the whole of the ancestral property of V, he must give up for the benefit of R that part of V's other property included in his share in the division, and to give effect to which his consent was not necessary.

Among the *Soodras*, a childless Hindoo may adopt a son from a *gotrum* different from his own.

The consent of a wife to the adoption of a son, by her husband, a childless Hindoo, is not essential to the validity of the adoption. Adoption is the act of the husband alone; although the wife may join in it.

Upon a disputed question of adoption, the Provincial Court, and the *Sudder* Court, on appeal, held that the evidence was not sufficient to establish the fact of adoption. Such decision reversed by the Judicial Committee. *Rungama v. Atchama*, and *Atchama v. Ramanadha*, 4 Moore, In. App. 1.

ADULTERY.

[See DIVORCE—MARRIAGE.]

ADVERSE POSSESSION.

[See EJECTMENT—LIMITATIONS, STATUTE OF—TRUST AND TRUSTEE.]

ADVOCATE-GENERAL OF MADRAS.

[See CHARITY.]

AFFIDAVIT.

[Verifying Plea, see ABATEMENT.—To hold to Bail, see ARREST.—Of Debt, see BANKRUPTCY.—And see PRACTICE, AT LAW, Motions, Rules, and Orders,—PRACTICE, IN EQUITY, Affidavit.]

(A) BY WHOM TO BE MADE.

(B) WHEN AND HOW TO BE ENTITLED.

(C) BEFORE WHOM AND WHEN TO BE SWORN.

(D) JURAT.

(E) DATE [WHEN IT MAY BE SUPPLIED BY JURAT].

(F) DEPONENT'S DESCRIPTION.

(G) INTERLINEATION.

(H) AMENDMENT. [See (B) When and how to be entitled.]

Digest, 1845—1850.

(I) WAIVER [OF WANT OF ADDITION].

(K) FILING AND TAKING OFF THE FILE.

(L) COSTS [UPON DISCHARGE OF RULE FOR DEFECTIVE AFFIDAVIT].

(M) FRESH AFFIDAVITS [SECOND APPLICATION UPON].

(A) BY WHOM TO BE MADE.

Where there are several defendants in an action, and it is sought to attach the plaintiff for non-payment of costs, the affidavit denying the payment must be made by all the defendants. *Manwell v. Thompson*, 6 Dowl. & L. P.C. 91.

(B) WHEN AND HOW TO BE ENTITLED.

[See PRACTICE, Rule—PLEADING, Plea to the Jurisdiction.]

Affidavits in support of a rule for a *certiorari* ought not to be entitled at all. And where they were entitled "In the matter of *The Queen v. Robert Wallwork and James Wallwork*" (the name of the proceedings in the court below, which it was sought to bring up, being "*The Queen v. Robert Wallwork and James Wallwork*"), the Court held them irregular, and discharged the rule. *Ex parte Wallwork*, 4 Dowl. & L. P.C. 403.

Affidavits on which a rule calling on an attorney to answer the matters in the affidavit has been granted, need not be entitled at all.

But affidavits in answer to the rule must be entitled in the same way as the rule.

Where, however, they were not so entitled, the Court enlarged the rule in order that they might be amended. *In re Grantham*, 4 Dowl. & L. P.C. 427.

Where the defendant was described in the writ of summons as "Frederic C Prosser," affidavits in support of a rule to set aside the judgment, &c. for irregularity, entitled "Henry Sims v. Frederic Coulston Prosser," (his real name) are improperly entitled. *Sims or Symes v. Prosser*, 15 Law J. Rep. (n.s.) Exch. 199; 15 Mee. & W. 151; 3 Dowl. & L. P.C. 491.

An action was brought by M T against J S and W H. An affidavit made after the appearance of defendants, intituled "Between M T, plaintiff, and J S and W P (miscalled W H), defendants," was held insufficient. *Tagg v. Simmonds*, 16 Law J. Rep. (n.s.) Q.B. 319; 4 Dowl. & L. P.C. 582.

Affidavits in support of a rule for judgment as in case of a nonsuit, entitled "Edward Lomax, plaintiff, v. William Wells Kilpin, defendant;" the defendant having been described as "W W Kilpin" in the writ of summons,—Held, sufficient. *Lomax v. Kilpin*, 16 Law J. Rep. (n.s.) Exch. 23; 16 Mee. & W. 94; 4 Dowl. & L. P.C. 295.

Defendant, whose name was J G, had been described in the writ of summons as H G, and a person named H G had appeared to the writ:—Held, on motion by plaintiff B to set aside the appearance, that the affidavits were rightly entitled *B v. J G*, sued by the name of H G. *Belcher v. Goodered*, 16 Law J. Rep. (n.s.) C.P. 176; 4 Dowl. & L. P.C. 814; 4 Com. B. Rep. 472.

Where the defendant's affidavits in support of a rule to set aside the proceedings in an action, after a rule to compute, for irregularity, were entitled "In the Queen's Bench, between William Frederick

Hodgson, plaintiff, and Benjamin William May, sued as B W May, defendant," and those of the plaintiff on shewing cause, "In the Queen's Bench, between William Frederick Hodgson, plaintiff, and B W May, defendant," and it appeared that in the writ of summons and all subsequent proceedings in the action the defendant was described by initials as "B W May."—Held, that neither the defendant's nor the plaintiff's affidavits were wrongly entitled; and that stating the defendant's name at full length was no objection, as by the words "sued as B W May," the title was connected with the previous proceedings in the action. *Hodgson v. May*, 18 Law J. Rep. (N.S.) Q.B. 249.

Upon a motion against an attorney to pay over a sum of money received by him for his client in a cause, the affidavits may be entitled in the matter of the attorney. *Ex parte Randall, in re* —, 17 Law J. Rep. (N.S.) Q.B. 232.

Affidavits in support of a motion to compel an attorney to pay over money which he has received as attorney in a cause, may be entitled in the matter of the attorney, and need not be entitled in the cause. *In re Wood*, 6 Dowl. & L. P.C. 154. [See (L) COSTS.]

(C) BEFORE WHOM AND WHEN TO BE SWORN.

An affidavit of service of a rule, sworn before the British Consul, resident at Paris, is not sufficient. *Williams v. Welch*, 15 Law J. Rep. (N.S.) Q.B. 7; 3 Dowl. & L. P.C. 357.

Quære, whether an affidavit, which appears by the jurat to have been sworn in court on a Sunday, is void. *Doe d. Williamson v. Roe*, 15 Law J. Rep. (N.S.) Q.B. 39; 3 Dowl. & L. P.C. 328.

(D) JURAT.

[*Regina v. Inhabitants of Bloxham*, 5 Law J. Dig. 17; 6 Q.B. Rep. 528.]

An affidavit taken by a commissioner, in which the words "before me," in the jurat, were omitted,—Held, a nullity. *Regina v. Inhabitants of Norbury*, 15 Law J. Rep. (N.S.) Q.B. 264; 6 Q.B. Rep. 534, n.: s. p. *Graham v. Ingleby*, 1 Exch. Rep. 651.

It is a good objection to an affidavit being used, that the jurat omits to state the particular day of the month on which the affidavit was sworn. *Duke of Brunswick v. Harmer*, 19 Law J. Rep. (N.S.) Q.B. 456; 15 Q.B. Rep. 682, n.

[See (L) COSTS, and (E) DATE.]

(E) DATE [WHEN IT MAY BE SUPPLIED BY JURAT].

The day stated in the jurat of an affidavit may be looked at for the purpose of supplying a date given by words of reference in the body of the affidavit. Where the affidavit stated that judgment was signed "this day," it was referred to the day stated in the jurat. *Holmes v. London and South-Western Rail. Co.*, 18 Law J. Rep. (N.S.) Q.B. 87; 13 Q.B. Rep. 211.

So the jurat of an affidavit may be referred to for the purpose of fixing the date of an event mentioned in the body of the affidavit. *Craig v. Lloyd*, 18 Law J. Rep. (N.S.) Exch. 165; 3 Exch. Rep. 232.

But an affidavit of service of rule to compute, alleging a service "on the day of the date hereof,"

no date appearing otherwise than in the jurat, is insufficient. *Abrahams v. Davison*, 6 Com. B. Rep. 622.

(F) DEPONENT'S DESCRIPTION.

An affidavit sworn in London, and describing the deponent as "agent for the defendant in this cause," is sufficient. *Mathewson v. Baistow*, 15 Law J. Rep. (N.S.) Q.B. 40; 3 Dowl. & L. P.C. 327.

An affidavit sworn for the purpose of obtaining a rule, by a party styling himself clerk to A & B, "agents for the defendant," shews sufficiently that the application is authorized by defendant, if it does not appear that he is absent from the country. *Slack v. Clifton*, 8 Q.B. Rep. 524.

"H B, clerk to the above-named defendant," is not a sufficient description of a deponent in an affidavit. *Elton v. Martindale*, 5 Dowl. & L. P.C. 248.

Whether, in an affidavit, the description of the deponent at the commencement of it is a part of what he swears—*quære*. *Regina v. Chapman*, 18 Law J. Rep. (N.S.) M.C. 152; 1 Den. C.C. 432; 2 Car. & K. 846.

(G) INTERLINEATION.

The rule as to the exclusion of affidavits in the jurats of which there are interlineations, applies to affidavits sworn in India. *In re Page*, 5 Dowl. & L. P.C. 475.

(H) AMENDMENT.

[See *In re Grantham*, (B) WHEN AND HOW TO BE ENTITLED.]

(I) WAIVER [OF WANT OF ADDITION].

A Judge's order to allow plaintiff to sue *in forma pauperis* had been obtained on an affidavit which was defective for the want of an addition of the plaintiff's profession or occupation:—Held, that the defect was a mere irregularity, and that after several months had elapsed in which the defendant might have examined the affidavit, and in which various steps had been taken in the cause, it was too late for the defendant to move to set aside the Judge's order for the defect and dispauper the plaintiff, although it was sworn that the defendant had only acquired knowledge of the defect three days before the motion. *Seymour v. Maddox*, 19 Law J. Rep. (N.S.) Q.B. 525; 1 L. M. & P. 543.

[And see ABATEMENT (B) (k) 2.]

(K) FILING AND TAKING OFF THE FILE.

Where a rule *nisi* has been granted, one of the terms of which is, that affidavits in answer shall be filed before a certain day, the Court will, upon reasonable ground being shewn, extend the time within which the affidavits must be filed. *Regina v. Keen*, 4 Dowl. & L. P.C. 622.

The Court will not allow additional affidavits to be filed in support of a motion for a new trial, after the expiration of the time for moving. *Gibbs v. Tunaley*, 1 Com. B. Rep. 640.

The Court will not order an affidavit which is not shewn to be scandalous or irrelevant to be taken off the file merely because it cannot, upon some technical ground, such as a defect in the jurat, be read in the cause in which it is filed. *The Duke of Brunswick v. Sloman*, 1 L. M. & P. 247.

(L) COSTS [UPON DISCHARGE OF RULE FOR DEFECTIVE AFFIDAVIT].

A rule for a new trial in an action of A v. B, tried before a sheriff, was obtained upon an affidavit verifying the sheriff's notes, which was entitled B plaintiff v. A defendant. The rule was discharged without costs. *Bodley v. Reynolds*, 15 Law J. Rep. (N.S.) Q.B. 152.

If the jurat of an affidavit used in support of a rule is defective in not containing the names of the deponents, the Court will discharge the rule, with costs. *Cobbett v. Oldfield*, 16 Law J. Rep. (N.S.) Exch. 150; 16 Mee. & W. 469; 4 Dowl. & L. P.C. 492.

Where the jurat of an affidavit, upon which a rule nisi had been obtained, was "sworn by A B the above-named deponent, at my chambers, Rolls Gardens, Chancery Lane, dated the 24th of April. E V Williams,"—Held, that the jurat was defective so as to prevent the affidavits being used; but in discharging the rule the Court refused to allow costs, and gave leave for a second application upon an affidavit of the same facts with a proper jurat. *In re Lloyd*, 19 Law J. Rep. (N.S.) Q.B. 457; 15 Q.B. Rep. 682.

(M) FRESH AFFIDAVITS [SECOND APPLICATION UPON].

Where a summons is dismissed by a Judge through insufficiency of affidavits, fresh affidavits cannot be used on applying to the Court. *Hawkins v. Akrill*, 1 L. M. & P. 242.

AGENT.

[See ATTORNEY AND SOLICITOR—PRINCIPAL AND AGENT.]

AGREEMENT.

[See ASSUMPSIT—CONTRACT—SPECIFIC PERFORMANCE.]

ALIEN.

[See HEIR—OFFICIAL PERSONS—SETTLEMENT.]

Naturalization of aliens facilitated by 10 & 11 Vict. c. 83. 25 Law J. Stat. 241.

The removal of aliens from the realm authorized by 11 Vict. c. 20. 26 Law J. Stat. 35.

A native-born Irishman, a British subject, married a French woman domiciled in France. They resided in France till the breaking out of the French Revolution, when they emigrated to Germany. The wife died in the lifetime of her husband, without having ever come within the territory of Great Britain;—Held, in such circumstances, that she did not by her marriage become a British subject, for that, while she remained abroad, she was not within the allegiance of the Crown of England.

An alien woman held real estates in Champagne in her own right, in fee simple, and these estates were expressly excluded by the marriage contract from the community of goods. By the custom of Paris, which governed this contract, these estates re-

mained during the coverture the separate property of the wife, and she could during her husband's lifetime, with his consent, have alienated them away, and have absolutely disposed of them at his death, so as to exclude her issue's right to *legitim*. The estates were confiscated by the French Revolutionary Government under the law of the French Convention against emigration, and she died in her husband's lifetime, leaving issue a son, a British subject:—Held, that the son had neither an infeasible nor a contingent interest in such estates, and that he was not entitled to indemnity for their loss.

Held also, that the statute 7 & 8 Vict. c. 66. s. 16, by which an alien woman married to a natural-born subject is naturalized, is not a declaratory act.

By the common law of England, an alien woman married to an Englishman is not entitled to dower.

The *Matrices de Roles*, or assessments to the land-tax of the year 1791, the primary evidence required by the Convention No. 7 for the purpose of ascertaining the value of the confiscated estates, not being forthcoming, it was held by the Judicial Committee that the Commissioners for liquidating the claims of British subjects in France were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase-money; the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack-rent; the rent, allowing a certain number of years' purchase, or the sum for which the property had been sold at the time of the confiscation. *Count de Wall's case*, 6 Moore, P.C. 216.

A female alien, who has married a natural-born subject is by virtue of the 7 & 8 Vict. c. 66. s. 16, naturalized, and acquires the status of a natural-born subject; and, consequently, when indicted for an offence is not entitled to be tried as an alien by a jury *de medietate lingue*. *Regina v. Manning*, 19 Law J. Rep. (N.S.) M.C. 1; 2 Car. & K. 887; 1 Den. C.C. 467.

ALIMONY.

A wife *de facto*, as a fact of marriage is necessarily pleaded in such a suit, is entitled *pendente lite* to alimony. *Miles v. Chilton*, 1 Robert. 684.

ALLOCATUR EXIGENT.

[See OUTLAWRY.]

AMENDMENT.

[For Amendments in Equity, see PLEADING, and PRACTICE, IN EQUITY. And see AFFIDAVIT—BILLS OF EXCHANGE—FINES AND RECOVERIES—GUARANTIE, Construction of—MANDAMUS—PRACTICE—PRISONER, Discharge of—SEQUESTRATION—VARIANCE.]

(A) WHEN AND IN WHAT CASES ALLOWED.

- (a) In general.
- (b) To save the Statute of Limitations.
- (c) Misprision of Office. [See (e) Of the Postea.]
- (d) Of the Record.
- (e) Of the Postea.
- (f) Writ of Error.

- (B) AT NISI PRIUS.
 (a) *In Cases of Variance under 3 & 4 Will. 4. c. 42. s. 23.*
 (b) *When Amendment renders Pleadings demurrable, or deprives Defendant of Motion in arrest of Judgment.*
 (c) *On Terms.*
 (C) BY THE COURT.
 (a) *Special Finding of Jury under 3 & 4 Will. 4. c. 42. s. 24.*
 (b) *Under Agreement in special Case.*
 (D) COSTS.

(A) WHEN AND IN WHAT CASES ALLOWED.

(a) *In general.*

[*Fowler or Foster v. the Bank of England*, 5 Law J. Dig. 19; 6 Q.B. Rep. 878; *Jackson v. Galloway*, 5 Law J. Dig. 20; 1 Com. B. Rep. 280.]

Where a writ had been issued, and a declaration delivered, in which a blank was left for the Christian name of defendant, to which he pleaded, and afterwards gave a written consent, signed with his name in full, to a Judge's order for payment of the debt, on which judgment was signed,—the Court, a year and a half after judgment signed, amended the declaration and judgment, by inserting the Christian name of defendant, in order to enable plaintiff to proceed to outlawry. *Wood v. Hume*, 15 Law J. Rep. (n.s.) Q.B. 319; 4 Dowl. & L. P.C. 136.

The Court refused to allow a plea to be amended after judgment pronounced thereon. *Smith v. the London, Brighton and South Coast Rail. Co.*, 7 Com. B. Rep. 793.

The Court refused to allow a replication to be amended after the lapse of a year after judgment pronounced on demurrer, the case having previously stood over that the parties might mutually agree to amend, and both having declined to do so. *Hammond v. Colls*, 3 Com. B. Rep. 212.

The Judge refused to allow an amendment at Nisi Prius as to the day of the demise, in order to give effect to the demand of possession, where the action if successful would defeat a family equitable arrangement. *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448.

Where a cause had been made a remanet, but there was no respite of the award authorizing the issue of the jury process,—the Court ordered the error to be amended before the ensuing term, and proceeded with the trial. *Ward v. Dalton*, 2 Car. & K. 659.

(b) *To save the Statute of Limitations.*

The Court permitted a plaintiff to amend an *alias* and a *pluries* writ of summons, by inserting therein the date of the first writ of summons, and therewith, in order to save the Statute of Limitations. *Culverwell v. Nugee*, 15 Law J. Rep. (n.s.) Exch. 308; 15 Mee. & W. 559; 4 Dowl. & L. P.C. 30.

The Court permitted plaintiffs, in order to save the Statute of Limitations, to amend the writ of summons by describing themselves as assignees of a bankrupt and the defendants as the registered public officers of a banking co-partnership. *Christie*

v. Bell, 16 Law J. Rep. (n.s.) Exch. 179; 16 Mee. & W. 669; 4 Dowl. & L. P.C. 690.

Where in an action against A and B, as executors of C, plaintiff, after declaration and plea, discovered that C's widow was co-executrix with A and B, and the Statute of Limitations had become a bar since the commencement of the suit, this Court refused to allow the writ of summons to be amended by adding the name of the co-executrix as a defendant, considering that such amendment would not have been made before the Uniformity of Process Act.

Quære—If the application to amend had been made before declaration or plea. *Goodchild v. Leadham*, 17 Law J. Rep. (n.s.) Exch. 90; 1 Exch. Rep. 706; 5 Dowl. & L. P.C. 383.

The Court will not (even in order to save the Statute of Limitations) amend the indorsement upon a *pluries* writ of summons, though to make it conformable to the fact, because by stat. 2 Will. 4. c. 39. s. 10. the indorsement must have been made at the time of service of the writ. *Medlicott v. Hunter*, 19 Law J. Rep. (n.s.) Exch. 191; 5 Exch. Rep. 34.

(c) *Misprision of Office.* [See (e) *Of the Postea.*]

(d) *Of the Record.*

The proceedings upon an indictment, removed by *certiorari*, were continued on the plea-roll from the 11th of January 1843 to the 16th of April, and from that day to others, but there were no continuances from Easter term 1844, to Trinity term 1845. Judgment being given against the defendant, he brought error, assigning that the proceedings were not properly continued, the 16th of April being a Sunday, the following months being stated without mention of the year, and the continuances above mentioned being altogether omitted. The Court made a rule *nisi*, obtained by the prosecutor, absolute for leave to issue a *venire facias juratores*, as of the 11th of January, returnable on some day in Easter term 1843, and to amend the entry roll and record of Nisi Prius accordingly, and further to insert the years after the months, and the omitted continuances, in the roll and record. *Regina v. Gregory*, 16 Law J. Rep. (n.s.) Q.B. 281; 4 Dowl. & L. P.C. 777.

In an action on a bill of exchange, dated in May 1838, the original writ of summons into Middlesex was issued on the 15th of August 1844; on the 14th of January 1845 it was returned *non est inventus* and filed, and entered of record; on the same day an *alias* writ of summons was issued into Middlesex; on the 10th of June 1845, a *pluries* writ of summons was issued into Surrey, and served the same day, and the defendant duly appeared to it; the plaintiff declared, and the defendant pleaded that the cause of action did not accrue within six years next before the commencement of the suit. The *alias* writ of summons was not in fact returned or entered of record till the 4th of July 1845. The Nisi Prius record was made up, stating only that the defendant was summoned to answer the plaintiff by virtue of a writ issued on the 15th day of August 1844, and on its production at the trial the plaintiff obtained a verdict:—Held, that the provisions of the stat. 2 Will. 4. c. 39. s. 10. had not been complied

with, and the Court made absolute a rule to amend the *Nisi Prius* record by stating the continuances according to the truth, at the cost of the plaintiff.

Where a writ, issued within six years after the cause of action accrued, has not been duly continued, pursuant to the 2 Will. 4. c. 39. s. 10, the defendant is not bound to plead such non-continuance specially, but may take advantage of it under the general plea, that the cause of action did not accrue within six years next before the commencement of the suit; for, *for this purpose*, the last writ which is served is the commencement of the suit. *Pratt v. Hawkins*, 15 Mee. & W. 399.

[And see (f) *Writ of Error*.]

(e) *Of the Postea*.

A Judge's direction as to the amendment of the *postea* cannot be questioned by the Court above. *Daintry v. Brocklehurst*, 18 Law J. Rep. (N.S.) Exch. 347; 3 Exch. Rep. 691.

A party cannot introduce a new averment into a *postea*. The Judge before whom a cause has been tried may direct a modification of the language of a *postea*, but the Court will not interfere.

A declaration in ejectment claimed in each of two counts one "pasture-gate," and one "cattle-gate." The cause having been referred, the arbitrator found the lessor of the plaintiff entitled to three "pasture-gates." The *postea* described the tenements as "three pasture-gates, known sometimes as pasture-gates, sometimes as cattle-gates"; and an affidavit was filed stating that they were known by either name. The Court made absolute a rule for rendering the *postea* conformable to the award. *Doe d. Haxby v. Preston*, 16 Law J. Rep. (N.S.) Q.B. 337; 5 Dowl. & L. P.C. 7.

Where the finding of the jury on two breaches of covenant is manifestly inconsistent, as appears by the *postea*, the Judge who tried the case may amend the *postea* from his recollection or his notes after judgment has been entered up, and a writ of error brought, and argument thereon.

The plaintiff in an action on the husbandry covenants of a lease assigned as one breach that the defendant did not seed down a certain field at the time it was sown, whereby a certain penal rent became due for one half-year, which the defendant had not paid, &c., and assigned as a further breach the non-payment of a further half-year's penal rent, in respect of the same breach of covenant. The jury found for the defendant on the first of these breaches, and for the plaintiff on the last; and the entry on the *postea* was, as to the first breach, that the defendant did seed down, &c. at the time of sowing, and as to the last that the defendant did not seed down. Judgment having been entered up accordingly, it was assigned for error that the issue on the last breach should have been found for the defendant. After argument in the court of error the *postea* was amended by order of the Judge who tried the cause, the amendment being as to the first breach that the defendant did not seed down at the time of sowing, and that the sum claimed in such breach as penal rent did not become due, and as to the last breach that the sum mentioned in such last breach did become due:—Held, that the Judge had power to order such amendment to be made, and that the judgment roll was also properly amended

according to the amended *postea*. *Bowers v. Nixon*, 18 Law J. Rep. (N.S.) Q.B. 41; 12 Q.B. Rep. 546.
[And see (f) *Writ of Error*.]

(f) *Writ of Error*.

A writ of error being directed to the Chief Justice of the court "to return a transcript of the record and proceedings" to the court of error,—Held, that the Court below could not amend the return of the Chief Justice; the course is to allege diminution, and move the court of error if amendment is required. *Newton v. Boodle*, 18 Law J. Rep. (N.S.) C.P. 72; 6 Com. B. Rep. 529.

An application to enter on the judgment roll orders charging stock in execution under 1 & 2 Vict. c. 110. s. 14, for the purpose of having them reviewed by a court of error, was refused. *Newton v. Boodle*, 18 Law J. Rep. (N.S.) C.P. 73; 6 Com. B. Rep. 532.

A writ of error was directed to M T B, Esq., "Recorder of the court of record of and for the borough of K." The return was made by M T B, Esq., "Judge of the court of record of the borough of K." It appeared that the court of record of the borough of K was an ancient court of record, and that the recorder acted as Judge, under the 5 & 6 Will. 4. c. 76. s. 118. On motion to quash the writ of error for irregularity, the Court allowed the plaintiffs to amend the writ of error by inserting the word "Judge" instead of "Recorder."

Where the declaration contained two counts, one of which was bad, and the verdict in the court below was taken generally for the plaintiffs,—Held, that the Court in bank had no power, after error brought, to amend the verdict, by confining it to the sufficient count. *Spencer v. Haggiadur*, 5 Dowl. & L. P.C. 68.

(B) AT NISI PRIUS.

(a) *In Cases of Variance under 3 & 4 Will. 4. c. 42.*
s. 23.

[*Boucher v. Murray*, 5 Law J. Dig. 22; 6 Q.B. Rep. 362.]

Declaration stated that defendant sold to plaintiffs 485 tons of coals, subject to the conditions that they were of a suitable quality to be used in steam vessels, and were adapted for all closed furnace or stove fires, where a strong, steady, and lasting heat was desirable; that they would burn with little or no smoke, would make but a small quantity of ashes, would ignite readily with a good draught, would open and swell out, would not cake and unite like the bituminous coal, and would burn without being stirred. Declaration then stated that the coals did not possess the properties above stated. Prior to the sale, defendant handed to plaintiffs a printed advertisement or statement, in which the qualities of the coals were described in the manner stated in the declaration. Plaintiffs afterwards purchased the coals, when an invoice was sent to them, which described the coals in question as "steam coals." The coals having proved unfit for steam purposes, plaintiffs brought an action for a breach of the conditions contained in the printed statement, but failed to prove that such a statement constituted the contract. The Court amended the declaration by substituting, instead of the contract declared on, a

statement that the coals were of fit quality for working steam-engines, and generating steam for steam-engines. *Pacific Steam Nav. Co. v. Lewis*, 16 Law J. Rep. (n.s.) Exch. 212; 16 Mee. & W. 783; 4 Dowl. & L. P.C. 681.

Declaration stated that A and B were possessed of certain premises, and that being so possessed, by indenture made between C of the first part, and A and B of the second part, A and B demised to C, and set out covenants by C with A and B. It appeared at the trial that B was dead at the time of the execution of the deed:—Held, that the declaration was properly amendable by striking out B's name in the allegation of possession as well as in the allegation of the demise and covenants. *Gregory v. Duff*, 18 Law J. Rep. (n.s.) Q.B. 213.

A declaration stated that in consideration that plaintiff would execute an indenture bearing date, &c. and purporting to be made between, &c. [stating the parties] and thereby release A from a debt, defendant agreed to pay the said debt, and averred that plaintiff did execute the said deed, and thereby released A. Issue, that plaintiff did not execute the said deed and thereby release A *modo et formâ*. The evidence was that plaintiff agreed to execute an indenture, bearing date, &c., (not stating between what parties) and thereby to release A. The Judge at Nisi Prius amended by striking out the statement as to parties in the indenture in the declaration:—Held, that this was such a variance as might be amended; and also that the omission of the parties in the description of the indenture was not a ground of special demurrer. *Hassall v. Cole*, 18 Law J. Rep. (n.s.) Q.B. 257.

In issues framed under section 45 of the Tithe Commutation Act (6 & 7 Will. 4. c. 77.) the Judge at Nisi Prius has no power to amend the issue agreed upon by the parties, or settled between them by a Judge at chambers.

In such cases the claim of a *modus* or exemption from tithe may be stated in different ways in several issues, so as to avoid variances between the claim and the evidence produced at the trial. *James v. Lynn*, 18 Law J. Rep. (n.s.) Q.B. 347.

Judge right in allowing plaintiff to amend his declaration by substituting for allegation of presentment to the acceptor an allegation that he was dead, and that the bill was presented to his executor. *Caunt v. Thompson*, 18 Law J. Rep. (n.s.) C.P. 125; 7 Com. B. Rep. 400.

The 3 & 4 Will. 4. c. 42. s. 23. does not authorize the amendment of the record upon the trial of an issue of *nul tiel record*. *Cooper v. Pennefather*, 7 Com. B. Rep. 739.

A plea of justification in an action for a malicious prosecution on a charge of receiving stolen goods, alleged that the goods had been stolen by "some person unknown," and the evidence at the trial shewed that the plaintiff had received the goods from a servant of the defendant named John Press:—Held, that under the 3 & 4 Will. 4. c. 42. s. 23. the Judge at the trial had properly allowed the plea to be amended, by striking out the words "some person unknown," and substituting the words "one John Press." *Pratt v. Hanbury*, 19 Law J. Rep. (n.s.) Q.B. 17.

A count in detinue stated that plaintiff delivered to defendant a certain bill of exchange [of the

plaintiff]; to wit, a bill of exchange, bearing date, to wit, the 20th day of November, A.D. 1848, drawn by the plaintiff upon and accepted by the defendant] for [the payment to the plaintiff or his order of a certain sum: to wit,] 85*l*. [two months after the date thereof] of great value; to wit, of the value of 100*l*., to be re-delivered by defendant to plaintiff on request. Breach, that defendant did not re-deliver the bill, but detained it. Plaintiff, on the trial, proved that a bill of exchange for 85*l*. was in the defendant's hands, but did not prove the particular description as laid. The Judge, on objection, amended, first, by striking out the words "two months after the date thereof," and then, on further objection, all the words within brackets:—Held, that the count so amended was not specially demurrable for want of certainty; and that the amendment was warranted by stat. 3 & 4 Will. 4. c. 42. s. 23. *Graham v. Gracie*, 13 Q.B. Rep. 548.

The enactments for allowing amendments at Nisi Prius were intended to meet variances arising from mere slips or accidents, and do not extend to a case in which the party has intentionally and designedly framed his pleading in a manner which gives rise to the objection. Thus, if a plaintiff, declaring on a deed, recites it according to what he contends is its legal effect, and the Judge should hold that that is not the legal effect of the deed, this would not be such a variance as should be amended at Nisi Prius. *Bowers v. Nixon*, 2 Car. & K. 372.

A plea alleging that a promissory note was given "for money lost, to one J G, by playing at a certain illegal game, to wit, the game of blind hooky," was amended at Nisi Prius, by inserting the words "and others" after "J G," and by substituting the word "hazard" for "blind hooky." *Masters v. Barrets*, 2 Car. & K. 715.

[See *post*, *Southey v. Denny*, (c) *On Terms*; and *Chapman v. Sutton*, *post* (C) (b). And see FRAUDS, STATUTE OF.]

(b) *When Amendment renders Pleadings demurrable, or deprives Defendant of Motion in arrest of Judgment.*

Where a Judge at Nisi Prius amends a declaration so as to render it open to a special demurrer for defects of form, which would be cured by pleading over, the counsel for the defendant is bound to point out the effect of such defects at the time, and cannot afterwards make it a ground for objecting to the amendment. *Bury v. Blogg*, 18 Law J. Rep. (n.s.) Q.B. 57; 12 Q.B. Rep. 877.

A Judge at Nisi Prius ought not to amend a pleading, if the effect would be to render it demurrable. *Evans v. Powis*, 1 Exch. Rep. 601.

A declaration for breach of promise of marriage alleged that in consideration that plaintiff would go to L, for the purpose of marrying defendant, defendant promised to marry plaintiff within a reasonable time after her arrival. The Judge at the trial gave the plaintiff leave to amend the declaration, which was accordingly done by stating that in consideration that defendant promised plaintiff to marry him, and would go to L, for the purpose of marrying him, and would within a reasonable time marry him, defendant promised, &c. A rule *nisi* having been obtained for a nonsuit,—Held, first,

that the consideration, as it originally stood, was sufficient to support the promise; secondly, that the Judge at *Nisi Prius* had power to make the amendment; and that it is not a sufficient objection to prevent a Judge from amending a declaration, that he would thereby deprive the defendant of the means of moving in arrest of judgment. *Harvey v. Johnston*, 17 Law J. Rep. (N.S.) C.P. 298; 6 Com. B. Rep. 295.

[See *Hassall v. Cole*, and *Graham v. Gracie*, ante, (a) *In Cases of Variance*.]

(c) On Terms.

An amendment which may be made by the Judge at *Nisi Prius* on terms of postponement, &c. is properly refused if applied for to be made at the trial. *West v. Bazendale*, 19 Law J. Rep. (N.S.) C.P. 149; 9 Com. B. Rep. 141.

Declaration stated that plaintiff was a surgeon and accoucheur, and that he had been employed to attend, and had attended, one R. in her confinement; that defendant in a discourse with the said R. of and concerning plaintiff in relation to his said profession, falsely, &c. spoke and published the following words:—"I wonder you had him to attend you. Do you know him? he is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many inquests had upon persons who have died because he had attended them." At the trial the words proved, as to the inquests, were "several have died that the plaintiff has attended, and there have been inquests held upon them:"—Held, that the Judge was right in allowing the declaration to be amended, by inserting the words proved.

Held, also, that if the amended words could have been answered by a plea of justification, and the words originally inserted could not, the counsel for the defendant should have applied to the Judge to postpone the trial. *Southey v. Denny*, 17 Law J. Rep. (N.S.) Exch. 151; 1 Exch. Rep. 196.

(C) BY THE COURT.

(a) *Special Finding of Jury, under 3 & 4 Will. 4, c. 42, s. 24.*

The indorsement of the special finding of the jury, made by the officer of the court on the back of the *Nisi Prius* record, will not be treated by the Court above as the *postea*, on motion for a new trial, no application to have the facts found specially and the finding stated on the record having been made at the trial until after the jury had delivered their verdict.

Semble—it is too late to apply to have the facts found specially after the jury have given their verdict. *Baird v. Hodges*, 18 Law J. Rep. (N.S.) Exch. 435.

(b) Under Agreement in special Case.

A guarantie expressed, that in consideration of advances made and to be made by C and D, bankers, or by any other persons of whom their firm might from time to time consist, in the way of loan, payments, discount, or otherwise to F, H and S jointly and severally thereby gua-

ranteed to C and D the repayment of the said advances, and to indemnify them against any loss by reason of such advances, their liability not to exceed the sum of 1,000*l*. The guarantie to be a continuing guarantie, and to be a security to the said C and D to the extent of 1,000*l*. as aforesaid, for the whole of any balances which might from time to time or at any time become due to C and D, or to the persons for the time being constituting the firm of the said banking-house:—Held, that this was a good and binding guarantie for both the past and future advances, such future advances having been made.

A declaration framed on this guarantie, after stating the past advances, stated that in consideration of the said advances so made as aforesaid, and that the plaintiffs (C and D) would from time to time make advances to F of monies in the way of loan, &c., the defendant (S) guaranteed and promised the plaintiffs the repayment of the said last-mentioned advances, and to indemnify them by reason of such advances, and further promised that the said guarantie "should be a continuing guarantie and a security to the plaintiffs to the extent of 1,000*l*. as aforesaid, for the whole of any balance which might from time to time become due to the plaintiffs or to the persons for the time being carrying on the said trade or business." Averment, that the plaintiffs did afterwards make advances to F:—*Semble*, that the plaintiffs might thus state the promise to have been for the payment of the future advances: but held, that there was a variance between the declaration and the guarantie in the statement of the consideration, which in reality consisted of advances to be made not merely by the plaintiffs, but by the persons constituting their firm; and *semble* also, that there was a further variance in the promise, in fact, being to pay the balance which might be due to the plaintiffs or the persons for the time being carrying on the said trade or business; but held also, that such variances were amendable by a Judge at *Nisi Prius*, and that an agreement in a special case that the Court should be at liberty to amend any part of the pleadings as they might think proper, did not extend that power. *Chapman v. Sutton*, 15 Law J. Rep. (N.S.) C.P. 166; 3 Dowl. & L. P.C. 646; 2 Com. B. Rep. 634.

(D) Costs.

The Reg. Gen. Hil. term, 4 Will. 4, give certain forms of issues, &c., and provide that, in case of non-compliance, the Court or a Judge may give leave to amend:—Held, that the application to amend should be made to a Judge at chambers, and defendant having come to the Court in a vexatious and expensive manner, his rule was discharged with costs unless he consented to pay the costs of the amendment: *Duke of Brunswick v. Sloman*, 17 Law J. Rep. (N.S.) C.P. 81; 5 Com. B. Rep. 218.

A fatal variance having in the course of a cause been discovered between the declaration and the evidence, the plaintiff applied to the Judge to amend the declaration, which was done, and the following order made: "Upon hearing counsel and by consent it is ordered that the record be withdrawn, and that the plaintiff do have leave to

amend the record":—Held, that although the order was silent as to costs, the plaintiff was liable to pay the costs of the day. *Skinner v. London, Brighton, &c. Rail. Co.*, 19 Law J. Rep. (N.S.) Exch. 162; 4 Exch. Rep. 885; 1 L. M. & P. 189.

AMOTION.

[See OFFICIAL PERSONS.]

ANIMALS.

[Keep of when impounded, see DISTRESS. And see CRUELTY.]

Liability for keeping mischievous and ferocious Animals after Knowledge and without Negligence.

Declaration for an injury to plaintiff's wife by a ram, alleged that defendant wrongfully and injuriously kept it, knowing it to be prone and used to attack and injure mankind:—Held, in arrest of judgment, that the declaration was not bad for not averring that defendant negligently kept the ram. *Jackson v. Smithson*, 15 Law J. Rep. (N.S.) Exch. 311; 15 Mee. & W. 563; 4 Dowl. & L. P.C. 45.

Whoever keeps a mischievous animal (either domestic or *fera natura*) with knowledge of its mischievous propensities is bound to keep it secure at his peril, and is *prima facie* liable to an action on the case, at the suit of any person attacked or injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping such an animal after knowledge.

Quere—Whether, to an action on the case for injury caused as above stated, it would be a defence that the injury was occasioned solely by the wilfulness of plaintiff, after warning. *May v. Burdett*, 16 Law J. Rep. (N.S.) Q.B. 64; 9 Q.B. Rep. 101.

Declaration stated that defendant wrongfully and injuriously kept a ferocious dog, well knowing him to be ferocious; that defendant kept his said dog so negligently that he bit and worried divers sheep of the plaintiff:—Held, that the plea of not guilty put in issue the *scienter*, which is a material averment in the declaration. *Card v. Case*, 17 Law J. Rep. (N.S.) C.P. 124; 5 Dowl. & L. P.C. 509; 5 Com. B. Rep. 622.

ANNEXATION.

[See PREROGATIVE.]

ANNUITY.

[See APPORTIONMENT—PLEADING—REPLEVIN—STAMP.]

(A) ENROLMENT OF.

(a) *When necessary.*

(b) *Form and Requisites of Memorial.*

(B) RIGHTS AND LIABILITIES OF ANNUITANT.

(A) ENROLMENT OF.

(a) *When necessary.*

[*Marriage v. Marriage*, 5 Law J. Dig. 23; 1 Com. B. Rep. 761.]

A, who was in possession of lands which had been conveyed to such uses as he should appoint, and until appointment to the use of himself for life, remainder to a trustee for his life, in trust for A and to bar dower, remainder to A's heirs and assigns, granted to B an annuity of 240*l.* charging the lands therewith. The lands were of greater annual value than the annuity, beyond any other charge thereon:—Held, that this annuity deed was within the exceptions of the statute, 53 Geo. 3. c. 141, and did not require enrolment. *Doe d. Butler v. Kensington*, 15 Law J. Rep. (N.S.) Q.B. 153; 8 Q.B. Rep. 429.

An annuity granted in consideration of a debt existing at the time of the grant does not require any memorial of enrolment. *Doe d. Church v. Pontifex*, 19 Law J. Rep. (N.S.) C.P. 145.

It is the duty of the grantee of an annuity to enrol it under 53 Geo. 3. c. 141; and he cannot set up the want of enrolment against the grantor, although the statute declares that in case of non-enrolment the deed shall be void to all intents and purposes. *Molton v. Camroux*, 18 Law J. Rep. (N.S.) Exch. 356; 4 Exch. Rep. 17:—affirming the judgment of the Court of Exchequer, 18 Law J. Rep. (N.S.) Exch. 68; 2 Exch. Rep. 487.

(b) *Form and Requisites of Memorial.*

[*Abbott v. Douglas*, 5 Law J. Dig. 23; 1 Com. B. Rep. 483.]

Where, in the memorial required by 55 Geo. 3. c. 141, under column "Consideration, and how paid," the statement was 5,000*l.* made up of five several sums of 300*l.*, 200*l.*, 2,000*l.*, 1,500*l.*, and 1,000*l.*, previously lent and advanced by C H to or for the use of J L and E J L, and owing to C H on security of five several bills of exchange, drawn by E J L upon, and accepted by, J L and indorsed by E J L, the said consideration being paid and satisfied by the cancellation of the said bills and a release, &c.:—Held, a fair statement, and one with as much detail as the nature of the transaction permitted.

The statement of a pre-existing debt need not shew how such debt has arisen. *Hall v. Lack*, 17 Law J. Rep. (N.S.) Exch. 43; 1 Exch. Rep. 300.

Part of consideration for an annuity was stated in the memorial to be for 1,303*l.*, money lent and advanced in the sums and at the times following; "the sum of 250*l.* paid by the cheque of the defendants, on and dated the 29th of December 1837, drawn by them on their bankers Messrs. P & S;" the further sum of 500*l.* paid by a like cheque, dated the 24th of February 1838, &c.:—Held, that the memorial sufficiently stated the time when the different sums were paid. *Doe d. Church v. Pontifex*, 19 Law J. Rep. (N.S.) C.P. 145.

In the memorial of an annuity to be enrolled under the 53 Geo. 3. c. 141, under the head "Consideration, and how paid," it is only necessary to state the amount paid, and whether in cash, notes, &c. And it is not necessary to state "to whom"

the consideration was paid. *Moody v. Heberd*, 17 Law J. Rep. (N.S.) Chanc. 381; 7 Hare, 182.

In consideration of 500*l.* paid by A to B, B gave a bond to A for 500*l.*, conditioned to be void on payment of an annuity of 60*l.* to A for his life; and B also deposited with A the title deeds of a real estate belonging to B, with a written memorandum. The bond was enrolled, but not the memorandum. B became bankrupt. A petition by A for a sale of the mortgaged property, and the application of the purchase-money to his claim, was dismissed, with costs. *Ex parte Miller, re Swann*, 18 Law J. Rep. (N.S.) Bankr. 9.

(B) RIGHTS AND LIABILITIES OF ANNUITANT.

By an annuity deed A granted to B, the grantee of the annuity, a right to enter and distrain for the annuity if in arrear for fourteen days after any day of quarterly payment, and if in arrear for twenty-one days, a further power to enter and hold possession until all arrears should be paid up. And, by the same deed, for the further and better securing of the payment of the annuity, A with B's consent, and by his direction and appointment, granted and demised the premises to H for a term of years, in trust, to permit A to receive the rents until default in payment of the annuity for thirty days, and upon such default, after demand, out of the rents, or by demising, selling, leasing, or mortgaging the same or any part thereof, for all or any part of the term, to raise and pay off the arrears, with all expenses; A still to receive the surplus rents, and upon death of the *cestuis que vie*, and full satisfaction of the annuity, the term to become void save as to any mortgages made by H under the power for answering the purposes of the term. It was further provided in the deed, that as to the premises of which A was in occupation at the time of the grant, they were to be considered as held by him as tenant to H at a rent of 500*l.*, payable on the same day as the annuity:—Held, that upon default in payment of the annuity, ejectment on the demise of B might be supported against A, though no notice to quit had been given, B's right of entry not being defeated by the outstanding term in H, his trustee.

Quere—If H had assigned or mortgaged the term under the powers for that purpose given, whether B's right of entry would have been defeated. *Doe d. Butler v. Kensington*, 15 Law J. Rep. (N.S.) Q.B. 153; 8 Q.B. Rep. 429.

If an annuity be granted out of land, with power to the grantee and his assigns, in case the annuity be in arrear, to enter and retain possession of the land until payment, and the grantee enter for non-payment of the annuity, and die in possession of the land, the arrears being still unpaid,—*Semble*, that the executor of the grantee takes such an interest in the land as will entitle him to maintain an ejectment. *Doe d. Sugden v. Weaver*, 2 Car. & K. 754.

A Judge having made an order, under the 1 & 2 Vict. c. 110. and 3 & 4 Vict. c. 82, charging an annuity, payable out of the suitors fund by order of the Lord Chancellor, under the 46 Geo. 3. c. 128,—the Court of Exchequer considering it doubtful whether the Judge's order might not be enforced, left the question of its validity open, and discharged a rule *nisi* to set aside the order. *Witham v. Lynch*, 17 Law J. Rep. (N.S.) Exch. 13; 1 Exch. Rep. 391.

To induce the Court to set aside a warrant of attorney given to secure an annuity, on the ground of an improper returning or retaining of part of the consideration-money, the fact of such returning or retaining must be unequivocally sworn to.

At the time of executing an annuity deed, the grantor, an attorney, received the full amount of the consideration-money, 170*l.*, and immediately paid thereout 8*l.* 6*s.* 6*d.* for the costs of preparing the securities and enrolling the memorial, and 20*l.* to the grantee's agent, in satisfaction of a liability to him (the agent) upon a bill of exchange drawn by the grantor upon and accepted by his father, and which was within a week of maturity:—Held, that this was not such a transaction as would warrant the Court in setting aside the security eleven years after the date of the grant. *Barber v. Thomas*, 7 Com. B. Rep. 612.

An annuitant, with power of sale over property on which the annuity was secured, employed A & B as her solicitors to sell the property by auction; and A & B procured the consent in writing of the grantor to the sale. The purchaser at the auction declining to complete on the ground of defect of title, A. & B. subsequently obtained from the grantor an assignment of the property to a trustee for themselves at the same price that it brought at the auction, but without disclosing to the grantor certain facts, and that they were purchasing for themselves:—Held, that A & B were the agents as well for the grantor as for the annuitant; and, as such, were under all the disabilities of an agent purchasing for himself; and the Court declared the assignment invalid. *Re Bloye's Trust, ex parte Lewis*, 19 Law J. Rep. (N.S.) Chanc. 89; 1 Mac. & G. 488; 2 Hall & Tw. 140.

APOTHECARY.

[See SURGEON AND APOTHECARY.]

APPEAL.

[See CLERGY—INFERIOR COURT—PARLIAMENT—PRIVY COUNCIL—RATE—SESSIONS.]

APPEARANCE.

[See PRACTICE.]

APPOINTMENT.

[See POWER.]

APPORTIONMENT.

[See TITHE.]

The act 4 & 5 Will. 4. c. 22, for the apportionment of rents, annuities and other periodical payments, extends to Scotland. *Fordyce v. Bridges*, 1 H. L. Cas. 1.

An accumulating fund formed by investing money in bank annuities, was charged with 150*l.* a

year to A for her life:—Held, that A's executors were entitled to a proportionate part, for the interval between her death and the last day of payment. *Carter v. Taggart*, 16 Sim. 447.

A testator gave freehold, copyhold and leasehold estates to a trustee upon trust to maintain his mansion-house, and pay various expenses, and for that purpose to expend annually not exceeding 600*l.*, and permit his wife to reside therein, &c., and after some other deductions, to pay five eighth parts of the net rents of his estates unto his wife *for her own use during her life*, and the other three-eighths to his daughters. The wife received her portion of the net rents up to Lady-day 1847, and died on the 24th of July 1847. The personal representatives under her will, by a petition in the cause, claimed a proportionate part of the rents from the last payment up to and including the day of her decease:—Held, that the tenant for life was not affected by the payments of the rents, as they were payable to the trustee: that a right of the trustee to pay arose with his receipt: that the right of the wife to receive accrued under the will: that there was nothing to prevent the payments being made at fixed periods; and that the personal representatives were entitled to a proportionate part of the rents up to and including the day of the death of the wife. *Knight v. Boughton*, 19 Law J. Rep. (N.S.) Chanc. 66; 12 Beav. 312.

By a settlement, dated in 1820, trustees were directed to invest a sum of money in their hands in East Indian securities, and to pay the dividends to A for life, and after his death to the persons therein mentioned. The trustees invested this sum in the loan effected by the East India Company in 1822, and afterwards transferred that debt to the loan opened by the company in 1834. The dividends in respect of the last-mentioned loan were payable on the 15th of January and the 15th of June in every year. A died on the 2nd of June 1846:—Held, that the dividend payable on the 15th of June 1846 was not apportionable, and belonged wholly to the persons entitled in remainder. *Warden v. Ashburner*, 17 Law J. Rep. (N.S.) Chanc. 440; 2 De Gex & S. 366.

APPRENTICE.

[See MASTER AND SERVANT—POOR, Settlement—SLAVE.]

A sum of 99*l.* 19*s.* was paid as an apprentice fee, and was stated as the consideration in the indenture. Contemporaneously with the indenture, a written agreement was made between the master and the apprentice's uncle that the latter should pay 150*l.* more for the board of the apprentice during the term, 50*l.* of which was paid, and notes given for the residue. This was not stated in the indenture:—Held, that the consideration was truly stated, and that the indenture was not void, under the statute 8 Ann. c. 9.

Semble—That if parties choose to divide their contracts, so as to lessen the amount of stamps, they may legally do so. *Hankins v. Clutterbuck*, 2 Car. & K. 810.

APPROPRIATION.

[See BOND—CHURCH—GOODS SOLD AND DELIVERED—MONEY HAD AND RECEIVED—PAYMENT.]

ARBITRATION.

[See FRIENDLY AND BENEFIT SOCIETIES—LANDS CLAUSES CONSOLIDATION ACT—PRACTICE, Irregularity—STAMP.]

(A) SUBMISSION AND REFERENCE.

- (a) *In general.*
- (b) *Authority of Attorney to refer.*
- (c) *Making the Submission a Rule of Court.*

(B) ARBITRATOR.

- (a) *Powers and Duties.*
- (b) *Liability.*

(C) AWARD.

- (a) *Enlarging Time for making.*
- (b) *Certainty and Conclusiveness.*
- (c) *Finding on several Issues.*
- (d) *Damages.*
- (e) *Sending back to Arbitrator.*
- (f) *Not Evidence of Account stated.*

(D) REMEDIES FOR ENFORCING AWARDS.

- (a) *Rule and Attachment.*
- (b) *Action. [And Pleadings therein.]*
- (c) *In Equity.*

(E) SETTING ASIDE AWARDS.

- (a) *Grounds for.*
- (b) *Matters of Practice as to.*

(F) COSTS.

- (a) *In general.*
- (b) *Of Arbitrators.*
- (c) *Taxation of.*

(G) SIGNING, AND MOVING IN ARREST OF JUDGMENT.

(A) SUBMISSION AND REFERENCE.

- (a) *In general.*

The 9 & 10 Will. 3. c. 15. is not confined to references of existing controversies. *Parkes v. Smith*, 19 Law J. Rep. (N.S.) Q.B. 405; 15 Q.B. Rep. 297.

On the trial of two indictments, one for perjury and the other for conspiracy between the same parties, it was arranged by the counsel on each side that verdicts of not guilty should be taken, and an order of *Nisi Prius* was drawn up by consent, whereby the indictments and all matters in difference between the prosecutor and the defendant (including suits in Chancery) were referred to arbitration, the costs of the indictments to be in the discretion of the arbitrator, but no power was given to him to alter the verdict. After various attendances before the arbitrator, the defendant revoked the submission, and proceeded with the suits in Chancery. On a rule for an attachment for contempt,—Held, that this was not, in effect, a reference of the indictments, which were at an end by the verdict; and also that the reference was not illegal as being made upon a corrupt agreement to stifle the prosecutions.

Held also, that the instrument of reference could not be treated as a submission under 9 & 10 Will. 3. c. 15, so as to make it irrevocable under 3 & 4 Will. 4. c. 42. s. 39. That, assuming it to be valid as an order of *Nisi Prius*, the defendant was entitled at common law to revoke the submission, and not being made in an action that power was not taken away by 3 & 4 Will. 4. c. 42. s. 39.

But, *quære*, whether the order was valid as it embraced nothing before the Court except the costs.

Quære also—Where a cause and all matters in difference are referred by order of *Nisi Prius*, whether as to the matters in difference, the order operates as an agreement of reference under the statute.

An indictment for perjury cannot be referred to arbitration. *Quære*, whether an indictment for conspiracy can? *Regina v. Hardey*, 19 Law J. Rep. (N.S.) Q.B. 196.

[See *Parkes v. Smith*, post, (D) (b), as to submission by covenant in a deed. Also *Faviell v. Eastern Counties Rail. Co.* (E) (a).]

(b) Authority of Attorney to refer.

An attorney authorized to appear for a party in a suit has incidentally authority to refer it without any fresh authority to that effect, and the attorney having appeared for the corporation, to the knowledge of the directors, the corporation were bound by his acts as attorney, though he was not authorized to appear by an authority under seal. *Faviell v. Eastern Counties Rail. Co.*, 17 Law J. Rep. (N.S.) Exch. 297; 2 Exch. Rep. 344.

An attorney appeared for defendant in an action of assumpsit, and consented to a Judge's order, referring the cause to an arbitrator, who awarded a sum of money in favour of plaintiffs. The order of reference was made a rule of court, and plaintiffs executed a power of attorney, authorizing D to demand the money. After great difficulty in finding defendant, who astutely evaded service, a personal demand was made upon him by W. On a rule to shew cause why the defendant should not pay the money according to the award, &c.—Held, that an attorney authorized to appear in a cause has also an implied authority to consent to a reference.

Held also, that under the special circumstances there was a sufficient service on the defendant of the demand of the money. *Smith v. Troup*, 18 Law J. Rep. (N.S.) C.P. 209; 7 Com. B. Rep. 757.

(c) Making the Submission a Rule of Court.

An order of *Nisi Prius*, referring a cause to arbitration, may be made a rule of court, without any express reservation of a power so to do. *Millington v. Claridge*, 3 Com. B. Rep. 609.

Where an award is made on a submission by order of reference at *Nisi Prius*, the order of reference does not belong exclusively to either party, but the party holding it holds it for the benefit of both parties, and is bound to produce it in order to its being made a rule of court.

Where a submission was by order of reference at *Nisi Prius*, and the defendants in whose favour the award was made had possession of the order of reference, and although requested by the plaintiff, delayed making it a rule of court till it was too

late to move within the time ordinarily limited for setting aside an award, the Court ordered the defendants either to make the order of reference a rule of court, or to file it with one of the Masters, so as to enable the plaintiff to make it a rule of court, and allowed the plaintiff to move to set the award aside in a subsequent term *nunc pro tunc*. *Bottomley v. Buckley*, 4 Dowl. & L. P.C. 157.

A, one of the parties to an award, had reason to believe that B, the opposite party, in whose hands the original deed of submission was, was going to make it a rule of court, and B, in point of fact, intended to do so, and was prevented by accident only. On the last day but one of the term next after the making of the award, A. obtained a rule *nisi* to set aside the award, and also a rule *nisi* for B to file the submission with the Master, in order to its being made a rule of court as of the day on which the motion to set aside the award was made; and that the rule to set aside the award should be drawn up on reading such rule; and the Court, in the following term, made the rule absolute. *In re the Midland Rail. Co. and Heming*, 4 Dowl. & L. P.C. 788.

An order of reference of a borough court of record expressed to be made by consent of the attorneys or the parties, and containing a consent clause for making the order a rule of one of the superior courts at Westminster, may be made a rule of that superior court under the stat. 9 & 10 Will. 3. c. 15, as an agreement of reference between the parties. *Harlow v. Winstanley*, 19 Law J. Rep. (N.S.) Q.B. 430; 1 L. M. & P. 425.

A submission to arbitration may be made a rule of court after the award has been made, and notwithstanding the expiration of the time allowed by the 2nd section of 9 & 10 Will. 3. c. 15. to either party to take objections to the award, on the ground of corruption and undue means. *Heming v. Swinnerton*, 16 Law J. Rep. (N.S.) Chanc. 287; 5 Hare, 350.

[See (D) Remedies, (c) *In Equity*.]

(B) ARBITRATOR.

(a) Powers and Duties.

An arbitrator has no power to order judgment *non obstante veredicto*. *Toby v. Louibond*, 17 Law J. Rep. (N.S.) C.P. 201; 5 Com. B. Rep. 770; 5 Dowl. & L. P.C. 768.

Where a cause is referred, the arbitrator to be at liberty to state any point of law for the opinion of the Court, and he declines to do so, the Court will not interfere with his discretion. *Miller v. Shuttleworth*, 7 Com. B. Rep. 105.

After issue joined in an ejectment, the matters at issue in an action, together with all claims in respect of mesne profits, and all matters in difference between the parties, and of the costs of the action, and of the reference, were referred by a Judge's order. The award directed judgment to be entered for plaintiff in the action, with *l.s.* damages, and that plaintiff should recover, under the same judgment, a plot of land (describing it by metes and bounds), and that defendant should pay 12*l.* as mesne profits, and plaintiff's costs in the action, to be taxed by the proper officer, and part of the costs of the reference and award:—Held, first, that

the arbitrator had no authority to direct judgment to be entered up, and final judgment, which had been signed, was set aside; but that, rejecting all that related to the judgment, the award sufficiently decided the matters referred. *Doe d. Body v. Cox*, 15 Law J. Rep. (N.S.) Q.B. 317; 4 Dowl. & L. P.C. 75.

An arbitrator or umpire has no power to fix his own fee in the award, and to make the taking up of the award conditional upon the payment of the fee, unless the submission specifically gave him that power.

Certain matters in difference between A B and C D, were referred to two arbitrators, with power to appoint an umpire, and, by the terms of the submission, the costs of the submission and award were to be in the discretion of the arbitrators or umpire, who, by their award, might direct by and to whom the same should be paid, with power also to make the submission a rule of court, (which was done). An umpire was appointed who made an award, and thereby found a certain sum to be due from A B to C D; and he awarded and directed all the costs (specifying the sum) of the submission and award, including therein the costs of taking up the award, to be paid on a specified day by A B. The fees of the arbitrators and umpire were included in the costs.—*Seemle*, that the award was bad; and that C D, having paid the amount to take up the award, might recover back the amount beyond what was reasonably due, in an action for money had and received. *In re Coombs*, 4 Exch. Rep. 839.

An inclosure act empowered A B (who was not the inclosure commissioner) to declare by an award under his hand, &c., within six months after the passing of the act the annual amount of rent-charge payable to the rector of M, and also provided that in case the said A B should die, neglect or refuse to act, another arbitrator should be nominated with like power by the Bishop of O. Through the delay of the inclosure commissioner under the act in making his award, A B was prevented from making his award, and in fact did not make it within six months. After that period he made an award which was bad on the face of it. The Bishop of O subsequently appointed another arbitrator under the power contained in the act of Parliament. An action being brought on this award, the declaration alleged that A B neglected to act in the matters submitted to him, and did not make his award within six months, but neglected so to do, and that the bishop appointed another arbitrator under the act of Parliament. The defendant pleaded that A B made his award, which was acquiesced in by the plaintiff, *absque hoc* that the said A B neglected, &c. for six months:—Held, under this issue, that A B in permitting six months to expire without making an award, had neglected to make one within the meaning of the act. *Willoughby v. Willoughby*, 16 Law J. Rep. (N.S.) Q.B. 251; 9 Q.B. Rep. 923.

[See *Scott v. Van Sandau*, *post*, (C) (b); also (E) Setting aside Awards.]

(b) Liability.

A contracted with a company to execute, for a specified sum, certain works, subject to such omissions therefrom and additions thereto as might be directed by H, the engineer of the company. The

contract provided that the value of such omissions and additions should be estimated according to a schedule of prices in cases where the same would apply, and where not, by the valuation of H; that the certificate of H should be necessary to authorize any payment to A, and that in case of any dispute touching the contract, the award of H should be final. H having given his final certificate of the balance due, A filed his bill for an account against the company and H, stating that certain variations directed to be made were respectively of a specified amount, and that H had declined to make any estimate of such works, and charging that the said certificate was a fraudulent contrivance of the company and H for the purpose of enabling the company to avoid paying the amount justly due to the plaintiff. The bill interrogated H as to whether the particular items were not of such an amount respectively as stated. The defendant H, by his answer, denied fraud in general terms, and answered all interrogatories except those which related to the amount in value of the particular items, which he declined to answer, on the ground that, as arbitrator, he was not bound to disclose the data upon which his award was founded. Upon exceptions, held, affirming the decision of the Court below, that an arbitrator could not, by a general denial of fraud, protect himself from answering those facts which, if omitted, would tend to shew the fraud alleged.

The 38th Order of August 1841 does not enable a defendant, by his answer, to decline answering a question from which he could not, previously to the Order, have protected himself from answering by demurrer. *Padley v. Lincoln Waterworks Co.*, 19 Law J. Rep. (N.S.) Chanc. 436; 2 Mac. & G. 68; 2 Hall & Tw. 295.

(C) AWARD.

(a) Enlarging Time for making.

The Court has power, under 3 & 4 Will. 4. c. 42. s. 39, to enlarge the time for an arbitrator to make his award, where the arbitrator had power to enlarge the time, but had omitted to exercise it. *Lestie v. Richardson*, *Richardson v. Lestie*, 17 Law J. Rep. (N.S.) C.P. 324; 6 Com. B. Rep. 378.

The 3 & 4 Will. 4. c. 42. s. 39. enables a Judge to enlarge the time for making an award to a period beyond that to which the power of the arbitrator to enlarge is limited by the submission. *Parkes v. Smith*, 19 Law J. Rep. (N.S.) Q.B. 405; 15 Q.B. Rep. 297.

[See *Bowen v. Williams*, *post*, (D) (a), where, after order enlarging time for arbitrators to make award, award made by umpire; also *Parkes v. Smith*, *post*, (D) (b).]

(b) Certainty and Conclusiveness.

[*Stonehewer v. Farrer*, 5 Law J. Dig. 31; 6 Q.B. Rep. 730; *Grenfell v. Edgecombe* or *Grenfell v. Edgecombe*, 5 Law J. Dig. 32; 7 Q.B. Rep. 661; *Hawkyard v. Greenwood* or *Stocks*, 5 Law J. Dig. 33; 2 Dowl. & L. P.C. 936.]

Before plea, all matters in difference between the parties in a cause were referred to arbitration, costs of the action to abide the event of the award, and costs of the reference and award to be in the discretion of the arbitrator. The declaration contained

two counts in case for false representations. The award, after reciting the order of reference, and not stating "that it was made of and concerning the premises," ordered that the defendant should pay to the plaintiff a sum of 167*l.* 6*s.* 2*d.*, and that the costs of the reference and award and all other costs connected therewith should be paid by defendant:—Held, bad, as it was uncertain whether the payment of 167*l.* 6*s.* 2*d.* was to be made in respect of the action or of other matters in difference. *Crosbie v. Holmes*, 15 Law J. Rep. (n.s.) Q.B. 125; 3 Dowl. & L. P.C. 566.

Where the arbitrator was empowered to raise a point of law, and he directed what should be done in case the Court should be of a certain opinion, and a certain sum to be paid at all events,—Held, that the award was final: also, that after notice of the arbitrator proceeding, and a refusal to attend, denying his authority, the arbitrator might proceed in the absence of the defendant. *Scott v. Van Sandau*, 6 Q.B. Rep. 237.

In an action, in which two issues were raised, each of which went to the whole cause of action, all matters in difference were referred; the costs of the cause to abide the event. The arbitrators awarded generally that the action should be no further prosecuted, and that a sum should be paid by defendant to plaintiff:—Held, that the award sufficiently ascertained the event, and was final. *Hobson v. Stewart*, 16 Law J. Rep. (n.s.) Q.B. 145; 4 Dowl. & L. P.C. 589.

Agreement of reference recited, that a Chancery suit for a dissolution of partnership existed between the parties, and that, in order to put an end to it, they had agreed to refer all matters in dispute arising out of their accounts or otherwise; and power was given to the arbitrators to assess and apportion the costs of the suit as well as the other costs. The arbitrators found a sum of money to be due from one of the parties to the other, and apportioned the costs of the suit and the other costs:—Held, that the award was final, and sufficiently adjudicated on the Chancery suit. *In re Marsh*, 16 Law J. Rep. (n.s.) Q.B. 330.

One of the questions submitted to an arbitrator in an indenture of reference was, whether plaintiff was liable to discharge a sum of money secured by a mortgage executed by him to the testatrix on or about the 29th of September 1818. The arbitrator found that "the plaintiff was not liable to discharge a sum of money secured by mortgage executed by him to the testatrix on the 26th of September 1817, which was by the defendant produced to me as the mortgage in the said indenture mentioned as, and by the plaintiff admitted to be, the mortgage executed by the plaintiff to the said testatrix on or about the 26th of December 1818." The only deed mentioned in the indenture of reference was the mortgage deed. In an action upon the award,—Held, that it sufficiently appeared, notwithstanding the errors in the date, that the arbitrator had decided on the liability of plaintiff upon the mortgage deed referred to him. *Spooner v. Payne*, 16 Law J. Rep. (n.s.) C.P. 225; 4 Com. B. Rep. 328.

An action of trespass was brought in the Court of Exchequer by a plaintiff against three defendants, and all matters in difference between the said parties were referred by order of Nisi Prius to an arbit-

trator, a verdict having been taken for the plaintiff; and by another like order, made at the same time, an action of replevin brought in the Court of Queen's Bench, by the same plaintiff, against one only of the defendants, was also referred to the same arbitrator. The main question agitated on both sides was, whether or not the plaintiff had, in 1842, become tenant to that party who was defendant in both actions. No other tenancy was ever set up, or brought into question before the arbitrator. The reference of the replevin suit was first proceeded in, and the evidence taken in it was, by consent, read over as evidence in the action of trespass. The arbitrator awarded in the action of replevin, that the plaintiff had good cause of action against the defendant, and was entitled to a verdict. In the action of trespass he awarded nothing as to the costs of the action of replevin, or whether at the date of the order of reference of either action a tenancy of the plaintiff to the party, who was defendant in both actions, existed:—Held, that the award was good, these matters, if in difference, not having been brought before the arbitrator at the hearings.

The arbitrator having the power of a Judge at Nisi Prius, did not award execution, but ordered the damages and costs to be paid at a stated time and place. That part of the award was held void *pro tanto*, as surplusage.

The plaintiff had replevied in the county court, but on the sale by the three defendants of the goods replevied, dropped that suit, and brought the action of trespass against them:—Held, that as the proceeding in the county court was not brought before the arbitrator, his award was good, though he had not awarded on it.

Quære—Whether, on a reference of a cause and "all matters in difference between the said parties," they being A on the one part, and B, C and D on the other, an arbitrator must award on a cause and matter of difference pending between A and B only. *Rees v. Waters*, 16 Mee. & W. 263.

By order of Nisi Prius a cause and all matters in difference were referred to the award of A B, with power to enter a verdict for either party, the costs to abide the event, and neither party to be at liberty to bring a writ of error. It was contended before the arbitrator that the third and sixth pleas were bad in law, and, though proved in point of fact, that plaintiff was entitled on the issues raised on them to judgment *non obstante veredicto*. The award directed a verdict to be entered for plaintiff on the second and fifth issues, with 1*s.* damages, "which sum, except for my finding upon the other issues, the plaintiff would be entitled to recover in the said cause." The first, third, fourth and sixth issues were found for defendant:—Held, that the arbitrator had no power to order judgment *non obstante veredicto*; and that as regarded the damages the award (as above) was sufficiently final.

An award of mutual releases in general terms is sufficient. *Toby v. Lovibond*, 17 Law J. Rep. (n.s.) C.P. 201; 5 Dowl. & L. P.C. 768; 5 Com. B. Rep. 770.

An attorney appeared for a corporation in an action of debt, and consented to a Judge's order, referring "all claims made in the action" to an arbitrator. The arbitrator having awarded to plain-

tiff a sum actually claimed in the action,—Held, that the question, whether that sum was a debt or not was submitted to the arbitrator, and that his decision on the point was final, even if erroneous. *Faviell v. Eastern Counties Rail. Co.*, 17 Law J. Rep. (n.s.) Exch. 297; 2 Exch. Rep. 344.

Pending a reference, the parties,—by a memorandum to which the arbitrator was an assenting party,—agreed that a particular portion of the account in dispute between them should be settled and adjusted by a third person, whose report was to be adopted by the arbitrator as conclusive evidence:—Held, that this was not an improper delegation of authority by the arbitrator. *Sharp v. Nowell*, 6 Com. B. Rep. 253.

Where a cause and all matters in difference were referred to arbitration, costs of reference and award to be in the discretion of the arbitrator, and the award found a specific sum to be due “in respect of all the matters in difference so referred,” &c.,—Held, a sufficiently certain finding, although the declaration contained several *indebitatus* counts, to all of which the defendant had pleaded non assumpsit and payment. Held, also, that the recital in the award, that it had been drawn by a person who, under the terms of the submission, attended the arbitrator as an attorney, shewed no improper delegation of authority; and further that the award containing no order to pay the sum found due by the defendant was no objection to a rule calling upon the defendant to shew cause why payment should not be made. *Baker v. Cotterill*, 18 Law J. Rep. (n.s.) Q.B. 345; 7 Dowl. & L. P.C. 20.

By a rule of reference of a cause and all matters in difference, the arbitrator had power to determine, define and adjust, and for ever set at rest all disputes touching all and all manner of rights of water or depths of weir; and was authorized to order to be erected and put up, and for ever thereafter to be kept in repair, any erections in or about the weir of defendant, &c. It was also ordered that, in the event of any application being made to the Court on the subject of the award, the Court if it should see fit should have power to send the matters, any or either of them, back to the arbitrator for his reconsideration and determination. The award ordered that defendant was entitled to keep and maintain his weir at the depth of fourteen inches and no more. It proceeded to direct that for the purpose of defining and perpetuating the depth at which defendant might maintain the weir, “such durable marks and directions be placed on the land adjoining the weir as B may direct,” &c. On motion for a rule to pay the amount of costs pursuant to the award, the Court held that the direction in the award as to the depth of the weir was sufficiently certain, but that the award was not final, since the direction that such durable marks should be placed as B should direct, was a delegation to B of the arbitrator’s authority, and consequently bad; and that the bad part was not separable, as the consideration for the submission was not only the settling existing differences, but the for ever settling at rest of all disputes touching the water rights, which latter object was attempted to be effected by the faulty direction. The Court consequently discharged the rule, but remitted the award to the arbitrator to reconsider the prospective directions

which should be given for the purposes of defining and perpetuating the depth of the weir. *Johnson v. Latham*, 19 Law J. Rep. (n.s.) Q.B. 329; 1 L. M. & P. 348.

Where a submission to arbitration stipulated that the costs of the submission, of the arbitrator, of the award, “and of making the submission a rule of court,” were to be in the discretion of the arbitrator, who awarded correctly as to the costs of the submission, &c., but directed that “the costs of making the submission a rule of court shall be borne by such of the parties in difference through whose default in the performance of the award the same shall become necessary,” the Court set aside the award as uncertain and not final. *In re Smith and Wilson*, 18 Law J. Rep. (n.s.) Exch. 320; 2 Exch. Rep. 327.

Where agreement of reference contained a stipulation that the costs of the agreement, of the reference, and of the award should be in the discretion of the arbitrator, and should be defrayed as he should direct, and the arbitrator awarded a sum of money to be paid by defendant to plaintiff, but made no award as to the costs,—Held, that the award was therefore bad. *Richardson v. Worsley*, 19 Law J. Rep. (n.s.) Exch. 317; 5 Exch. Rep. 613.

An action by plaintiffs for two bills of costs against defendant, a managing committee-man, was referred to an arbitrator, to whom were referred the cause and the subject-matter of the cause, and the rights of the parties in relation thereto, as well at law as in equity, to order and determine what he should think fit to be done by either of them respecting the matters in dispute. The arbitrator awarded that plaintiffs would be entitled to receive from defendant 375*l.* and 400*l.*, as soon as they should have discharged the demands of certain local agents of the company, which plaintiffs had undertaken to satisfy; and upon production by plaintiffs to defendant of the vouchers of the local agents, and “upon proof” that the said demands had been discharged, defendant was directed by the award to pay to plaintiffs 375*l.* and 400*l.*:—Held, that the award was final; that the words “upon proof” might either be rejected as surplusage, or that the arbitrator as to that matter had awarded the very thing that the parties had agreed should be done. *Miller v. De Burgh*, 19 Law J. Rep. (n.s.) Exch. 127; 4 Exch. Rep. 809; 1 L. M. & P. 177.
[See *Armitage v. Coates*, post, (D) (b).]

(c) Finding on several Issues.

To a declaration consisting of three *indebitatus* counts, there were pleas of non-assumpsit, tender, set-off and payment, upon which issues were joined. The cause having been referred at Nisi Prius, the costs of the cause to abide the event of the award, the arbitrator found on the first, third, and last issues for plaintiff, and on the second issue for defendant:—Held, that this was a sufficient finding, and that it was not necessary that there should be distinct findings on the issues raised by the plea of non assumpsit upon each separate count of the declaration. *Adam v. Rowe*, 15 Law J. Rep. (n.s.) Q.B. 223; 3 Dowl. & L. P.C. 331.

An action of trover, with pleas Not guilty and Not possessed as to part, and payment into court as to the residue, was referred to an arbitrator, who adjudged that the verdict should stand, and that

the damages should be reduced to 91*l.*:—Held, that the award was good, the arbitrator having sufficiently decided on all the issues. *Wilcox v. Wilcox*, 19 Law J. Rep. (N.S.) Exch. 27; 4 Exch. Rep. 500.

(d) *Damages.*

By a Judge's order made in a cause of A v. B, it was ordered by consent of the parties and of C (a stranger), that a verdict should be entered for plaintiff, damages 50*l.*, subject to the award of an arbitrator, who was to settle all matters in difference between the parties in the action, and also between B and C. The arbitrator awarded that all proceedings in the action should cease, &c.; and that the plaintiff had a good cause of action against defendant in the said cause, and was entitled to a verdict therein, and assessed the damages at 40*s.*, "to be paid by the defendant to A and C, who had consented to become a party to the said cause." An action being brought by A and C v. B on the award,—Held, on demurrer, that the award was good. *Hawkins v. Benton*, 15 Law J. Rep. (N.S.) Q.B. 139; 8 Q.B. Rep. 479.

Quære—Whether upon breach of covenant "to make yearly one fourth part of the arable lands a good fallow, or otherwise pay 20*l.* per acre per annum, for every acre which should be used contrary to the covenant, over and above the rent reserved by the indenture, to be paid forthwith, or to be recovered by the plaintiff as ascertained or liquidated damages," an arbitrator or jury is bound to assess the damages at 20*l.* per acre, or only at the amount of damage actually caused by breach of the covenant? *Fuller v. Fenwick*, 16 Law J. Rep. (N.S.) C.P. 79; 3 Com. B. Rep. 705.

(e) *Sending back to Arbitrator.*

[*Nickalls v. Warren*, 5 Law J. Dig. 34; 6 Q.B. Rep. 615.]

Where an award is sent back to the arbitrator to be amended, he is not bound to give the parties notice to attend him thereon. *Howett v. Clements*, *Clements v. Howett*, 1 Com. B. Rep. 128.

By an order of reference the Court had power, on the validity of an award being disputed, to remit the matters referred to the reconsideration of the arbitrator. An award having been made, and containing a defect, the attorneys agreed verbally that the arbitrator should amend it; subsequently to which the defendant's attorney obtained a Judge's order that the matters referred should be remitted to the arbitrator for his reconsideration. The arbitrator altered the award without giving notice to either party of his intention to do so, neither party having requested him to hear fresh evidence, and he did not recite the Judge's order:—Held, that the arbitrator was not bound to give notice to the parties, or to recite the Judge's order. *Baker v. Hunter*, 16 Law J. Rep. (N.S.) Exch. 203; 16 Mee. & W. 672; 4 Dowl. & L.P.C. 696.

The Court will not amend an order of reference drawn up by one of the parties thereto, upon affidavits by such party that an error was made by him in copying a document attached by consent to the order of reference.

A cause was referred by an order of Nisi Prius; and it was agreed that the balance due to the plaintiff in February 1842 was 700*l.*, and in 1843

400*l.*, and that these sums (among others) should be inserted in a statement of account, and annexed to the order of reference. By consent the order was drawn up by the plaintiff's attorney, whose clerk by mistake inserted in the account annexed to the order 400*l.* as the balance due to the plaintiff for 1842. The arbitrator acted on the figures laid before him, and the mistake was discovered when the award was published. The plaintiff applied to the Court to amend the order, and send back the award to the arbitrator:—Held, that the mistake was the mistake of the party, and that the Court would not interfere. *Wynn or Winn v. Nicholson*, 18 Law J. Rep. (N.S.) C.P. 231; 7 Com. B. Rep. 819.

After an award made in favour of B against W, on a submission to reference between them, which contained a clause empowering the Court to remit the matters to the reconsideration of the arbitrators, W moved to send back the award to the arbitrators, on the ground that since the award he had discovered a letter in the handwriting of B, which contained material evidence in his favour. The arbitrators deposed that had such a letter in the handwriting of B been produced at the reference their decision would have been materially affected. B, in answer, swore that the letter was not in his handwriting, but was an absolute forgery.

The Court remitted the case to the arbitrators for them to say if the letter were in B's handwriting, and if they found that it was, then for them to reconsider the matters in difference. *Burnard or Burnard v. Wainwright*, 19 Law J. Rep. (N.S.) Q.B. 423; 1 L.M. & P. 455.

Where a cause was referred, with all matters in difference, at Nisi Prius, and the order of reference empowered the Court of Queen's Bench, in the event of any application being made on the subject of the award, to refer the matter back to the arbitrator for further consideration,—Held, that the application to refer back must be made within the same time as an application to set aside an award. *Doe d. Banks v. Holmes*, 12 Q.B. Rep. 951.

[See *Johnson v. Latham*, ante, (b) *Certainty and Conclusiveness*; also *Fuller v. Fenwick* (E) (a).]

(f) *Not Evidence of Account stated.*

An award is not evidence of an account stated between the parties to the submission. *Bates v. Townley*, 19 Law J. Rep. (N.S.) Exch. 399; 2 Exch. Rep. 152.

(D) REMEDIES FOR ENFORCING AWARDS.

(a) *Rule and Attachment.*

A rule obtained with the view to issue execution under 1 & 2 Vict. c. 110. s. 18, for payment of money due under an award and Master's allocatur, which have been personally served, is notwithstanding such service a rule to shew cause only; and the Court refused to make that rule absolute without a personal service of it, there not appearing to be any difficulty in effecting it. *Winwood v. Hoult*, 15 Law J. Rep. (N.S.) Exch. 10; 14 Mee. & W. 197; 3 Dowl. & L.P.C. 85.

In an action in which several issues were raised all matters in difference were referred to two arbitrators and an umpire, the costs of the cause to

abide the result. The umpire awarded that all further proceedings in the cause should thenceforth cease, and be no further prosecuted, and that plaintiff should pay to defendant 12s. 0½d., being the amount which the umpire found to be due to him. A demand of 21l. 16s. 2d., being the costs of the cause, had been made upon plaintiff, and payment refused, but no demand had been made of the sum of 12s. 0½d.

A rule having been obtained calling on the plaintiff to shew cause why he should not pay to the defendant both those sums, the Court, under the circumstances, refused to make the rule absolute for payment even of the one sum that had been demanded. *Tattersall v. Parkinson*, 17 Law J. Rep. (N.S.) Exch. 208; 2 Exch. Rep. 342.

A submission of reference, after referring the amount of damages caused by certain trespasses, provided that the costs and the charges of the agreement, and the costs, charges, and expenses of, and attending or incident to the arbitration, including the payment to be made to the referees and their umpire, and for any proofs that might be required by them, should be borne and paid by J S, and should be awarded accordingly. The award found the amount of damages, and then found a further sum to be due for costs, but did not distinguish the amount due to the referees, and awarded the sum so found due for costs to be paid to one J O, who was only mentioned in the attestation clause of the award as clerk to the attorneys of the successful party:—Held, that a rule might be granted to compel the payment of the sum awarded for damages, for that if the award of the costs were in any degree defective, it was separable from the rest of the award.

Held, also, that a mis-recital in the award of the date of the enlargement was immaterial. *In re Lloyd*, *In re Addison*, 18 Law J. Rep. (N.S.) Q.B. 151.

Where an award does not ascertain the exact amount of money to be paid, the Court will neither grant a rule for an attachment, nor a rule, under the 1 & 2 Vict. c. 110. s. 18, calling upon the other party to shew cause why he should not pay the money since ascertained (by the applicant) to be due under the award. *Graham v. D'Arcy*, 18 Law J. Rep. (N.S.) C.P. 61; 6 Com. B. Rep. 537.

In order to obtain a rule for payment of money due under an award under the 1 & 2 Vict. c. 110. s. 18, it is necessary to shew that a copy of the award was served on the party sought to be charged, and the original shewn to him at the same time, in order that he may be enabled to see that the copy is a true one. *Lloyd v. Harris*, 18 Law J. Rep. (N.S.) C.P. 346; 8 Com. B. Rep. 63.

Where on a rule *nisi* ordering the defendant to pay a sum of money due under an award, a question was raised as to the validity of the award, on the ground of its having been executed by the arbitrators at different times and not in the presence of each other, the Court refused to decide that question on such a motion, and discharged the rule.

Where a cause has been referred by a Judge's order, *semble* that a party shewing cause against a rule to pay the sum awarded is confined to objections apparent upon the submission and the award, and cannot bring the pleadings before the Court on

affidavit for the purpose of objecting to the sufficiency of the award. *Wright v. Graham*, 18 Law J. Rep. (N.S.) Exch. 29; 3 Exch. Rep. 131.

A party attached for contempt in not performing an award, and sentenced to imprisonment for a definite period, is not, by undergoing such imprisonment, exonerated from the performance of the award.

And, *semble*, that an action upon the award may be maintained at the same time.

Course of proceeding for enforcing performance of an award by attachment. *Regina v. Hemsworth*, *In re Hemsworth v. Brian*, 3 Com. B. Rep. 745.

Where, in an agreement to refer an action and all matters in difference, the parties agreed to abide by the award "of and concerning the action, and of and concerning the other matters in difference,"—Held, that the arbitrator ought to have made an award concerning the action, and the other matters separately; and the award having been made generally, the Court refused to enforce it by attachment. *Rule v. Bryde*, 16 Law J. Rep. (N.S.) Exch. 256; 1 Exch. Rep. 151.

A party cannot, on shewing cause against an attachment for non-performance of an award, good on the face of it, use affidavits impeaching the award.

Where an award between A and B directed that the costs of the arbitrator should, in the first instance be paid by A and afterwards reimbursed and paid by B to A, and by the Master's allocatur on taxation, after giving A credit for having paid the arbitrator's costs, a certain sum was specified as the "balance to be paid by B to A,"—Held, that it was not sufficient, in order to support an attachment against B for non-payment of such sum, to shew a demand of it, as due by virtue of the allocatur, without also shewing, by affidavit, that A had first paid the arbitrator's costs. *Masters v. Butler*, 18 Law J. Rep. (N.S.) Q.B. 328.

Where a cause was submitted to the arbitration of certain arbitrators, and, in the event of their not agreeing, to an umpire, power being given to examine the parties, and the defendant died without having been examined, and the time for making the award was enlarged beyond the period specified in the submission, by an order of a Judge at chambers, in the month of October, by which order the arbitrators were to make their award, and subsequently the award was made by the umpire; the Court refused to grant a rule *nisi* to set aside the order, on the ground that the application, being made towards the latter end of Michaelmas term, was too late; but intimated that they would not enforce the award by attachment.

Held also, that the term "arbitrators" in the order was satisfied by the award having been made by the umpire. *Bowen v. Williams*, 3 Exch. Rep. 93.

An arbitrator awarded that a party should, on or before the 23rd of March next, execute a certain indenture. No demand of the execution of the indenture was made on or before that day, but was made at subsequent times, when execution was refused:—Held, that an attachment ought not to be granted.

Quære—Whether under the above circumstances an action would lie against the party for his refusal to execute the indenture. *Doe d. Williams v. Howell*,

19 Law J. Rep. (N.S.) Exch. 232; 5 Exch. Rep. 299.

[See *ante*, *Smith v. Troup*, (A) (b).]

(b) *Action*. [And Pleadings therein.]

Declaration in debt stated that an action had been brought by plaintiff, as assignee, to recover 1,000*l.* due to the insolvent; that all matters in difference in the action and between the parties were referred to arbitration, and thereupon in consideration of plaintiff then agreeing to perform the award on his behalf, defendant agreed to perform the award on his behalf; that the arbitrator awarded that plaintiff was entitled to recover from defendant the sum of 372*l.* 3*s.*, and stated, that, in finding that sum to be due to plaintiff, he had allowed for all and singular the sums which were ever paid to the insolvent before he became such insolvent. Declaration then averred that defendant had not paid the sums awarded:—Held, on special demurrer, first, that the declaration being in debt on an award, was rendered bad by the introduction of mutual promises; secondly, that the plaintiff was not bound to aver that the reference was made with the consent of the major part in value of the creditors; thirdly, that the award was not bad in omitting to set out the dates and amounts of the sums paid by the defendant to the insolvent. *Sutcliffe v. Brooke*, 15 Law J. Rep. (N.S.) Exch. 118; 14 Mee. & W. 855; 3 Dowl. & L. P.C. 302.

To a declaration in debt on an award, the defendant pleaded a special plea shewing that the arbitrator had not awarded on all the issues in the cause referred to him:—Held, that the plea of “no award” means no valid award, and, therefore, that the above plea was bad on special demurrer, as being an argumentative denial of the validity of the award. *Dresser v. Stansfield*, 15 Law J. Rep. (N.S.) Exch. 274; 14 Mee. & W. 822.

To a declaration stating that the defendant covenanted that he or A would pay the plaintiff 6,800*l.* by certain instalments, with interest thereon at 4*l.* per cent., with a proviso that in a certain event there should be deducted from the five last instalments sums not exceeding 4,800*l.*, and that in that event the plaintiff should repay to the defendant and A all interest which should have been paid in respect of the sum deducted, and that in default of payment of any of the instalments the whole should be recoverable, and averring that default had been made, and that no sum was deductible under the proviso, the defendant set out the deed on oyer, which contained a mutual covenant between the plaintiff, defendant, and A, that if any disputes or differences should arise touching the sums which should be deductible under the proviso, it should be and was thereby referred to an arbitrator, and that the said parties should abide by his award, so as it should be made on or before a certain day, with power to him to enlarge the time to a period not exceeding the 1st of July 1847, and that the present submission should be made a rule of court; and the defendant then pleaded as to the five last instalments and interest thereon, that certain differences had arisen between the parties to the deed touching the sums deductible from the five last instalments, and that the plaintiff, defendant, and A, did, in pursuance of the covenants in the

indenture contained, submit to, refer, and did then refer the said differences to the said arbitrator, and the same were then referred to him to determine what sum (if any) not exceeding 4,800*l.* should be deducted by the defendant and A, or either of them, from the said five last instalments; but the arbitrator duly enlarged the time for making his award until the 30th of June 1847; that before that day a Judge’s order was made further enlarging the time until the 1st of December 1847, and that before that day the arbitrator awarded that the whole of the 4,800*l.*, being the total amount of the five last instalments, should be deducted from the said five last instalments; and that the defendant did therefore claim to deduct and deducted the said sum of 4,800*l.* from the said five last instalments, whereof the plaintiff had notice.

On special demurrer, the plea was held a good plea in bar as to the 4,800*l.* and interest.

Held, also, that the covenant in the deed became a good submission in writing within the 9 & 10 Will. 3. c. 15, as soon as the controversy arose, and that the Judge had power to enlarge the time under 3 & 4 Will. 4. c. 42. *Parkes v. Smith*, 19 Law J. Rep. (N.S.) Q.B. 405; 15 Q.B. Rep. 297.

A count in assumpsit for non-performance of an award, stated the pending of an action between the plaintiff and the defendant, wherein the plaintiff claimed damages from the defendant for work and labour, materials, and goods sold and delivered, a reference by Judge’s order to an arbitrator, the award to be made on or before the 16th of April next ensuing, with liberty to the arbitrator to enlarge the time, but not beyond the 1st of May; the costs of the cause to abide the event. The declaration then alleged mutual promises to perform the award so to be made and published, and stated two enlargements, by Judge’s order and consent, made respectively on the 18th of April and on the 19th of May, until the 29th of May; and an award made on that day, whereby the arbitrator ordered and determined that there was due from defendant to plaintiff, after balancing the accounts between them, and giving credit for all sums paid by defendant to plaintiff, and every item of set-off, the sum of 220*l.* 8*s.* the clear balance, and ordered payment thereof, and also of the costs of the reference and award. It then stated the amount of the costs of the cause and award, and averred non-payment by defendant:—Held, first, that even if it had appeared that there were pleas of payment and set-off in the action, the award was final; secondly, that the promise was well laid, the enlargement of the award not affecting the original promise.

Held, also, that a plea commencing by an admission that the arbitrator made an award, purporting to be under and by virtue of the said orders of reference, and then setting out facts to shew that the award was not final, was bad, as amounting to *nul tiel agard*.

Held, also, that a plea that the arbitrator did not make an award before the 16th of April, the time of making the award under the order of reference, or any enlarged time according to the said order of reference, nor before the 1st of May, nor until the 29th of May, was bad for argumentativeness. *Armistage v. Coates*, 19 Law J. Rep. (N.S.) Exch. 95; 4 Exch. Rep. 641.

A declaration stated that matters in dispute were referred to A and B "and to such third person as should be chosen and agreed upon by the said A and B, and appointed by writing under their hands, to be indorsed on the agreement of submission before proceeding on the said reference, to arbitrate, &c. jointly with them of and concerning the matters in difference, so as the said arbitrators, or any two of them, should make their award on or before a certain day, and that the costs of the reference and award, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators." The declaration then averred that A and B, before proceeding with the reference, chose and agreed upon, and by writing under their hands nominated and appointed C to be third arbitrator together with them; that the three said arbitrators made their award, and found a certain sum to be due from the defendant to the plaintiff, and further that the plaintiff and defendant should pay a moiety each of the costs of the reference and award, including the compensation to the arbitrators. Breach, non-payment of the sum so found to be due:—Held, that the declaration was bad on general demurrer, for not shewing that a third arbitrator was properly appointed. *Bates v. Tounley*, 19 Law J. Rep. (n.s.) Exch. 396; 1 Exch. Rep. 572.

[And see *Doe d. Williams v. Howell*, ante, (a) *Rule and Attachment*.]

(c) *In Equity*.

Parties to a suit agreed under an order of court to submit all matters in difference to arbitration, under which an award was made. Upon a motion to enforce it, an objection was taken that the Court had no jurisdiction, unless the award was made an order of court:—Held, that the Court had jurisdiction to sustain such application, though the award had not been made an order of court. *Wood v. Taunton*, 18 Law J. Rep. (n.s.) Chanc. 207; 11 Beav. 449.

(E) SETTING ASIDE AWARDS.

(a) *Grounds for*.

[*Dobson v. Groves* and *Regina v. Dobson*, 5 Law J. Dig. 36; 6 Q.B. Rep. 637. *In re Plews*, 5 Law J. Dig. 36; 6 Q.B. Rep. 845.]

An award made by a Punchayet, settling a disputed boundary to land forming an island, claimed by the inhabitants on the respective banks of the river, under circumstances, set aside, as having been made contrary to the provisions of Bombay Regulation VII. of 1827. The decision of the Sub-Collector, appointed by the Government to settle the boundary, annulling the award of the Punchayet, and assigning a boundary, confirmed on appeal.

Semble—This Court will not encourage a mere objection of form, that does not affect the substantial merits of the case. *The Mokuddims of Kunkunwady v. the Enamdar Brahmins of Soorpal*, 3 Moore, In. App. 383.

The parties to an order of reference mutually agreed to strike out the usual clause giving the arbitrator power to examine the parties. At the hearing the plaintiff's attorney tendered the plaintiff as a witness, and he was examined by the

arbitrator. The defendant's counsel objected to the admission of the plaintiff, but as the arbitrator decided against him, he proceeded to cross-examine the plaintiff, and went into his case. On a motion to set aside the award for irregularity,—Held, that the examining of the plaintiff under those circumstances, was a good ground for setting aside the award; and that the objection was not waived by the defendant going on with the arbitration.

Semble—If the defendant had tendered himself as a witness to support his own case, that would have been a waiver. *Smith v. Sparrow*, 16 Law J. Rep. (n.s.) Q.B. 139; 4 Dowl. & L. P.C. 604.

The submission in a reference was to two arbitrators, and a third, to be named by them; and the parties treated the third arbitrator so named as an umpire throughout the whole proceedings:—Held, that the non-attendance of the third arbitrator at the meetings, and the want of notice to him, formed no ground for setting aside the award.

The parties had submitted their accounts to the arbitrators, and a report had been made, and a meeting was fixed to close the accounts. At that meeting, one of the parties tendered in evidence fresh documents which he had discovered relating to the accounts, and the arbitrators, after looking at them, declined to go into them:—Held, that this was not misconduct affecting the validity of the award, but a rejection of evidence within the arbitrator's authority. *In re Marsh*, 16 Law J. Rep. (n.s.) Q.B. 330.

Where an award is good upon the face of it, the Court will not set it aside, nor send it back to the arbitrator, upon affidavits shewing that the arbitrator has wrongly decided a point of law. *Fuller v. Fenwick*, 16 Law J. Rep. (n.s.) C.P. 79; 3 Com. B. Rep. 705.

Plaintiff agreed with the defendants, by deed, to execute a portion of a railway for them at certain prices stipulated therein; and defendants covenanted to give plaintiff possession of certain land for the above purpose, within a specified time. Plaintiff having brought an action of *debt* against defendants to recover a sum of money for extra work, rendered necessary, as he alleged, by the defendants' omission to give him possession of the land within the specified time, an order of reference was made for referring to arbitration "the claims made in the action." It was objected, before the arbitrator, that plaintiff could not, in the present form of action, recover in respect of the extra work, his remedy being by an action for damages for a breach of covenant. The arbitrator received the evidence, and awarded a sum to the plaintiff in respect of the extra work:—Held, that as the arbitrator had not been guilty of misconduct, and had acted within his jurisdiction, his mistake in point of law was no ground for setting aside the award.

The Court refused a rule for setting aside the order of reference, on the objection that the order, being made by defendants, who were a *corporation*, was not under seal, and that their attorney, who entered into it, had not been appointed under seal. *Faviell v. Eastern Counties Rail. Co.*, 17 Law J. Rep. (n.s.) Exch. 223; 2 Exch. Rep. 344.

The parties to a written submission to reference agreed by parol, that notes of the evidence should be taken in writing by a clerk and signed by the

arbitrators, and that in case of their disagreeing the umpire should be at liberty to make his award on the notes so taken, without examining the witnesses. The notes were so taken, and the arbitrators disagreed. The umpire having refused to examine any witnesses, though required to do so by one of the parties, and having made his award on reading the notes, the Court refused to set aside the award. *In re Firth*, 19 Law J. Rep. (N.S.) Q.B. 169; 1 L. M. & P. 63.

M built a ship for G and others, and also purchased stores for the vessel on his own credit. On reference of all matters in difference between M and G, G took upon himself the payment of the bills, and requested the umpire to fix the liability in respect of them upon him. The umpire directed G to pay to M the balance which he found due to the latter after giving G credit for the amount of the bills; he then awarded that G should be solely liable in respect of the bills, and should execute a bond to indemnify M against them; and then ordered that after G had paid the balance and the bills the parties should execute mutual releases of all claims and demands whatsoever, and that the form of the releases should be settled by P in case of dispute.

The Court refused to set aside the award, holding that the umpire had authority to order G to be liable for and to pay the bills, and to execute the bond of indemnity; and that although the delegation to P of authority to settle the releases was void, it did not affect the validity of the award, even if it vitiated the whole of the direction as to the giving releases. *Goddard v. Mansfield*, 19 Law J. Rep. (N.S.) Q.B. 305; 1 L. M. & P. 25.

An action of assumpsit in which the pleas were non assumpsit, and payment by persons unknown, was referred by an order of Nisi Prius, which ordered, &c., "the defendant, by his counsel, admitting his liability to the plaintiff in respect of the several matters alleged in the declaration, that a verdict be entered for the plaintiff, damages 20,000*l.*, costs 40*s.*, but that such verdict shall be subject to the award of the arbitrator named. At the first meeting defendant's counsel objected to proceeding without amending the order, alleging it to be doubtful whether as worded it enabled the arbitrator to find, on the second issue, for his client. Plaintiff's counsel contended, that it was sufficient for that purpose; and the arbitrator expressed the same opinion, and said that he had power to direct a verdict for defendant on that issue; and the reference then proceeded. The award directed a verdict for plaintiff on the first issue, and for defendant on the second. No motion was made to set aside the award within the time limited by law. But after the *postea* had been drawn up pursuant to the award, and judgment had been signed by defendant, plaintiff applied to set aside the *postea*, judgment and subsequent proceedings, on the ground that the arbitrator had exceeded his authority in directing a verdict on the second issue for defendant. The Court refused the rule, on the ground that to grant it would be indirectly to set aside the award which plaintiff by his own laches had precluded himself from calling on the Court to do directly; and also on the ground, that as plaintiff's counsel at the reference had concurred in the view

that the arbitrator had power over the verdict, and thereby prevented defendant from applying to have the order of reference amended, plaintiff could not now be allowed to take the objection to the exercise of the power by the arbitrator. *Gravatt v. Attwood*, 19 Law J. Rep. (N.S.) Q.B. 474; 1 L. M. & P. 392.

An arbitrator has a general discretion as to the mode of conducting the inquiry before him.

The Court refused to set aside an award, on the ground that the arbitrator had declined to permit a stranger to be present for the purpose of assisting the defendant's attorney with practical hints for the conduct of the defence. *Tillam v. Copp*, 5 Com. B. Rep. 211.

It is no ground for granting a rule, calling upon a plaintiff to shew cause why an award made in his favour should not be set aside, that the arbitrator allowed the plaintiff's counsel to call the plaintiff to prove his own case; that, after the case had been closed on both sides, he obtained information from each party in the absence of the other; and that after the hearing, and before making his award, he dined with one of the parties and his witnesses. *Crossley v. Clay*, 5 Com. B. Rep. 581.

In assumpsit for goods sold and delivered, money lent, &c., the defendants pleaded non assumpsit and the Statute of Limitations. The cause and all matters in difference were afterwards referred, upon the terms, amongst others, that "the action should be decided according to the pleadings, but that under the reference, so far as it related to matters in difference, the plea of the Statute of Limitations was not to be set up by either party." The arbitrator directed a verdict to be entered for plaintiff for a sum excluding items that were barred by the statute; and he allowed those items as matters in difference. The Court refused to disturb the award. *Slowman v. Wiggins*, 6 Com. B. Rep. 276.

The Court refused to set aside an award on the ground that the witnesses had been examined without being sworn; it appearing that the party objecting had called witnesses in support of his case, and examined them also not upon oath. *Allen v. Francis*, 4 Dowl. & L. P.C. 607, n.

An order nisi to set aside an award may be obtained upon an *ex parte* application.

An umpire may under some circumstances join in an inquiry with the arbitrator before the time for his acting has arrived.

The surveyor of a railway company who had in that character treated with a landowner and offered a price for land required by the company, ought not to be selected by the company as an arbitrator under the Lands Clauses Consolidation Act, 1845, but the landowner knowing the fact and proceeding with the arbitration (though under protest) was held to have waived the objection.

A surveyor to and shareholder in a railway company closely connected with and holding shares in another railway company was in an arbitration between the latter company and a landowner appointed umpire by the arbitrators, and as such made his award. Held, that whatever objections there might be, in point of delicacy, to the appointment of such an umpire, they furnished no ground for setting aside the award. *In re Elliot and the South Devon Rail. Co.*, 2 De Gex & S. 17.

Upon a cause coming on for trial at Nisi Prius, a reference was ordered to an arbitrator,—*Semble*, that the Court of Chancery could not interfere with the award, upon the ground of mistake on the part of the arbitrator; and that it was immaterial, for this purpose, whether there was the verdict of a jury or the decision of a referee. *Chuck v. Cremer*, 17 Law J. Rep. (N.S.) Chanc. 287; 2 Ph. 477.

A court of equity set aside an award on the face of which a sum appeared to be improperly disallowed, though it was offered to be allowed by the party against whom the application was made. *Skipworth v. Skipworth*, 9 Beav. 135.

A and B referred a matter in dispute between them to the arbitration of C. A meeting took place on the 22nd of June for the purpose of carrying out the business of the award, at which A was present a part of the time. On the 23rd, B had an interview alone with C on the business of the award, without the personal knowledge or assent of A. C made his award. Bill by A to set aside the award on the ground of the meeting on the 23rd:—Held, that under the circumstances, A must be taken to have acquiesced in the interview on the 23rd, and sustained the award.

Whether the award could have been maintained in the absence of the implied acquiescence of A,—*quære*. *Hamilton v. Bankin*, 19 Law J. Rep. (N.S.) Chanc. 307.

Where owners of land required by a railway company appointed an arbitrator under the Lands Clauses Consolidation Act, but refused to produce the appointment for the purpose of enabling the registrar to draw up an order obtained by the company making the submission a rule of court, the Court refused a motion by the company that the order should be drawn up or that the landowner should produce the appointment. But it afterwards appearing on the affidavits and by a recital in the appointment of the umpire that the arbitrator had been duly appointed, the Court ordered the submission to be made a rule of court.

A railway company and landowners appointed arbitrators, who appointed an umpire. The arbitrators and umpire met on November 4, and adjourned to the following day. On that day the company's arbitrator did not attend. The other arbitrator and umpire proceeded in his absence notwithstanding the protest of the company's solicitor, and examined a witness. The company's solicitor left the meeting without examining his witnesses. No meeting was held after the 5th, nor had the company any notice to attend on any subsequent day. On the 22nd the landowner's solicitor told the umpire that the arbitrators had not made an award and required him to do so, which he did on the 29th without any evidence on the part of the company having been given:—Held,

1. That it must be presumed that the umpire had acted on the evidence given on the 5th, and it would not be inferred that the company had no evidence to adduce.

2. That the umpire ought to have given the company an opportunity of producing evidence or of addressing him, and that he was bound to take up the proceedings *de novo*, or from the 4th, and that the award was consequently bad, and should be set aside.

The skill or competency of the umpire to decide from personal observation held immaterial. *In re Hawley and the North Staffordshire Rail. Co.*, 2 De Gex & S. 33.

(b) *Matters of Practice as to.*

[*Hawkyard v. Greenwood or Stocks*, 5 Law J. Dig. 37; 2 Dowl. & L. P.C. 936.]

Where by Judge's order a cause only was referred to arbitration, a motion to set aside the award made after the 4th day of the term following the publication of the award, was held to be too late, and the Court refused to allow affidavits to be filed accounting for the delay. *Riccard v. Kingdon*, 15 Law J. Rep. (N.S.) Q.B. 269; 3 Dowl. & L. P.C. 773.

By order of Nisi Prius a verdict was taken for the plaintiff, subject to the award of an arbitrator, to whom all matters in difference in the cause were referred, and who was to state on the face of his award such points of law as either of the parties might require. The arbitrator, on the 13th of November, made his award, and directed that, unless the Court should otherwise order, the verdict for the plaintiff should stand on all the issues, but that the damages should be reduced; and proceeded to direct, that, in certain events, and with reference to certain points of law, stated in his award, the verdict should be entered for plaintiff on the first, and for defendants on the second and third issues. The parties had notice of the award on the 16th of November:—Held, that the defendants could not, in Hilary term, move to enter a verdict on the points stated by the arbitrator, but should have moved within four days after notice of the award. *Paxton v. Great North of England Rail. Co.*, 15 Law J. Rep. (N.S.) Q.B. 270; 8 Q.B. Rep. 938; 3 Dowl. & L. P.C. 773, n.

It is no excuse for not applying within the proper time to set aside an award, that the party had been prevented from obtaining a knowledge of its contents by the arbitrator's improperly demanding an extortionate sum for his fees. *Moore v. Darley*, 1 Com. B. Rep. 445.

In a cause which had been referred to arbitration by an order of Nisi Prius, the arbitrator made an award in favour of the defendant, who thereupon signed judgment. The plaintiff obtained a rule to set aside the award, notice of which was served upon the defendant. The defendant afterwards, and before the argument of the plaintiff's rule, obtained a Judge's order to stay all further proceedings until the plaintiff should have given security for costs:—Held, that the Court could not entertain the application for setting aside the award whilst this order remained in force. *Badham v. Badham*, 1 Exch. Rep. 824.

Semble—That a motion to set aside a judgment signed on an award for defects apparent on the face of it, may be made after the time has elapsed for setting aside the award itself. *Wilcox v. Wilcox*, 19 Law J. Rep. (N.S.) Exch. 27; 4 Exch. Rep. 500.

On a motion to set aside an award, the Court will not look at the notes of the arbitrator. *Doe d. Haxby v. Preston*, 3 Dowl. & L. P.C. 768.

The Court will not set aside an award on motion unless they are clear that it is bad. And where a cause was referred by Judge's order left

before trial, which gave no express power to direct a verdict to be entered, and the arbitrator awarded that a verdict should be entered for the plaintiff with damages and costs, the Court refused a rule to shew cause why the award should not be set aside.

A rule afterwards obtained to enforce the award by attachment, was discharged, with costs. *Cock v. Gent*, 15 Law J. Rep. (n.s.) Exch. 33; 13 Mee. & W. 364; 14 Mee. & W. 680; 3 Dowl. & L. P.C. 271.

Where an award was made on the 18th of September, and a rule *nisi* to set it aside obtained on the 24th of November, and it appeared that the submission was not, by virtue of the consent clause which it contained, made a rule of court till the 30th of November, the Court refused to order the rule of court to be dated as of the 24th, and to enlarge the rule *nisi* under it to be drawn up on reading the rule of court so dated. *Ross v. Ross*, 16 Law J. Rep. (n.s.) Q.B. 138; s.c. *In re Ross*, 4 Dowl. & L. P.C. 648.

The Court of Chancery is a court of record within the provisions of the stat. 9 & 10 Will. 3. c. 15. for enforcing awards; and where, by an agreement of reference, the submission may be made an order of the Court of Chancery by either of the parties, the original jurisdiction of the Court to interfere with the award is taken away by the stat. 9 & 10 Will. 3. c. 15, whether the submission has or has not been actually made an order of the Court; and the award can only be impeached in the manner pointed out by the statute. *Heming v. Swinnerton*, 16 Law J. Rep. (n.s.) Chanc. 90; 2 Ph. 79.

[See *In re Elliot*, and *In re Hawley*, ante, (a) *Grounds for*.]

(F) Costs.

(a) *In general*.

An action on the case for diverting a watercourse was, after issues joined on pleas of not guilty, and denying plaintiff's right to and user of the water, referred by a Judge's order to arbitration, by which the costs of the suit were to abide the event of the award, but no power was given to the arbitrator to certify under 3 & 4 Vict. c. 24. s. 2. The arbitrator found all the issues for the plaintiff, and assessed the damages on the first issue at 6*d*. The plaintiff was held to be entitled to full costs. *Griffiths v. Thomas*, 15 Law J. Rep. (n.s.) Q.B. 336; 4 Dowl. & L. P.C. 109.

A special jury cause not having come on for trial at the Middlesex Sittings after Trinity term, the parties agreed that it should be tried in London, that the venue should be changed to London, that a special jury should be summoned there, and that all costs of and occasioned by the arrangement should be costs in the cause and abide the event. The cause, having come on for trial in London, was referred to an arbitrator, who made his award in favour of defendant. He also certified for the costs of the special jury, but not until three months after the publication of his award, and after the expiration of his authority under the order of reference:—Held, that the defendant was entitled, not under the arbitrator's certificate, but under the agreement, to the costs of the London special jury.

Geeves v. Gorton, 15 Law J. Rep. (n.s.) Exch. 169; 15 Mee. & W. 186; 3 Dowl. & L. P.C. 481.

Where a party claiming compensation under a railway act, agrees to refer his claim to arbitration instead of taking the verdict of a jury under the provisions of the act, and the deed of reference and the award are silent about costs, the party is not entitled, on account of an award in his favour, to receive costs according to the provisions of the act, as if the jury had given a verdict in his favour. *Ex parte Reynal*, 16 Law J. Rep. (n.s.) Q.B. 304.

By articles of agreement between the plaintiff and the defendant, certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrator. The award found a sum due from the defendant to the plaintiff, and directed that the costs of the reference and award, including compensation to the arbitrator, should be borne, one moiety thereof by plaintiff, and the other moiety by defendant. The plaintiff took up the award, and paid the whole costs:—Held, that he could not recover a moiety thereof as money paid to the defendant's use. *Bates v. Townley*, 19 Law J. Rep. (n.s.) Exch. 399; 2 Exch. Rep. 152.

An action on an apprentice deed was referred to arbitration by order of Nisi Prius, together with two other actions, in one of which the infant apprentice sued by his next friend, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator awarded that the verdict in the above cause should be entered for the defendant, that the two other actions should be no further prosecuted, and that the infant should pay the costs of the reference and award:—Held, that the award was not bad by reason of its directing an infant to pay costs. *Proudfoot v. Boyle or Poile*, 3 Dowl. & L. P.C. 524; 15 Mee. & W. 198.

(b) *Of Arbitrators*.

By a Judge's order, subsequently made a rule of court, a cause and all matters in difference were referred to O, C, and W, or any two of them. C and W duly made their award, and employed G, an attorney, who was not the attorney in the cause, to prepare the same. The award directed, that defendant should pay to plaintiff 500*l*., with all costs of the cause and of the award. G refused to deliver the award to plaintiff's attorney, except upon payment of 45*l*.: viz. 16*l*. 16*s*. each for the expenses of C and W, and 11*l*. 8*s*. for his own charges. This sum was paid under protest. Upon taxation of the costs between plaintiff and defendant, which was not attended by C, W, G, or by attorney of defendant in the cause, the Master allowed to C and W 10*l*. 10*s*. each, and to G 5*l*. 5*s*. On the following day, at the request of G, he increased the sum allowed to him to 6*l*. 6*s*. Upon motion to compel C, W and G to refund to plaintiff so much of the fees paid them as exceeded the sums allowed by the Master,—Held, that the Court had no general authority to make such order; and as neither the arbitrators, nor G, their attorney, had conferred on the Court any special jurisdiction in the case, the Court refused to interfere. *Dossett v. Gingell*, 10 Law J. Rep. (n.s.) C.P. 183; 3 Sc. N.R. 179.

By order of reference the costs of the award were to be in the discretion of the arbitrator. The award ordered "that the costs of the award shall be paid by the defendant, which said costs I do assess at 39*l.* 17*s.* 4*d.*" Part of this amount was for the arbitrator's remuneration and part was the sum charged by an attorney who had been employed by the arbitrator (a layman) in examining the witnesses and in framing an award, which was very special. The defendant had not applied to have the costs of the award taxed, and they had not been taxed. On a motion for an attachment to compel payment, the defendant objected that an arbitrator was not entitled to assess his own costs, that no attachment could issue until the costs had been taxed, and that the arbitrator was not justified in charging the expenses of the attorney:—The Court granted the attachment, holding that an arbitrator may, in the first instance, name the amount of his costs in the award; that his charges are not, as a matter of course, open to taxation, and that if the party affected objects to them he must, at all events, proceed with diligence to procure their taxation; and that as the arbitrator was a layman it was almost of necessity that an attorney should be employed, and that as no objection to his being employed was made on the part of defendant during the reference, the latter must be taken to have assented to so reasonable a course. *Threlfall v. Fanshawe*, 19 Law J. Rep. (N.S.) Q.B. 334; 1 L. M. & P. 340.

(c) *Taxation of.*

Where an arbitrator finds the amount of the costs of an award, it is not necessary that they should be taxed by the Master previously to the Court ordering them to be paid. *Dixie v. Alexandre*, 1 L. M. & P. 338.

(G) SIGNING, AND MOVING IN ARREST OF JUDGMENT.

Where a verdict is taken at Nisi Prius by consent, subject to the certificate of an arbitrator, and the certificate is given in vacation after more than four days from the return day of the *distringas juratores*, the certificate has relation back to the date of the verdict, and the successful party is entitled to sign judgment immediately, without waiting until the first four days of the next term have expired. *Cromer v. Churt* or *Cromer v. Chuck*, 15 Law J. Rep. (N.S.) Exch. 263; 15 Mee. & W. 310; 3 Dowl. & L. P.C. 672.

Where a cause was referred by order of Nisi Prius, which directed that neither party should bring or prosecute any action or suit in any court of law or equity against the arbitrator or against each other, and an award was made,—Held, that plaintiff could not move in arrest of judgment. *Britt v. Pashley*, 16 Law J. Rep. (N.S.) Exch. 240; 1 Exch. Rep. 64; 5 Dowl. & L. P.C. 97.

ARREST.

[See ATTORNEY, Privileges—BANKRUPTCY—COSTS—EXECUTION—INSOLVENT—MALICIOUS AND VEXATIOUS ARRESTS—PRACTICE, Process—COMPANY, Bye-laws—SHERIFF.]

(A) IN GENERAL.

- (a) *On Sunday.*
- (b) *Without Warrant.*

(B) AFFIDAVIT AND ORDER UNDER 1 & 2 VICT. c. 110.

(C) PRIVILEGE FROM ARREST.

- (a) *Servants of the Crown.*
- (b) *Members of Parliament.*
- (c) *Barristers.*

(d) *Party to Suit attending Registrar's Office.*

(D) PROTECTION FROM ARREST BY STATUTE.

(A) IN GENERAL.

(a) *On Sunday.*

Where a prisoner has been arrested on a Sunday, a subsequent detainer by another party, without collusion, is not vitiated by the illegality of the original arrest. *In re Ramsden*, 15 Law J. Rep. (N.S.) M.C. 113.

A party guilty of an indictable offence may be apprehended on a Sunday, whether such offence involve an actual or only a constructive breach of the peace. *Rawlins v. Ellis*, 16 Law J. Rep. (N.S.) Exch. 5; 16 Mee. & W. 172.

(b) *Without Warrant.*

An officer of the city of London police has no authority to arrest a person without a warrant, merely upon suspicion of his having committed a misdemeanour. *Bowditch v. Balchin*, 19 Law J. Rep. (N.S.) Exch. 337; 5 Exch. Rep. 378.

A policeman on duty at a police station is justified in detaining a person brought there in charge and delivered to him by a policeman, although he may have been illegally arrested, as for instance, if he has been arrested without warrant upon suspicion of having been guilty of perjury. *Bowditch v. Fosberry*, 19 Law J. Rep. (N.S.) Exch. 339.

(B) AFFIDAVIT AND ORDER UNDER 1 & 2 VICT. c. 110.

An affidavit of debt claiming part of an integral sum for interest should shew that it arose from some contract for the payment of interest; and, therefore an affidavit, stating the debt to be partly "for interest upon and for the forbearance to the said defendant by this deponent, at the said defendant's request, of monies due and owing from the said defendant to this deponent," is bad. *Neale v. Snoultzen*, 15 Law J. Rep. (N.S.) C.P. 48; 3 Dowl. & L. P.C. 422; 2 Com. B. Rep. 320.

An affidavit to hold to bail is bad, which states that the defendant "before and at the time of the commencement of this action was and still is justly indebted to the deponent in 100*l.*, for work done, and materials for the same provided, and goods manufactured and made by the said deponent for the said defendant, and at his request." *Pontifex v. De Maltzoff*, 17 Law J. Rep. (N.S.) Exch. 55; 1 Exch. Rep. 436.

An affidavit to hold to bail stated the defendant to be indebted to the plaintiff as "indorsee of a bill of exchange," describing it in the ordinary way. The declaration was upon a foreign bill of exchange:

—Held, no variance. *Phillips v. Don*, 18 Law J. Rep. (N.S.) Q.B. 104; 6 Dowl. & L. P.C. 527.

An affidavit of debt which states different causes of action, some sufficiently and others insufficiently, is not bad altogether; and the defendant may be held to bail for such cause or causes of action as are sufficiently sworn to in the affidavit. But the causes of action sufficiently stated must be separate, or by necessary inference separable, from the causes of action insufficiently stated in the affidavit. *Cunliffe v. Malkass*, 18 Law J. Rep. (N.S.) C.P. 233; 7 Com. B. Rep. 695; 6 Dowl. & L. P.C. 723.

An affidavit to hold a defendant to bail stated that he was indebted to plaintiff in 337*l.* made up of 267*l.* 16*s.* debt, and 69*l.* 4*s.* costs, recovered against, and paid by plaintiff in an action brought by the indorsee of a bill of exchange which plaintiff had accepted for the accommodation of defendant at his request:—Held, that this was a sufficient statement of a cause of action. *Stratton v. Mathews*, 18 Law J. Rep. (N.S.) Exch. 5; 3 Exch. Rep. 48; 6 Dowl. & L. P.C. 229.

Upon appeal against a Judge's order to hold a defendant to bail under 1 & 2 Vict. c. 110. s. 3, affidavits in denial of the plaintiff's cause of action are admissible, but the Court will not interfere unless it be clear that there is no cause of action. *Pegler v. Hislop*, 17 Law J. Rep. (N.S.) Exch. 53; 1 Exch. Rep. 437; 5 Dowl. & L. P.C. 223.

(C) PRIVILEGE FROM ARREST.

(a) *Servants of the Crown.*

The Somerset Herald, being one of the Queen's servants in ordinary with fee, bound to attend Her Majesty whenever required, and to be present on great state occasions and other ceremonial, is privileged from arrest. *Dyer v. Disney*, 16 Law J. Rep. (N.S.) Exch. 182; 16 Mee. & W. 312; 4 Dowl. & L. P.C. 698.

The appointment of a priest in ordinary to Her Majesty's Chapels Royal continues after the demise of the Crown, and no fresh appointment is necessary; and the fact of a party having performed the duties of such office during the present reign, of his being in the receipt of the salary affixed thereto, and of his name appearing in the books of the household, are sufficient evidence of his holding the office to satisfy this Court in discharging him from the custody of the sheriff. *Harvey v. Dakins*, 18 Law J. Rep. (N.S.) Exch. 156; 3 Exch. Rep. 266; 6 Dowl. & L. P.C. 437.

(b) *Members of Parliament.*

Members of the House of Commons are privileged from arrest on a *ca. sa.* for forty days before and forty days after the meeting of Parliament; and the rule is the same in the case of a dissolution as in that of a prorogation of Parliament. *Goudy v. Duncombe*, 17 Law J. Rep. (N.S.) Exch. 76; 1 Exch. Rep. 430; 5 Dowl. & L. P.C. 209.

(c) *Barristers.*

A barrister, who had attended the assizes at Chelmsford, where the business had terminated on Friday, was arrested on a *capias utlagatum* in a civil suit, on the morning of the following Monday, the commission day of Maidstone, before the open-

ing of the commission. The arrest took place a few miles from London at the defendant's residence, which was not on the road from Chelmsford to Maidstone. *Lord Denman, C.J.* and *Alderson, B.*, the Judges on the circuit, ordered the defendant to be discharged as to the *capias utlagatum*, and all detainers thereon. *Anonymous*, 15 Law J. Rep. (N.S.) Q.B. 268; 2 Car. & K. 197.

A barrister of the Oxford circuit had attended court as a barrister at the Abingdon and the Oxford Assizes. The latter assizes concluded on the 25th of July, and the commission day at the next town (Worcester) was the 27th of July. The barrister was taken on a *ca. sa.* at Oxford on the 26th of July:—Held, that he was entitled to be discharged, as being a barrister on the circuit.

Held, also, that a circuit is continuous from its commencement to its termination.

Held, also, that the fact that the barrister had no brief at Abingdon or Oxford was immaterial with respect to his discharge.

Held, also, that the fact that he was not in the habit of attending the Worcester Assizes, and that he made no affidavit that he intended to do so on the present circuit, was also immaterial to his discharge. *The Case of the Sheriff of Oxfordshire*, 2 Car. & K. 200.

(d) *Party to Suit attending Registrar's Office.*

A party to a suit, who is interested in the decree pronounced, is privileged from arrest while attending the registrar's office on passing the minutes of the decree. *Newton v. Askew*, 18 Law J. Rep. (N.S.) Chanc. 42; 6 Hare, 319.

(D) PROTECTION FROM ARREST BY STATUTE.

[See BANKRUPTCY, Protection from Process.]

[*Fitzball v. Brooke*, 5 Law J. Dig. 40; 6 Q.B. Rep. 873.]

The 2 & 3 Vict. c. 41. (Scotch Sequestration Act) empowers the Lord Ordinary to grant to the debtor a warrant of protection or liberation, and, by section 18, it is enacted "that the warrant granting protection or liberation, or a copy thereof, certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain and Ireland and her Majesty's other dominions, for civil debt contracted previously to the date of sequestration; but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment in *meditatione fugæ*," &c.:—Held, that a departure from England, for the purpose of returning to Scotland, was not a *fuga* within this exception, and that the defendant having been arrested by a Judge's order, under 1 & 2 Vict. c. 110. s. 3, made after such order of protection was granted, was entitled to his discharge. *M'Gregor v. Fiskien*, 17 Law J. Rep. (N.S.) Q.B. 186; 5 Dowl. & L. P.C. 591.

A warrant of protection from arrest, granted by the Lord Ordinary to a bankrupt, under the 13th section of the Scotch Sequestration Act, 2 & 3 Vict. c. 41, is inoperative if the bankrupt is already in custody. In such case the proper course is to apply for a warrant of liberation under section 17. of that statute. *M'Gregor v. Fiskien*, 17 Law J. Rep. (N.S.)

Exch. 201 ; 2 Exch. Rep. 226 ; 5 Dowl. & L. P.C. 722.

Where the sum indorsed on the writ of summons in an action of debt is less than 20*l.*, the defendant is protected by the 7 & 8 Vict. c. 96. from being taken in execution under a writ of *ca. sa.* issued after judgment by default, although the debt claimed in the declaration and stated in the judgment and mandatory part of the writ of *ca. sa.* exceed 20*l.*

A rule *nisi* in such a case to discharge the defendant out of custody, need not appear to have been drawn up upon reading the writ of *ca. sa.* *Walker v. Hewlett*, 18 Law J. Rep. (N.S.) Q.B. 220 ; 6 Dowl. & L. P.C. 732.

ARSON.

A was indicted on the stat. 1 Vict. c. 89. s. 3. for the capital offence of setting fire to B's dwelling-house, B being therein. A had set fire to an out-house under the same roof as the dwelling-house, and the fire communicated to the dwelling-house and burnt it. At the time that A set fire to the out-house B was in the dwelling-house, but had left before the fire reached the dwelling-house :—Held, that the capital charge could not be sustained, as B was not in the house at the time it was on fire, and that the prisoner could not be convicted of the transportable offence, under section 3. of that statute, as the indictment did not charge the offence to have been committed with intent to defraud or injure any one. *Regina v. Fletcher*, 2 Car. & K. 215.

ART-UNION.

Association for the distribution of works of art by lot legalized if a charter obtained. 9 & 10 Vict. c. 48 ; 24 Law J. Stat. 121.

ASSAULT.

[See FALSE IMPRISONMENT—MISDEMEANOUR—TRESPASS.]

(A) WHAT AMOUNTS TO AN ASSAULT.

(B) CONVICTION FOR.

(a) *Upon Indictments for Robbery.*

(b) *Upon Indictments for Manslaughter.*

(c) *Upon Indictments for abusing Children.*

(A) WHAT AMOUNTS TO AN ASSAULT.

Three boys, under fourteen years of age, were indicted for assaulting a girl nine years of age. It was proved that each of the boys had had connexion with her. The jury returned as their verdict that "the prisoners were guilty, the child being an assenting party ; but that from her tender years she did not know what she was about ;"—Held, that upon this finding a verdict of acquittal must be entered. *Regina v. Read*, 18 Law J. Rep. (N.S.) M.C. 88 ; 2 Car. & K. 957 ; 1 Den. C.C. 377.

If a surgeon professing to take steps to cure a girl of a complaint has carnal connexion with her,

and she is ignorant of the nature of his act, and makes no resistance solely from a *bond fide* belief that he is, as he represents, treating her medically, with a view to her cure, his conduct in point of law amounts to an assault. *Regina v. Case*, 19 Law J. Rep. (N.S.) M.C. 174 ; 1 Den. C.C. 580.

A put cantharides into rum and gave it to B to drink. B drank it, not knowing that the cantharides was in the rum, and became ill :—Held, that A was neither indictable for an assault, nor for a misdemeanour at common law. *Regina v. Hanson*, 2 Car. & K. 912.

(B) CONVICTION FOR.

(a) *Upon Indictment for Robbery.*

An indictment for robbery charged that A and B together assaulted C and robbed him of his watch. At the trial C did not appear, and there was no evidence of the felony ; but a witness saw C on the ground on the night in question and several persons round him abusing him, and this witness saw A strike C. The jury convicted A of an assault, but said that they were not satisfied that A had any intent to rob C. The fifteen judges held the conviction right, and held that the 11th section of the statute 1 Vict. c. 85, applies wherever the indictment charges an assault, and the jury negating the felony, find guilty of the assault : provided always that the finding be in respect of that very same act which the Crown seeks to make felonious ; identity being the question, and not the intention of the prisoner to commit a felony. *Regina v. Birch*, 2 Car. & K. 193 ; 1 Den. C.C. 185.

If, on the trial of an indictment for robbery with violence, the robbery be not proved, the prisoner cannot be found guilty of the assault only (under 7 Will. 4. & 1 Vict. c. 85. s. 11), unless it appear that such assault was committed in the progress of something which, when completed, would be, and with intent to commit, a felony. *Regina v. Greenwood*, 2 Car. & K. 339.

A, B, & C were indicted for having robbed and beaten D. A knocked D down, and it was imputed that B and C stole his property from his pockets :—Held, that if B and C stole the property, and A did not participate in the robbery, A could not be convicted of an assault, as the assault committed by him was an independent assault, unconnected with the robbery ; but that if the jury thought that D was not robbed by any of the prisoners, but had been assaulted by all of them, they might find all guilty of the assault. *Regina v. Barnett*, 2 Car. & K. 594.

(b) *Upon Indictments for Manslaughter.*

A prisoner indicted for manslaughter, was proved to have assaulted deceased some time before her death ; but the surgeon who examined deceased after death was of opinion, that her death was owing entirely to natural causes :—Held, that, in such a case, the jury could not find the prisoner guilty of an assault under 7 Will. 4. & 1 Vict. c. 85. s. 11. *Regina v. Connor*, 2 Car. & K. 518.

(c) *Upon Indictments for abusing Children.*

Semble—That on an indictment for carnally knowing and abusing a female child under ten years

which does not charge any assault, the prisoner cannot be convicted of an assault under the 11th section of the stat. 7 Will. 4. & 1 Vict. c. 85. *Regina v. Holcroft*, 2 Car. & K. 341.

[See *ante*, (A) What amounts to an Assault.]

ASSESSED TAXES.

[See REVENUE.]

ASSIGNMENT.

[For the benefit of creditors, see DEBTOR AND CREDITOR, Composition Deeds. And see BANKRUPTCY—DEED—FINES AND RECOVERIES—LANDLORD AND TENANT—LEASE—MORTGAGE—PARTIES.]

(A) PROPERTY ASSIGNABLE.

(a) *Salary.*

(b) *College Fellowship.*

(c) *Monies due.*

(B) VALIDITY OF.

(C) NOTICE OF ASSIGNMENT.

(A) PROPERTY ASSIGNABLE.

(a) *Salary.*

An assignment, by a Puisne Judge of the Supreme Court of Madras, "of the sum equal to the amount of six months' salary," directed by the 6 Geo. 4. c. 85. to be paid to the "legal personal representatives" of such Judge in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge; and not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 & 6 Edw. 6. c. 16, and 46 Geo. 3. c. 126, and, therefore, contrary to public policy. *Arbutnot v. Norton*, 5 Moore, P.C. 219; 3 Moore, In. App. 435.

(b) *College Fellowship.*

An assignment by a fellow of King's College, Cambridge, of the profits of his fellowship, by way of mortgage, for securing the repayment of a sum of money advanced to him, and interest thereon, is not contrary to public policy, in respect of the duties incident to the situation or office; neither is there anything in the nature of the income of the fellowship from which it can be inferred that the emoluments are not assignable in equity.

Although the assignment is contrary to the implied intention of the founder of the college, and to the spirit of the statutes regulating the college, and may be a violation of the duty of the fellow to the college, it is nevertheless not void.

In a suit instituted by the assignee against the fellow, the assignor, and the college, the Court directed the fines already apportioned to the assignor to be applied in satisfaction of the plaintiff's demand, and the necessary accounts to be taken of all sums then or thereafter to be appropriated to the fellow by the College. *Feistel v. King's College, Cambridge*, 16 Law J. Rep. (N.S.) Chanc. 339; 10 Beav. 491.

Digest, 1845—1850.

(c) *Monies due.*

G and B, engineers, had overdrawn their account with their bankers, but large sums of money were owing to several railway companies for whom P & W acted as solicitors. W, at the request of the engineers, wrote to the bank for himself and partner, stating that they would, on receiving the monies due from the railway companies, pay them to the bank, to the credit of the engineers. The manager of the bank wrote to P & W, acknowledging the receipt of this letter, as guaranteeing the payment of the monies received by them on account of Messrs. G & B; it also in a postscript stated the amount of the balance then due, and that on payment thereof this letter would be given up to P & W. Messrs. G & B subsequently became bankrupts:—Held, that the transaction did not amount to an agreement for an equitable assignment of the monies due, and that the plaintiff was not entitled to the relief asked.

The bill was dismissed, without costs, as against W, and also against P, his partner, though he knew nothing of the facts, but with the costs of serving G & B with the *subpoena* to hear judgment only, and with costs as against their assignees. *Rodick v. Gandell*, 19 Law J. Rep. (N.S.) Chanc. 113; 12 Beav. 325.

(B) VALIDITY OF.

Quare—Whether an assignment of property by a nun, in pursuance of a vow made on entering the convent, is valid. *Fulham v. McCarthy*, 1 H. L. Cas. 703.

(C) NOTICE OF ASSIGNMENT.

Under the 9 Geo. 2. c. 5. (Irish Statute), payment by the consor of a judgment to the consignee, without notice of the assignment of the judgment, is payment to the assignee thereof. The registration of the assignment under that statute does not operate as notice to the consor. The situation of a consor under this statute resembles that of a mortgagor, under the (English Statute) 32 Hen. 8. c. 34. *Boyle v. Ferrall*, 12 Cl. & F. 740.

ASSIZE.

Queen's counsel and others, not of the degree of the coif, enabled to act as Judges of assize. 13 & 14 Vict. c. 25; 28 Law J. Stat. 33.

ASSUMPSIT.

[See CONTRACT, Restraint of Trade—GOODS SOLD AND DELIVERED—MARRIAGE, Breach of Promise—MONEY COUNTS—PARTIES—PLEADING—REWARD—WORK AND LABOUR.]

CONSIDERATION TO SUPPORT.

(a) *In general.*

(b) *Forbearance to sue and Relinquishment of Claim.*

(c) *Future Maintenance of Child.*

(d) *Past Seduction and Cohabitation.*

(e) *Compromise of Assault and Riot.*

(a) *In general.*

An agreement having been signed by the plaintiff and A S, the defendant, who was present at the signature, indorsed, at the same meeting, upon the agreement the following memorandum:—"I hereby undertake that my daughter A S shall perform all the covenants in the annexed agreement, and hold myself responsible for her":—Held, that the agreement and memorandum were all one transaction, and that the latter might be coupled with the former, to shew a sufficient written consideration for the defendant's promise. *Coldham v. Showler*, 15 Law J. Rep. (N.S.) C.P. 261; 3 Com. B. Rep. 312.

A declaration stated that the defendant was possessed of a ship, and the plaintiff was a master mariner, having interest at N, for loading a vessel; and it having been proposed that the defendant should give the plaintiff the command of the said ship for a voyage to the West Indies and back, it was agreed that in consideration of the plaintiff having interest in N for loading a vessel, the defendant would give the plaintiff the command of the said ship, with the understanding that the plaintiff would use all possible exertions for the benefit of the ship and owners; and that for such services the defendant would pay the plaintiff 8*l.* per month during the command by the plaintiff, and other sums during the voyage, with outward and homeward primage. Allegation of mutual promises. Averment, that the defendant gave the plaintiff the command of the said ship, and that he set out on the voyage, and carried and delivered an outward cargo; that plaintiff arrived at N, and finding that a homeward cargo could not be obtained without disadvantage, he proceeded to R, and there took in a homeward cargo, and delivered the same at London, and then resigned the command to the defendant, who accepted the same; that from the time when the command was given to him till he so resigned it, the plaintiff used all possible exertions for the benefit of the said ship and owners. Breach, non-payment by the defendant of the monies due to the plaintiff. Plea, that the plaintiff did not use all possible exertions, &c., *modo et forma*:—Held, on demurrer, that the declaration imported a sufficient consideration; and that the plaintiff, having taken the command of the ship, might maintain the action.

Held, also, that the plea traversed only part of the consideration, and was, therefore, insufficient. *Mills v. Blackall*, 17 Law J. Rep. (N.S.) Q.B. 31; 11 Q.B. Rep. 358.

Where a bankrupt before obtaining his certificate promised the plaintiff to repay him a sum paid on his account with interest,—Held, that it was no objection to the promise, that it was made before the granting of the certificate, and that the mere liability to repay was a good consideration. *Earle v. Oliver*, 2 Exch. Rep. 71.

(b) *Forbearance to sue and Relinquishment of Claim.*

In assumpsit, the declaration stated, that the plaintiff having brought an action against the defendant, in the Exchequer, for the recovery of a sum of money, and issue being joined in it, in consideration that the plaintiff would forbear all proceedings in that action, until the 14th of December, except the taxation of costs, and the obtaining of a Judge's

order to sign judgment therein, the defendant promised, on that day, to pay the sum of money and costs. Plea, that the plaintiff never had any cause of action in the action in the Exchequer, which he, at the time of its commencement, and at the time of making the promise, well knew:—Held, that, on general demurrer, the plea was good.

Quære—Whether, on special demurrer, it would not have been bad for omitting to shew that the defendant was in a situation to have defended the original action, and also as amounting to the general issue.

Plea, also, setting forth the Judge's order, which directed that, on payment of the sum and costs on or before the 14th of December, all proceedings should be stayed, and that, in default of payment, the plaintiff should be at liberty to sign judgment, and issue execution for the sum of money and costs, and alleging that the promise to pay was a promise deduced from that order, and that the order was afterwards set aside by the Court of Exchequer: Held, on special demurrer, that the plea was bad, as amounting to the general issue. *Wade v. Simeon*, 15 Law J. Rep. (N.S.) C.P. 114; 3 Dowl. & L. P.C. 587; 2 Com. B. Rep. 548.

The declaration stated that the defendant was solicitor to a railway company; that C G and C S were members of the committee; that they were indebted to the plaintiffs in 1,000*l.*, which the plaintiffs sought to recover by contributions from the committee; that the plaintiffs had commenced an action against C G, and intended to commence one against C S for the amount; that in consideration that the plaintiffs at the request of the defendant, would cease to prosecute the one action and forbear to commence the other, the defendant promised that if the plaintiffs did not by the 1st of May ensuing realize the amount of their claim by contributions from the committee, he would pay them 30*l.*, in full satisfaction of all the claims of the plaintiffs against C G and C S in connexion with the railway company, &c.: on demurrer, the declaration was held good, the consideration of forbearance being sufficient whether there was any well-founded claim or not, and although it was not alleged that the defendant was a member of the company or that the actions related to the affairs of the company. *Empson or Tempson v. Knowles*, 18 Law J. Rep. (N.S.) C.P. 222; 7 Com. B. Rep. 651.

In an action of assumpsit the declaration stated, that there were accounts between plaintiff and defendant, which were open and unsettled; and that there were disputes concerning such accounts, and mutual claims by each party; and that it was agreed that they should give up their respective claims upon each other, and thereupon, in consideration that plaintiff would relinquish and forbear to prosecute all claims which he had against defendant, the defendant then promised to pay the plaintiff an annuity of 6*l.*:—Held, that the declaration disclosed a sufficient consideration for the promise. *Llewellyn v. Llewellyn*, 15 Law J. Rep. (N.S.) Q.B. 4; 3 Dowl. & L. P.C. 318.

(c) *Future Maintenance of Child.*

The reputed father of an illegitimate child wrote to the mother,—“As I always promised that you

and your child should never want, I will allow you 100*l.* a year for your life and little Emma's, to be paid quarterly into the bank wherever you live, &c. Of course, if I hear of your behaving ill or bringing up the child improperly, I will stop the allowance to you":—Held, by *Wilde, C. J.* and *Maule, J.* (*dissentiente Williams, J.*) that the annuity of 100*l.* was promised in respect of an executory consideration, the future bringing up of the child properly, which was sufficient to support an assumpsit; and that the promisee having executed her part of the contract, the promise to pay was binding on the defendant. *Hicks v. Gregory*, 19 Law J. Rep. (N.S.) C.P. 81; 8 Com. B. Rep. 378.

(d) *Past Seduction and Cohabitation.*

The declaration stated that the defendant had seduced, debauched, and cohabited with the plaintiff, and that it was agreed that no further immoral connexion should take place between them, and that the defendant, as a compensation to the plaintiff, and in consideration of the premises, had agreed to pay her an annuity during her life:—Held, bad on general demurrer. *Beaumont v. Reeve*, 15 Law J. Rep. (N.S.) Q.B. 141; 8 Q.B. Rep. 483.

(e) *Compromise of Assault and Riot.*

An agreement, by which, in consideration that the prosecutor of an indictment preferred against certain persons for an assault and riot would not proceed further on the indictment, the defendants promised to pay him a sum of money, is illegal, although the prosecutor forbore to give evidence on the indictment with the knowledge and assent of the Court before which the indictment was pending.

In all offences which involve damages to an injured party, and for which he may maintain an action, he may, notwithstanding they are also of a public nature, settle his private damage in any way he may think fit; but a compromise of an assault, coupled with riot, is not legal. *Keir v. Leeman*, 15 Law J. Rep. (N.S.) Q.B. 360; 9 Q.B. Rep. 371.

ATTACHMENT.

[Foreign Attachment, see PLEADING—STAYING PROCEEDINGS. — And see ARBITRATION, Award, Remedies — ATTORNEY AND SOLICITOR — CONTEMPT—COSTS—PRISONER—SHERIFF.]

(A) WHEN IT LIES.

- (a) *For Contempt.*
- (b) *On Rule of Court.*
- (c) *On Second Application.*

(B) SERVICE OF RULE FOR.

(C) PRACTICE ON SHEWING CAUSE AGAINST.

(A) WHEN IT LIES.

[*Regina v. Greenaway, Regina v. Carey*, 5 Law J. Dig. 44; 7 Q.B. Rep. 126.]

(a) *For Contempt.*

Where a sheriff's officer was, as he alleged, in possession of goods under a *fi. fa.* out of this court and an officer of the Palace Court levied and took

away the goods, under process out of that court, using no violence, this Court refused to grant an attachment against the officer of the Palace Court, there being reason to believe that the possession of the sheriff's officer was a matter in dispute. *White v. Chapple*, 16 Law J. Rep. (N.S.) C.P. 233; 4 Com. B. Rep. 628.

A, the treasurer of a loan society, took securities in his own name; having ceased to be treasurer, an action was commenced on behalf of the society upon a security so taken, in A's name, and prosecuted to execution under an indemnity to A, ordered by the Court. A, colluding with the defendant, discharged him from the execution:—The Court granted an attachment for contempt against A. *M'Gregor v. Barrett*, 6 Com. B. Rep. 262.

(b) *On Rule of Court.*

Attachment will not lie on a rule of court, unless for disobedience of some *express* direction.

An order was made *by consent*, in an action of ejectment, "that the proceedings be stayed, the defendant to pay his own costs of a former ejectment, and the lessor of the plaintiff to pay 5*l.*, towards the defendant's costs, and to grant a lease of the premises for twenty-one years, at the rent of 1*s.* a year on the same conditions as other parts of the estates of the lessor of the plaintiff in the parish were held." The defendant having declined to accept a lease and execute a counterpart, the Court refused to grant an attachment against him. *Doe d. the Earl of Cardigan v. Bywater*, 7 Com. B. Rep. 794.

(c) *On Second Application.*

Where a party having applied for an attachment for non-payment of costs, which was refused on the ground of the improper service of a power of attorney, but leave being given to apply again, renewed the application after making a proper service of the power of attorney, and a *fresh demand* of costs, which the plaintiff refused to pay,—Held, that the application might be made, the second demand and refusal being a fresh contempt, and amounting to new matter. *Dixon v. Oliphant*, 15 Law J. Rep. (N.S.) Exch. 106; 15 Mee. & W. 152; 3 Dowl. & L. P.C. 465.

The rule of practice, that an application is not to be renewed which has already been refused under the same circumstances and with the same object, is a rule adopted for preventing vexation and a waste of the public time, but is not to be considered as a privilege of a party who is clearly in the wrong; and where the rule for an attachment for non-payment of money awarded was discharged, on the ground that the affidavits did not shew the performance of a condition precedent, the Court made a subsequent rule absolute, on affidavits shewing such performance and a demand made since the discharge of the former rule. *Masters v. Butler*, 18 Law J. Rep. (N.S.) Q.B. 328; s. c. *In re Butler*, 13 Q.B. Rep. 341.

(B) SERVICE OF RULE FOR.

It is not in every case, and under all circumstances, an inflexible rule, that the Court will not make a rule for an attachment absolute without personal service. And; *semble*, where there is no

other remedy, and it is manifest the party is purposely evading personal service, the Court will make the rule absolute. *In re Whalley*, 15 Law J. Rep. (N.S.) Exch. 4; 14 Mee. & W. 731; 3 Dowl. & L. P.C. 291.

(C) PRACTICE ON SHEWING CAUSE AGAINST.

The practice that when cause is to be shewn in a different term from that in which the rule *nisi* has been obtained, office copies of the affidavits on which the rule was moved must be taken by the party intending to shew cause before he can be heard, applies equally to motions for an attachment as to other motions.

A rule for an attachment having been obtained on the part of a woman, who described herself in her affidavit as a widow, against her attorney, for not paying her a sum of money, the Court set aside the rule on its being shewn that she was a married woman (her second marriage having taken place subsequently to her employment of the attorney), since, although the concealment of her second marriage was not made with any fraudulent intention, she had deceived the Court, made a false affidavit, and was no longer in a condition to give a legal discharge for the money. *Regina v. Carttar*, 19 Law J. Rep. (N.S.) Q.B. 422; 1 L. M. & P. 274, 386.

ATTAINDER.

On a claim to a Scotch peerage, there being no patent or charter of creation or enrolment thereof discovered, a copy of an enrolment of a commission under the great seal and King's sign manual, dated in February 1605, directing the commissioners to create James Lord Drummond Earl of Perth, was received and held, in conjunction with subsequent entries in the Parliament records, to be sufficient proof of the creation of the earldom. In the absence of the instrument of creation of a Scotch peerage, the limitations are taken from usage to be to the grantee and his heirs male general. On the death of a peer, leaving his eldest son and heir, who had been attainted, the peerage does not vest in him, nor, on his death, in the nearest heir male, but is forfeited, as much as if he had been a peer at the time of the attainder. A peerage limited to a man and his heirs male is one entire estate, and no substitution of heirs takes place. A peerage limited to a man and his heirs male whomsoever, is forfeitable under the act of 26 Hen. 8. c. 13. Attested copies of French registers of marriages, births and deaths, held to be admissible evidence, upon the testimony of a French advocate that such registers were kept according to French law, and would be received in evidence in the French courts. *The Earldom of Perth*, 2 H.L. Cas. 865.

Scotch peerages, created by patents in 1616 and 1633 respectively, and limited to the grantee and his heirs male, descended through the line of his eldest son, and became in 1699 vested in the fifth baron and earl, who was attainted of high treason in 1715, and died in 1739, without leaving issue. His collateral heir, descended from a younger son of the first peer, claimed the dignities in 1848:—

Held, that the attainder was a bar. *The Earldom of Southesk*, 2 H.L. Cas. 908.

ATTORNEY AND SOLICITOR.

[See CONTRACT, Construction—EVIDENCE, Privileged Communications — SHERIFF, Duties and Liabilities, Escape—WORK AND LABOUR.]

- (A) ARTICLES OF CLERKSHIP.
 - (a) *Return of Premium.*
 - (b) *Affidavit of Execution of.*
- (B) ADMISSION.
- (C) CERTIFICATE.
- (D) AMENDMENT OF THE ROLL [CHANGE OF NAME].
- (E) RIGHTS, POWERS AND PRIVILEGES.
 - (a) *In general.*
 - (b) *Arrest.*
 - (c) *Suing and being sued in the Superior Courts.*
 - (d) *Venue.*
 - (e) *Plea of Privilege.*
- (F) DUTIES AND LIABILITIES.
 - (a) *In general.*
 - (b) *On their Undertakings.*
 - (c) *Attachment.*
 - (d) *Summary Jurisdiction.*
 - (1) *By Courts of Law.*
 - (2) *By Courts of Equity.*
 - (e) *Striking off the Roll for Misconduct.*
 - (f) *Negligence.*
- (G) RETAINER.
- (H) APPOINTMENT AND CHANGE OF ATTORNEY.
- (I) DEALINGS WITH CLIENT.
- (K) BILL OF COSTS.
 - (a) *Delivery of.*
 - (b) *Heading and Contents of.*
 - (c) *Taxation of.*
 - (1) *In general.*
 - (2) *What Bills are taxable.*
 - (3) *Order of Course for, under 6 & 7 Vict. c. 73. s. 37.*
 - (4) *Upon Terms.*
 - (5) *Upon special Circumstances after Verdict, Writ of Inquiry or Expiration of a Year, under 6 & 7 Vict. c. 73. s. 37.*
 - (6) *Upon special Circumstances after Payment, under 6 & 7 Vict. c. 73. s. 41.*
 - (7) *Entering up Judgment, under 6 & 7 Vict. c. 73. s. 43.*
 - (8) *Notice of Taxation.*
 - (9) *Appeal from Judge's Order for Taxation.*
 - (10) *Costs of Taxation.*
 - (d) *Remedies for.*
 - (1) *Against whom.*
 - (2) *By Action.*
 - (3) *By Execution, under 1 & 2 Vict. c. 110. s. 18.*
- (L) LIEN FOR COSTS.

(A) ARTICLES OF CLERKSHIP.

[*In re Bateman*, 5 Law J. Dig. 46; 6 Q.B. Rep. 853.]

(a) Return of Premium.

The Court refused to order an attorney to repay any portion of a premium of 200 guineas received by him with an articulated clerk, who died within a month after he was articulated. *In re Thompson*, 1 Exch. Rep. 864.

The plaintiff was articulated to an attorney for five years at 200*l*. The attorney died three years before the term had expired, and the plaintiff filed a bill against his representatives for a return of a proportionate part of the premium:—Held, that a debt had been established, and the plaintiff had a right to proceed against the assets of the deceased attorney; the Master to inquire what part of the premium ought to be returned. *Hirst v. Tolson*, 18 Law J. Rep. (n.s.) Chanc. 308; 16 Sim. 620; affirmed, 19 Law J. Rep. (n.s.) Chanc. 441; 2 Mac. & G. 134; 2 Hall & Tw. 359.

(b) Affidavit of Execution of.

An articulated clerk "from inadvertence only" neglected to file the necessary affidavit within six months:—Held, not a sufficient ground for relieving him from the consequences under 6 & 7 Vict. c. 73. s. 9. *In re Benson*, 10 Beav. 435.

(B) ADMISSION.

An indictment will lie against a person who acts as an attorney, without being admitted and enrolled pursuant to 6 & 7 Vict. c. 73. s. 2, although by section 35. disabilities and penalties are imposed on persons so acting. *Regina v. Buchanan*, 15 Law J. Rep. (n.s.) Q.B. 227; 8 Q.B. Rep. 883.

Where notice of an intention to apply for admission as an attorney in Hilary term had been given before Michaelmas term, the Court, under special circumstances, ordered that the clerk should be examined and admitted in Michaelmas term. *Ex parte Cunliffe*, 15 Law J. Rep. (n.s.) Q.B. 41; 3 Dowl. & L. P.C. 348.

An attorney who has paid the stamp duty of 60*l*. on being articulated, in order to being admitted in the court of a county palatine, must, under 9 Geo. 4. c. 49. s. 4. pay the further stamp duty of 120*l*. on being admitted in any of the courts at Westminster.

And though he has been admitted on payment of an additional 60*l*., by mistake of the officers of the court or the Stamp Office, and without any fraud or *mala fides* on his part, the Court will make an order for striking him off the roll, unless he consents to pay the additional duty of 60*l*. *In re Myers*, 15 Law J. Rep. (n.s.) Q.B. 209; 8 Q.B. Rep. 515.

Though an attorney has paid the duty of 60*l*. on his articles of clerkship in Wales, and the duty of 25*l*. on admission as an attorney of the Court of Great Sessions, he cannot be admitted an attorney of the superior courts of Westminster, under stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 17, without paying an additional sum of 60*l*. to make up the full amount of duty payable in England in order to admission as an attorney of such superior courts. *In re Humphreys*, 19 Law J. Rep. (n.s.) Q.B. 65.

The Court allowed an attorney to be enrolled in

this court by the name of Thomas James, dropping his surname of Moses, it being sworn that he was under no apprehension of any proceedings being taken against him in that surname. *In re James*, 19 Law J. Rep. (n.s.) Exch. 272; 5 Exch. Rep. 310.

The Lord Mayor's Court is an inferior court, within the meaning of the 6 & 7 Vict. c. 73. s. 27, notwithstanding its peculiar customs and jurisdiction.

Every attorney duly qualified is entitled to be admitted an attorney therein, although there is not and never has been a roll of the attorneys of that court—affirmed on error (see below).

Mandamus, to admit A B an attorney of the court, alleging it to be an inferior court. The return, without traversing this allegation in terms, set out at length the peculiar customs and jurisdiction of the Court, in order to shew that it was not within the operation of the 27th section of the 6 & 7 Vict. c. 73:—Held, on special demurrer, that the return was not bad in form, as an argumentative traverse of the allegation in the writ. *Regina v. the Mayor, &c. of London (In re Ashurst)*, 16 Law J. Rep. (n.s.) Q.B. 185; 13 Q.B. Rep. 1.

Attornies of the superior courts are entitled, by virtue of the statute 6 & 7 Vict. c. 73. s. 27, to be admitted to inferior courts of law. Where, therefore, a writ of mandamus directing the presiding officers of the lord mayor's court to admit A B, described it as an "inferior court," without stating it to be a court of law or equity,—Held, on error, that such writ was bad, and that the defect was not cured by such court being described in the return to the writ as a court of law. *The Mayor, &c. of London v. Regina (In re Ashurst)*, 17 Law J. Rep. (n.s.) Q.B. 330; 13 Q.B. Rep. 30.

(C) CERTIFICATE.

The 26th section of 6 & 7 Vict. c. 73. disables an attorney, who is uncertificated, only from suing for fees, rewards, and disbursements for any business, matter, or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the courts mentioned in the act, and not for business done which had no reference to such suits or proceedings. *Richards v. Suffield*, 17 Law J. Rep. (n.s.) Exch. 362; 2 Exch. Rep. 616: s. p. *Greene v. Reece*, 8 Com. B. Rep. 88.

An attorney's bill of costs having been referred to taxation, certain items were objected to before the Master, on the ground that the attorney at the time those items were incurred, was uncertificated; and the Master accordingly disallowed them:—Held, that the Master acted rightly in disallowing the items, and that it was no ground for reviewing the taxation. *In re Angell*, 6 Dowl. & L. P.C. 144.

An attorney in October 1848 took out a certificate for the year ending the 15th of November 1848. The certificate, by mistake of the clerk at the Stamp Office, stated that it was to be in force until the 15th of November 1849, instead of 1848. The attorney paid duty in respect of the year ending in November 1848, but paid none for the year 1849:—Held, that the attorney was not entitled in August 1849 to tax his costs in respect of business done in that year. *In re Duke of Brunswick*, 19 Law J. Rep. (n.s.) Exch. 112; 4 Exch. Rep. 492.

The Court will, in urgent cases, dispense with the Reg. Gen. Easter term, 9 Vict. which regulates the taking out a certificate as an attorney where more than a year has elapsed from the admission: provided it appear that there has been no neglect in the party applying to give as long notices as were in his power, and that the notices so given afforded a reasonable time for inquiry into his conduct, &c., since his admission. *Ex parte Webb*, 4 Dowl. & L. P.C. 641.

Where little more than a twelvemonth had elapsed since the admission of an attorney, the Court under special circumstances allowed him to take out a certificate, without giving the notices required by Reg. Gen. Easter term, 9 Vict. *Ex parte Weymouth*, 5 Dowl. & L. P.C. 60.

The Court refused to allow an attorney to take out his certificate, where it appeared that he had been found guilty on an indictment for a conspiracy to procure a fiat, and had been sentenced to, and had undergone, eighteen months' imprisonment; although the motion was unopposed, and the fact appeared only on his own affidavit, and he swore he was not guilty of the offence, and it had occurred eighteen years ago, since which time he had been engaged as law clerk in the offices of several attorneys. *Ex parte Grey*, 5 Dowl. & L. P.C. 275.

Where an attorney had omitted to take out a certificate for upwards of ten years, and had given the notices required in order to take it out at the end of the term, pursuant to Reg. Gen. Easter term, 9 Vict. the Court refused, although special grounds were stated for the application, to allow him, on the first day of the term, to take out his certificate forthwith. *Ex parte Barnes*, 5 Dowl. & L. P.C. 294.

(D) AMENDMENT OF THE ROLL [CHANGE OF NAME].

An attorney who, without royal licence, or any formal authority for the change, has assumed another name from that on the roll, for a specified reason, may have the roll altered to the assumed name, if it appear to the Court that such name has been taken *bond fide* and without fraudulent intention. *Ex parte Daggett*, 1 L. M. & P. 1.

If an attorney changes his name and wishes to be described by his new name on the roll of attorneys, the Court, if satisfied respecting the circumstances of the application, will allow an entry of the change of name to be made on the attorneys' roll. *Ex parte Moses* or *James*, 19 Law J. Rep. (n.s.) Q.B. 345; 1 L. M. & P. 4.

[See *In re James*, (B) ADMISSION.]

(E) RIGHTS, POWERS AND PRIVILEGES.

(a) In general.

The Court will in general set aside a release, executed after action by a plaintiff suing *in forma pauperis*, which would deprive the attorney appointed by the Court of his costs. *Wright v. Burroughs*, 15 Law J. Rep. (n.s.) C.P. 277; 4 Dowl. & L. P.C. 226; 3 Com. B. Rep. 344.

Where a release has been executed by a pauper plaintiff after action brought, and without the knowledge and consent of the attorney, it is matter entirely within the discretion of the Court, whether

under the circumstances of the case they will set it aside.

Where such a release had been executed in pursuance of a *bond fide* arrangement between plaintiff and defendant, the Court refused to set it aside, although its effect was to deprive plaintiff of his costs. *Jones v. Bonner*, 17 Law J. Rep. (n.s.) Exch. 343; 2 Exch. Rep. 230.

The attorney in an action has authority to order the sheriff to withdraw from possession under a *fi. fa.*

A return to a writ of *testatum fi. fa.* stated an order from E L L, the attorney of the plaintiff, to withdraw from possession:—Held, that this could only mean the attorney in the action. *Levy or Levi v. Abbott*, 19 Law J. Rep. (n.s.) Exch. 62; 4 Exch. Rep. 588.

A town agent of a solicitor in the country cannot, on an authority given to the solicitor for a particular purpose, take proceedings on behalf of the client not specially authorized. *Malins v. Greenway*, 17 Law J. Rep. (n.s.) Chanc. 26; 10 Beav. 584; affirmed 17 Law J. Rep. (n.s.) Chanc. 331.

(b) Arrest.

An attorney who had been properly admitted in the superior courts, was arrested while attending in his professional capacity in the county court:—Held, that he was entitled to his discharge, upon affidavits shewing the above facts, and in the absence of any counter statement that he was not entitled to practise in the county court. *Clutterbuck v. Hulls*, 15 Law J. Rep. (n.s.) Q.B. 310; 4 Dowl. & L. P.C. 80.

(c) Suing and being sued in the Superior Courts.

A creditor who sues in a superior court for a debt for which he might have sued in the county court cannot be considered as within the jurisdiction of the county court. And the words of sect. 67. of stat. 9 & 10 Vict. c. 95. being, that privilege shall not exempt "from the jurisdiction" of the county court, and not "from the provisions of the act,"—Held, that an attorney is not deprived of his privilege of suing in the superior court for a cause of action under 20L. *Lewis v. Hance*, 17 Law J. Rep. (n.s.) Q.B. 172; 5 Dowl. & L. P.C. 641; 11 Q.B. Rep. 921.

An attorney may sue in the superior courts for a debt recoverable in the county court, and his right to costs in respect thereof is not affected by the 67th and 129th sections of 9 & 10 Vict. c. 95. *Jones v. Brown*, 17 Law J. Rep. (n.s.) Exch. 163; 5 Dowl. & L. P.C. 716; 2 Exch. Rep. 329.

Under the 49th section of the London Small Debts Act (10 & 11 Vict. c. lxxi.), the privilege of attorneys to be sued as defendants in their own court is abolished. *Jefferies or Jeffreys v. Beart*, 17 Law J. Rep. (n.s.) Q.B. 290; 5 Dowl. & L. P.C. 646.

[See 12 & 13 Vict. c. 101. s. 18, abolishing all privilege of attorneys in the county courts.]

(d) Venue.

In order to entitle an attorney, suing in person, to retain the venue in Middlesex, it is not necessary that he should state in the declaration that he sues as an attorney. *Cutts v. Surridge*, 16 Law J. Rep. (n.s.) Q.B. 2; 4 Dowl. & L. P.C. 373.

(e) *Plea of Privilege.*

Where, to plea of privilege by an attorney alleging that defendant was an attorney of the Court of Queen's Bench and not of the Court of Exchequer, plaintiff replied that defendant was an attorney of the Court of Exchequer, and concluded to the country,—Held, on special demurrer, that the replication was bad for not concluding with a verification by the record. *Graham v. Ingleby*, 17 Law J. Rep. (N.S.) Exch. 313; 2 Exch. Rep. 442.

To a plea of privilege by an attorney as an attorney of the Queen's Bench, plaintiff replied, averring that defendant was an attorney of the Court of Exchequer, and after the prayer of judgment by inspection of the record added an entry of continuance by *Curia advisari vult*, and a day for judgment was given for plaintiff:—Held, that no rejoinder was necessary; and judgment was given for the plaintiff upon its appearing by the roll that defendant was an attorney of the Court of Exchequer. *South Staffordshire Rail. Co. v. Smith*, 19 Law J. Rep. (N.S.) Exch. 356; 5 Exch. Rep. 472.

(F) DUTIES AND LIABILITIES.

(a) *In general.*

Plea in trespass for false imprisonment, stating the bankruptcy of T and B, and that after a summons under 5 & 6 Vict. c. 122. disobeyed, a warrant was obtained by the defendant from the commissioner, to arrest and bring the plaintiff before him as a person suspected of having part of the bankrupt's estate in his possession, and capable of giving information, &c., which was duly executed by the messenger, the defendant taking no part in the caption:—Held, that the issuing the warrant was the judicial act of the commissioner, and although turning out to be invalid for defect of tendering expenses, the defendant, the attorney suing out the warrant, was not liable in trespass. Held, also, that the term suspected referred to the parties applying and not to the commissioner. *Cooper v. Harding*, 7 Q.B. Rep. 928.

An attorney indorsed a writ of *fi. fa.* in a case of *G v. D*: "The defendant resides at W and is an innkeeper." D (the defendant in that suit) resided at W, and conducted the business of A, who was his mother-in-law, and kept an inn there, and the goods on the premises were her property. The sheriff having seized A's goods, at the inn, under the *fi. fa.*,—Held, that there was evidence to go to the jury, that the attorney directed the sheriff to seize the goods, and to make him liable in trespass. *Rowles v. Senior*, 15 Law J. Rep. (N.S.) Q.B. 231; 8 Q.B. Rep. 677.

Where at the trial before an under-sheriff an attorney opened the case as an advocate for the plaintiff, cross-examined defendant's witnesses, and addressed the jury in reply, and then tendered himself, and was admitted as a witness to disprove the defendant's case, a verdict so obtained for plaintiff was set aside. *Stones v. Byron*, 16 Law J. Rep. (N.S.) Q.B. 32; 4 Dowl. & L. P.C. 393.

The attorney of the execution plaintiff is not liable to the sheriff for the fees due on the execution of a writ of *ca. sa.* *Maybery v. Mansfield*, 16 Law J. Rep. (N.S.) Q.B. 102; 9 Q.B. Rep. 754.

An attorney, although he need not be instructed

by a plaintiff personally, but may receive instructions from any one interested in the action, is liable to defendant for costs if it turns out that plaintiff is a non-existing person. *Hoskins v. Phillips*, 16 Law J. Rep. (N.S.) Q.B. 339.

An attorney is bound to be at his office by himself or clerk till 9 o'clock in the evening. *Grant v. Mackenzie*, 16 Law J. Rep. (N.S.) Exch. 255; 1 Exch. Rep. 12; 5 Dowl. & L. P.C. 129.

A declaration alleging that the defendant, an attorney, wrongfully, and without the consent or retainer of the plaintiff, entered an appearance for him in an action brought by D (a third party) against the plaintiff, and took upon himself to conduct the action, and such proceedings were thereupon had that D recovered judgment, and issued execution, and the plaintiff was obliged to pay the amount recovered and the costs of the execution, and "by reason of the premises" was injured in his credit and character,—Held ill, after verdict, as not shewing any damage resulting from any act of defendant. *Westaway v. Frost*, 17 Law J. Rep. (N.S.) Q.B. 286.

Where a sheriff's bailiff is employed by an attorney to issue a writ of execution against a defendant, the attorney and not the client is liable to the bailiff for his fees. *Mailé v. Mann*, 17 Law J. Rep. (N.S.) Exch. 336; 2 Exch. Rep. 608; 6 Dowl. & L. P.C. 42.

In an action by a sheriff's officer against the attorney of the plaintiff, for levy and caption fees, evidence of usage that "the sheriff's officer always looks to the attorney and not to the plaintiff in the action," cannot be admitted.

Quare—Whether a sheriff's officer can maintain an action for levy and caption fees against the attorney of the plaintiff, unless specially employed by him. *Seal v. Hudson*, 4 Dowl. & L. P.C. 760.

An attorney, to whom administration had been granted on behalf of the relict of a deceased, being cited at the instance of the relict residing abroad to exhibit an inventory and account, appeared under protest, alleging that the Court had not jurisdiction to require an account between a principal and agent:—Held, that the attorney was bound to comply with the citation. *Bailey v. Bristowe*, 2 Robert. 145.

(b) *On their Undertakings.*

Where an attorney, for the purpose of settling an action, in which he had not been professionally employed, prepared a promissory note to be signed by defendant, and also himself signed an undertaking to pay the amount due on the note in case of default being made by defendant, the Court, on a summary application, compelled him to perform the undertaking. *In re Fairthorne*, 15 Law J. Rep. (N.S.) Q.B. 131; 3 Dowl. & L. P.C. 548.

It is no answer to a rule, calling upon an attorney to pay money pursuant to his undertaking, that more than two years have elapsed since the undertaking was given. *In re Swan*, 15 Law J. Rep. (N.S.) Q.B. 402; s. c. *nom.* *Titterton v. Sheppard*, 3 Dowl. & L. P.C. 775.

Plaintiff having issued execution on a Judge's order against defendant, defendant's attorney R F L, sent to the plaintiff the following letter:—"Sir, —Yourself v. Gordon. In consideration of your agree-

ing to suspend execution upon this judgment, I hereby undertake to make an arrangement with you respecting payment of the debt and costs prior to Mr. Gordon being discharged from prison under his present detainers, or in the event of your not agreeing to the terms offered by me, to inform you in sufficient time of Mr. Gordon's intended discharge, so that you may not be deprived of your power of lodging a detainer against him in this action. Your reply, approving this arrangement, will oblige. I am, &c., R F L." The Court discharged a rule obtained to compel the attorney to pay the debt and costs.

An attorney, who has acted as such in one of the superior courts, and signed an undertaking in such court, cannot refuse to perform that undertaking, on the ground that he is not an attorney of that court. *Thompson v. Gordon*, 15 Law J. Rep. (N.S.) Exch. 344; 15 Mee. & W. 610; 4 Dowl. & L. P.C. 49.

Where the attorney of a mortgagor who was desirous of selling the property, had induced the attorney of the mortgagee to give up the title deeds, &c., on his undertaking to pay him the costs of preparing the abstract of titles, &c.; the Court granted a rule ordering him to pay the amount pursuant to his undertaking. *In re Gee*, 2 Dowl. & L. P.C. 997.

The defendant had obtained a Judge's order in the following terms: "It is ordered that the plaintiff do forthwith give security for costs to the satisfaction of the Master; no stay of proceedings in the mean time; the attorney for the plaintiff hereby undertaking to find such security":—Held, that the attorney was not bound to find security for costs, unless further proceedings were taken by the plaintiff. *Hill v. Fletcher*, 19 Law J. Rep. (N.S.) Exch. 320.

A petition was presented by a husband and wife, which related to her separate property; an objection was taken to its being heard on the ground that there was no security for costs: the solicitor of the petitioners instructed counsel to undertake to amend the petition, if required by the Court, by making it the petition of the wife by her next friend. The petition was accordingly heard, and an order made, but the petitioners were ordered to pay the costs. The petitioners and the solicitor afterwards declined to amend the petition, though ordered by the Court so to do; and upon an application that they might do so in four days, or that the solicitor might perform his undertaking,—Held, that the undertaking of the solicitor could only be considered as the undertaking of the client, and that no order could be made against the solicitor personally, but he was refused his costs. *In re Williams*, 19 Law J. Rep. (N.S.) Chanc. 422; 12 Beav. 510.

On the application of four of the directors of a railway company, an order for the taxation of the bill of parliamentary agents was made, under which the directors submitted to pay what should be found due to them. The bills were taxed at 22*4*l. 1*s.* 8*d.*, but before the certificate of the taxing Master was obtained, a petition was presented and an order was made for winding up the company. Upon an application for an injunction to restrain the parliamentary agents from issuing any process against the directors,—Held, that their submitting to pay

was a personal undertaking; and the injunction was refused, but without costs. *In re Sudlow, ex parte Dover and Deal Rail. Co.*, 19 Law J. Rep. (N.S.) Chanc. 524; 12 Beav. 527.

(c) Attachment.

A rule of court calling on C, an attorney, to deliver a bill of costs to Messrs. B & D was served only by a clerk of B & D, who made a demand of the bill; but it did not appear that the clerk had any authority to make the demand:—Held, that the demand was not sufficient as a ground for an attachment. *Ex parte Briggs in re C*—or *in re Cattlin*, 18 Law J. Rep. (N.S.) C.P. 184; 7 Com. B. Rep. 136.

An attorney of the Welsh Court of Great Sessions, whose name had been placed on the shilling roll in the superior courts under the 1 Will. 4. c. 70. s. 16, but who had not been admitted under section 17, is guilty of a contempt in acting as attorney in the conduct of a suit commenced against a person residing out of the limits of Wales, and may be proceeded against under 6 & 7 Vict. c. 73. s. 36, although the proceedings were conducted in his agent's name. *In re Humphreys*, 19 Law J. Rep. (N.S.) Q.B. 65.

(d) Summary Jurisdiction.

(1) By Courts of Law.

A, who was the London agent of S & J, attorneys in the country, by their directions issued a *fi. fa.* and warrant to levy on the goods of a debtor in Wilts, at the suit of one of their clients, referring the officer to S & J for instructions. The officer not being able to meet with S & J paid the amount of the levy to the under-sheriff, who without any instructions from S & J remitted the money to A in London, whose name was indorsed on the warrant. A refused to pay the money over to the client, claiming to apply it in reduction of the general balance due from S & J for agency business:—Held, that on these facts there was no privity of contract to support an action by the client against A for money had and received to his use. But it appearing that the money had been paid in the first instance to the town agent under a mistake, and retained by him against the express directions of S & J, the Court made absolute a rule obtained by the client to compel the town agent to refund the money. *Robbins v. Fennell*, 17 Law J. Rep. (N.S.) Q.B. 77; 11 Q.B. Rep. 243.

The Court will exercise its summary authority over an attorney only with reference to his conduct in a cause. *In re Anonymous*, 19 Law J. Rep. (N.S.) Exch. 219.

The Court will not in the exercise of its summary jurisdiction, prevent an attorney, defendant in an action at the suit of his client, suing as administratrix, from pleading a plea not directly to the merits, such as the plea of the Statute of Limitations; even though the accrual of the statute may have been owing to his neglect in not advising plaintiff to take out the letters of administration earlier. *In re Tristram*, 1 L. M. & P. 74.

[And see (b) *On their Undertakings*; and (e) *Striking off the Roll for Misconduct*.]

(2) *By Courts of Equity.*

An application (not in a cause) to compel a solicitor to deliver up papers is not within the 12th Order of August 1841, but must follow the old practice. *In re Taylor*, 10 Beav. 221.

Motion by an executor and trustee to restrain a solicitor from acting for plaintiffs in a suit, charging the executor with breaches of trust, was refused, though solicitor had been employed many years in the testator's affairs by the executor who had made many confidential communications to him relating thereto, and had never discharged him from being his solicitor. *Parratt v. Parratt*, 17 Law J. Rep. (n.s.) Chanc. 346; 2 De Gex & S. 258.

Upon the compromise of a suit, an agreement was entered into between the respective solicitors of the plaintiff and defendants, from which certain benefits were to be derived by the defendants, and the defendants' solicitor undertook to pay to the plaintiff's solicitor the amount of his bill of costs, and to indemnify the plaintiff against the costs of other defendants. It was not stated by either party whether the other parts of the agreement had or had not been performed. Upon motion in the cause and in the matter of the defendants' solicitor, he was ordered to pay the bill of costs of the plaintiff's solicitor within two days. But upon appeal to the Lord Chancellor, the order was discharged. *Gilbert v. Cooper*, 17 Law J. Rep. (n.s.) Chanc. 265; 15 Sim. 343.

B, a solicitor in the country, being employed by A and C to carry in and prosecute their claims as creditors under a decree of the Court made in the year 1841, employed K as his London agent for that purpose. Neither B nor K was the solicitor of A or C except in that transaction. In 1846 B died; and K, in 1847, without any authority from A or C, and without having previously obtained any order of the Court for that purpose, carried in a state of facts and charge before the Master, complaining of an arrangement and compromise that had been entered into between the plaintiffs and defendants. K afterwards abandoned that state of facts and charge, and took into the Master's office another state of facts and charge precisely the same as the former, except that it was on behalf of the executor of B. The Master disallowed the last state of facts and charge on production of an affidavit of service of the warrant taken out by the plaintiff on K. On the petition of the plaintiffs and one of the defendants in the cause, K was ordered to pay the costs incurred by the petitioners in and about the proceedings in the Master's office, having relation to the two states of facts and charge, and the costs of the petition. *Malins v. Greenway*, 17 Law J. Rep. (n.s.) Chanc. 26; 10 Beav. 584; affirmed 17 Law J. Rep. (n.s.) Chanc. 331.

A solicitor acted for clients under a special agreement as to costs which was doubtful:—Held, that the Court had no jurisdiction to determine the construction and effect of the agreement on petition. *In re Beale*, 11 Beav. 600.

(e) *Striking off the Roll for Misconduct.*

The Court made absolute a rule to strike off the roll an attorney convicted upon an indictment charging a conspiracy to defraud, though the rule

nisi was drawn up upon reading the record of the conviction only, and the judgment had been reversed on the ground of the insufficiency of the indictment, prior to the rule being made absolute; the acts of misconduct imputed to him in the indictment, though disclosing no legal offence, rendering him in the discretion of the Court an unfit person to practise as an attorney. *In re King*, 15 Law J. Rep. (n.s.) Q.B. 2; 8 Q.B. Rep. 129.

A rule to strike an attorney off the roll for misconduct having been applied for on production of a similar rule granted by the Common Pleas against the same party, the Court refused it, there being no evidence of the identity of the parties.

A rule of this kind ought not to be moved for on the last day of term, but in sufficient time to enable the party to shew cause against it within the term. *Anonymous*, 17 Law J. Rep. (n.s.) Exch. 20; 1 Exch. Rep. 453.

A rule to strike an attorney off the roll on the ground that he has been convicted of a misdemeanour in the Court of Queen's Bench, and struck off the roll of that court, is a rule *nisi* only in the first instance, which, in the Court of Exchequer, makes itself absolute unless cause is shewn. *In re Wright*, 17 Law J. Rep. (n.s.) Exch. 128; 1 Exch. Rep. 658; 5 Dowl. & L. P.C. 394.

On a bill filed by parties interested under a will, against the sole acting trustee and executor and against his solicitor, under whose advice the testator's property had been improperly sold and applied, principally to the solicitor's use, praying that the stock might be replaced, the Court at the hearing, after directing inquiries, ordered that the solicitor should shew cause why, having regard to his answer and the evidence in the causes, his name should not be struck off the roll of solicitors. *Goodwin v. Gosnell*, 2 Coll. C.C. 457.

(f) *Negligence.*

Where declaration stated that plaintiff retained defendants as attorneys in and about ascertaining the title of G R to certain lands and tenements, and to take due and proper care that "the same" should be a sufficient security for the repayment of a sum of 600*l.*—Held, that the words "the same" had reference to the title of G R, and were not to be construed as charging defendants upon a contract to inquire into the value of the lands, and was, therefore, supported by evidence of a retainer to investigate the title as a security for the repayment of the 600*l.* *Hayne v. Rhodes*, 15 Law J. Rep. (n.s.) Q.B. 137; 8 Q.B. Rep. 342.

An attorney undertook to conduct a cause, charging his client only money out of pocket. The client advanced money to the attorney during the progress of the cause, which was properly expended in carrying it on. By subsequent negligence in the attorney the cause failed,—Held, first, that the attorney was not entitled to recover money out of pocket paid by him subsequently to the negligence of which he had been guilty; and, secondly, that the client was not entitled to set off the money advanced and expended previous to such negligence. *Lewis v. Samuel*, 15 Law J. Rep. (n.s.) Q.B. 218; 8 Q.B. Rep. 685.

Where in an action against an attorney for

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negligence, the declaration alleged that the defendant "did not duly file the writs with the proper officer, according to the practice of the court, whereby the plaintiff's demand was barred by the Statute of Limitations;" and it was proved at the trial that after the writs were brought to the office it is the practice of the officer to file them, but in certain instances in this case the writs were not filed within one month after their expiration,—Held, that the Judge properly directed the jury that the filing might have the sense of bringing to the office, and in that sense was included under the word "returning," and was, therefore, a part of the attorney's duty.

Held, secondly, that the question of negligence in not complying with the statute was a question of fact for the jury.

Thirdly, that there was no ground for arresting the judgment, as the declaration after verdict must be taken as shewing a duty the breach of which was actionable—(affirmed on this point, 10 Q.B. Rep. 83). *Hunter v. Caldwell*, 16 Law J. Rep. (n.s.) Q.B. 274; 10 Q.B. Rep. 69.

Held, also, in the court of error, on objection that the declaration shewed no retainer for the purpose of keeping the action alive, and consequently no duty to do so, that there were, in the allegations above stated, a duty sufficiently shewn, and a breach well assigned. *Hunter v. Caldwell*, 10 Q.B. Rep. 69.

In assumpsit against an attorney for neglecting to instruct counsel to appear for plaintiff in an action brought by the latter against a third party, defendant pleaded that he did not neglect to instruct counsel to appear. Issue thereon. It appeared, that when the action was called on for trial, counsel for plaintiff rose with a brief, called his attorney who was not present, and the witnesses who did not answer, and then withdrew the record:—Held, that plaintiff was entitled to succeed, the meaning of the issue being that counsel had not been properly instructed to appear. *Hawkins v. Harwood*, 19 Law J. Rep. (n.s.) Exch. 33; 4 Exch. Rep. 503.

(G) RETAINER.

A corporation cannot make a valid appointment of an attorney to conduct suits or manage the affairs of the corporation, except under their common seal. And such attorney, if such appointment has not been under their common seal, cannot recover for business done, although the council of the borough had passed a resolution, directing that the business should be done by him, and was cognizant of its progress.

A, being the salaried town clerk of the borough of P, sued the mayor and corporation of the borough for work, &c., as solicitor, in respect of charges contained in different bills; of these bills—

No. 1 was for expenses incurred in opposing a bill introduced into parliament, for setting aside the municipal election in that borough in 1836.

No. 2 for opposing a rule for a mandamus, commanding him to allow certain burgesses to inspect the voting papers.

No. 3 for costs incurred in the matter of the municipal charities of the borough, and was for the extra costs in a Chancery suit, the taxed costs

as between party and party having been paid under the order of the Court of Chancery.

No. 4 and No. 8 were for costs in a Chancery suit, relative to the compensation granted by the corporation to a previous town clerk; this suit was still pending.

No. 5 was for defending an action brought against the mayor for an instalment due on a bond given to secure the same compensation.

No. 6 and No. 9 were for business done at the sessions.

No. 7 and No. 10 were for general business as town clerk.

The plaintiff had received no authority under the seal of the corporation with respect to any part of the business done, but was instructed, by resolutions passed by the town council, to take the necessary steps in reference to the actions and suits above mentioned, and payments had been at various times made to him on account. The cause having been referred to arbitration, and the arbitrator having found that there was no sufficient evidence of a retainer as to No. 1, and that the above facts did not furnish sufficient evidence of retainer as to Nos. 2, 3, 4, 5, and 8, and that there was due to the plaintiff a certain sum in respect of Nos. 6, 7, 9, and 10, which he awarded to be paid to him,—Held, that the finding of the arbitrator was correct.

The plaintiff, in May 1839, received from the defendants the sum of 350*l.*, on account of bills Nos. 2, 3, 4, 5, 6, 7. Of this sum, he appropriated 14*l.* 1*s.* 10*d.*, the amount of bill No. 2, in payment and satisfaction of that bill, and the further sum of 82*l.* 7*s.* 1*d.*, in payment and satisfaction of the bill No. 3:—Held, that the plaintiff's claim in respect of those bills being a just and equitable claim, he might lawfully so appropriate the sums in question. *Arnold v. the Mayor, &c. of Poole*, 12 Law J. Rep. (n.s.) C.P. 97; 5 Sc. N.R. 741; 2 Dowl. P.C. (n.s.) 574.

The declaration was in debt on a decree of the Supreme Court of N. The plea alleged that the decree was in respect of an amended bill, and that before filing thereof the defendant was out of the jurisdiction of the said Court, and so continued, and was never served with a copy of the said bill, nor had notice of any process calling on him to answer the said bill, and that the proceedings were taken in his absence and *ex parte*. Replication, that at the commencement of the suit the defendant was within the jurisdiction of the said Court, and was duly served with process in respect of the original bill in the said suit, and appeared and appointed H E attorney for him in the suit, and H E accordingly became and was the attorney of the defendant, and authorized to conduct his defence in the suit, and that while he was such attorney, and so authorized, he had notice of the amended bill. The rejoinder traversed that H E had notice of the amended bill, *modo et forma*, on which issue was joined:—Held, that the defendant by this traverse admitted that H E had such an authority as would render the replication good, viz., that he was authorized to act as attorney as well in respect of the amended as of the original bill.

Held, also, that such authority given by the defendant about to leave the jurisdiction would support

the decree. *Simms v. Henderson and Henderson v. Henderson*, 17 Law J. Rep. (N.S.) Q.B. 209; 11 Q.B. Rep. 1015.

Justices, in Quarter Sessions, having confirmed an order of removal, made from the parish of C to the parish of L, upon a preliminary objection, a rule nisi was afterwards obtained by L, in 1844, for a mandamus to the Justices to enter continuances and hear the appeal. A copy of the rule was served upon two of the defendants, R D and R T, who, at that time, and at the commencement of the suit, were the churchwardens of C. R T afterwards signed a retainer to the plaintiff, to act as attorney for the parish of C, but subsequently countermanded it. R D did not interfere. Before the rule was argued, J D and W E, the other defendants, were elected overseers, and R D and R T churchwardens. Before the argument on the rule (which was discharged) the plaintiff's clerk saw J D repeatedly about the rule, and was asked by him how the matter was going on; he also saw the other defendant W E repeatedly about it, but he was not so active. The plaintiff's bill of costs having been delivered to one of the defendants, they all expressed readiness to pay, but said there was a grudge in the parish:—Held, that the defendants were not liable. *Marsh v. Davies*, 17 Law J. Rep. (N.S.) Exch. 94; 1 Exch. Rep. 668.

Where actions brought against several defendants are consolidated by rule of court, and by consent, to abide the event of one of them which is proceeded with, the consolidation rule and subsequent proceedings operate as a joint retainer by defendants of the attorney in the action so proceeded with, and they are jointly liable for the subsequent costs of such action. *Anderson v. Boynton*, 19 Law J. Rep. (N.S.) Q.B. 42; 13 Q.B. Rep. 308.

(H) APPOINTMENT AND CHANGE OF ATTORNEY.

Where a party has conducted a cause in person, it is not necessary, in order to enable him to take a step in the cause by attorney, that he should obtain an order for the purpose, or that he should give the other side previous notice of the appointment of the attorney. Taking the step by attorney is in itself a sufficient notice to the opposite party of the appointment. *Jones v. King*, 5 Dowl. & L. P.C. 412.

The objection that an interlocutory proceeding has been taken by an attorney not on the record, is of a strict nature, and it is incumbent on the party making it to establish it distinctly. Therefore, where the attorney of plaintiff had died since the last proceeding in a cause nine years before, and a term's notice of proceeding was given by the attorneys for defendant, who were not the attorneys for him upon the record, an affidavit by plaintiff and his present attorney, that they had not, nor had either of them, been served with any order to change the attorney, nor had any notice that any other person had been appointed, was held insufficient. *Lord v. Wardle*, 15 Law J. Rep. (N.S.) C.P. 259; 3 Com. B. Rep. 295.

Upon an application to change the attorney, where the client is unacquainted with the English language, the affidavits must clearly shew that the purport and object of the motion are known to, and sanctioned by, the client. It is no objection to such

an application that it is made after final judgment. *Davies dem., Lowndes ten.*, 3 Com. B. Rep. 808.

In a declaration against a public officer of an insurance and loan company, the second count stated that it was agreed between the company and the plaintiff that from the 1st of January then next the plaintiff, as the attorney of the said company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business, &c.; and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, and to retain and employ the plaintiff as such attorney. Breach, that the company refused to employ the plaintiff as such attorney, and wrongfully dismissed him, and thence refused to employ him or to pay him the salary:—Held, by the Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, that such count was good upon motion in arrest of judgment, and that the agreement therein set forth was one which created the relation of attorney and client, and amounted to a promise, on the part of the defendants, to continue that relation at least for one year. *Elderton v. Emmens*, 17 Law J. Rep. (N.S.) C.P. 307; 6 Com. B. Rep. 160.

(I) DEALINGS WITH CLIENT.

Principles on which the Court acts in sustaining securities given by a client to his solicitor for bills of costs and monies advanced. *Hiles v. Moore*, 17 Law J. Rep. (N.S.) Chanc. 385.

A person in embarrassed circumstances enters into a composition with his creditors, one of whom is his solicitor. The solicitor prepares and (with the debtor and other creditors) executes the composition deed, by which the debtor is to pay 1,500*l.* by instalments, and to insure his life for that amount, and in default of such payment and insurance the deed is to be void. There is no evidence that the solicitor ever explained to him the nature of the obligations imposed by the deed, or that the covenants were to be strictly performed, or that he (the solicitor) was bound by it; but there is evidence of a private understanding between the solicitor and client, that the solicitor shall, notwithstanding the deed, be paid in full. The debtor fails to insure his life for the whole 1,500*l.* His solicitor cannot as between himself and his client insist upon this failure as ground for avoiding the deed. *Watts v. Hyde*, 2 Coll. C.C. 368.

(K) BILL OF COSTS.

[See BANKRUPTCY, Audit of Accounts—Costs, Taxation of.]

(a) Delivery of.

An attorney cannot maintain an action for a bill for conveyancing done before the 6 & 7 Vict. c. 73. (and until then not liable to taxation), unless he has, after the passing of that statute, delivered a bill as required by section 37, and waited a month after such delivery.

Quære—Whether in the case of a bill taxable before the statute, a delivery before the statute would not be sufficient.

Assumpsit for work as an attorney, and on an account stated. Plea, to the whole declaration, that

the account was stated in respect of work as an attorney, and that no signed bill was delivered as required by the statute:—Held, a good answer to the count on the account stated. *Brooks v. Bockett*, 16 Law J. Rep. (N.S.) Q.B. 178; 9 Q.B. Rep. 847.

In an action by an attorney, for his bill of costs, against a provisional committee-man of a railway company, it appeared that plaintiff had sent his bill to the attorney of the company at his house; that it was afterwards laid before a meeting of the provisional committee at which the defendant was present, and that it was subsequently laid before another meeting by the secretary of the company:—Held, that this was a sufficient delivery of the bill within the 6 & 7 Vict. c. 73. s. 37. *Eggington v. Cumberledge*, 16 Law J. Rep. (N.S.) Exch. 283; 1 Exch. Rep. 271.

In an action against one of the members of a provisional committee for work done as an attorney, defendant pleaded that no signed bill had been delivered. It was proved that a signed bill had been delivered to another member of the same committee at his place of business, and that defendant was appointed a committee-man after part of the work had been done:—Held, not such a delivery within 6 & 7 Vict. c. 73. as to render defendant liable in this action. The bill should be delivered either at the office of the company, or at least to some person who can reasonably be considered to represent the committee. *Edwards v. Lawless*, 17 Law J. Rep. (N.S.) C.P. 293; 6 Com. B. Rep. 329; 6 Dowl. & L. P.C. 105.

Plaintiff, an attorney, proved the delivery of his bill to defendant, accompanied by the following letter to him:—"As Mrs. J H has left your house, I beg to hand you my account, which I hope will be found satisfactory." Mrs. J H was a relation of the defendant, and the business done had reference to procuring a separation between her and her husband:—Held, not a sufficient delivery to the party to be charged, within 6 & 7 Vict. c. 73. s. 37.

But where defendant was one of the managing committee of a railway company, and plaintiff, an attorney, having applied to the managing committee for payment of his bill, was by them referred to the solicitor of the company, to whom, after some correspondence, he sent his bill headed "Northampton, Lincoln and Hull Railway, to R D (the plaintiff) debtor,"—Held, a sufficient delivery of bill within the statute. *Gridley v. Austen, Daubney v. Phipps*, 18 Law J. Rep. (N.S.) Q.B. 387.

A railway company was formed in August 1845, and defendant became a member of the provisional committee in October. The company took offices at No. 43, M St., and put up a plate with their name on it. On 5th of January 1846 the deposits not having been paid, the project was abandoned. Defendant was not shewn to have been at the offices after that date. In September 1846 plaintiff, who had been employed as an attorney by the committee, delivered a signed bill charging the committee, at the offices in M St., where the brass plate still remained:—Held, by *Wilde, C.J.* and *Williams, J.* that there was no evidence for the jury that the plaintiff's bill had been "left for the defendant at his office of business," under the 6 & 7 Vict. c. 73. s. 37; and by *Coltman, J.* and *Maule, J.* that there

was sufficient evidence. *Blandy v. De Burgh*, 18 Law J. Rep. (N.S.) C.P. 2; 6 Com. B. Rep. 623.

In an action on an attorney's bill, where the issue was that no signed bill had been delivered to defendant, a delivery of the bill at the dwelling-house of defendant to his servant is evidence of a delivery to the defendant. *Macgregor v. Keily*, 18 Law J. Rep. (N.S.) Exch. 391; 3 Exch. Rep. 794.

The defendant under a plea of set-off put in an account rendered to him by plaintiff by which he charged himself with items due to defendant. On the other side of the account were items due to plaintiff for costs as an attorney, but for which no signed bill was proved to have been delivered, and which left a balance due to plaintiff:—Held, that plaintiff was entitled to avail himself of the amount of the bill of costs, as the non-delivery of a signed bill did not extinguish the debt, but only prevented an action being brought to recover it. *Harrison v. Turner*, 16 Law J. Rep. (N.S.) Q.B. 295; 10 Q.B. Rep. 482.

A solicitor on payment of his costs undertook, but failed, to deliver his bill. On a petition more than twelve months afterwards the Court under its general jurisdiction ordered the delivery, with costs. *In re Foljambe*, 9 Beav. 402.

The provisional committees of two projected railway companies agreed that the two companies should be amalgamated. The parties who had acted as the solicitors of one of the companies, and had taken an active part in its formation, opposed the amalgamation, and refused to allow the committee of the amalgamated company to use the plans, &c., which were then in the possession of the solicitors, and were required immediately for parliamentary purposes, but upon receiving a cheque for a gross sum, which was to be in full of all demands, they gave up all the plans, &c. and undertook to send in a bill of costs. Upon the petition of a party who had purchased some scrip in the company, and who was one of the committee, but not one of the parties who signed the subscribers' agreement or the cheque, the Lord Chancellor (differing from the Court below) made an order that the solicitors should deliver their bill of costs for the purpose of taxation, without requiring any suit to be instituted. *Ex parte Bass in re Stephens*, 17 Law J. Rep. (N.S.) Chanc. 219.

If a solicitor disobeys the order of course to deliver his bill within fourteen days, the next proceeding is to order him to deliver it within four days, or stand committed. *In re Baxter*, 11 Beav. 37.

An *ex parte* order for the delivery of a bill of costs discharged, with costs; the allegation of the professional employment being denied by the solicitor. *In re Eldridge*, 12 Beav. 387.

A solicitor was ordered to deliver his bill of costs for taxation. Upon a notice to commit for non-delivery, he swore he had no documents or memoranda from which he could make out his bill of costs. The Court made no order on the notice. *In re Ker*, 12 Beav. 390.

(b) Heading and Contents of.

An attorney's bill, under the statute 2 Geo. 2. c. 23, should disclose the title of the suit or other proceedings, as well as the name of the court in which the greatest part of the business was done.

It is not, however, necessary that the bill should be headed in the suit or cause, or in the court; it is sufficient if the items enable a person of ordinary understanding to collect the name of the suit, and the court in which the proceedings charged for took place. *Martindale v. Falkner*, 15 Law J. Rep. (n.s.) C.P. 91; 3 Dowl. & L. P.C. 600; 2 Com. B. Rep. 706.

An attorney's bill must give substantial information as to the court in which the business was transacted. *Engleheart v. Moore*, 15 Law J. Rep. (n.s.) Exch. 312; 15 Mee. & W. 548; 4 Dowl. & L. P.C. 60.

In an action for recovery of fees, &c., for business done by an attorney and solicitor, it appeared that the bill of costs delivered under the provisions of the 6 & 7 Vict. c. 73. s. 37, contained charges for business done in a Chancery suit, headed *Churchill ats. Marks*, and also charges relating to a suit between the defendant and one E, which from the nature of the items must have been in one of the superior courts of law; but in which it did not at all appear. It was, however, proved that for such items as the bill comprised the charges were the same in all the superior courts of law:—Held, that there was no delivery of a sufficient bill of such fees, &c. under the above statute; and the plaintiff was nonsuited. The bill should have stated in what court the common law business was done. *Ivimey v. Marks*, 17 Law J. Rep. (n.s.) Exch. 165; 4 Dowl. & L. P.C. 709; 16 Mee. & W. 843.

A solicitor's bill of costs, directed to E Gannon, headed "*Yourself v. Round*," but indorsed "*Hancock v. Round*," contained various items referring to the purchase of property under a decree of the Court of Chancery, in a cause of "*Hancock v. Round*." Some of the items referred to proceedings in Chancery, and no proceedings in any other court were alluded to:—Held, that by reasonable intendment, the name of the cause and the court in which the business had been done sufficiently appeared in the bill, and that it was sufficient under the 6 & 7 Vict. c. 73. s. 37. *Sargent v. Gannon*, 18 Law J. Rep. (n.s.) C.P. 220; 7 Com. B. Rep. 742; 6 Dowl. & L. P.C. 691.

Where an attorney's bill gives the court in which the business was transacted, and the nature of such business appears from the various items, which relate to proceedings in particular causes, such bill is sufficient within 6 & 7 Vict. c. 73. s. 37, though it does not specify by name the causes in which the business was so transacted. *Anderson v. Boynton*, 19 Law J. Rep. (n.s.) Q.B. 42; 13 Q.B. Rep. 308.

An attorney's signed bill of costs delivered pursuant to 6 & 7 Vict. c. 73. s. 37, comprised items of nine actions in the Exchequer, two actions in the Common Pleas, and the residue of the items, which were of small amount, appeared to be for business done in one of the superior courts of common law, but no court was specified:—Held, that the bill sufficiently complied with the statute, as it gave sufficient information to enable the client to get it taxed by the proper officer. *Keene v. Ward*, 19 Law J. Rep. (n.s.) Q.B. 46; 7 Dowl. & L. P.C. 333.

In a solicitor's bill, the first items referred to taking instructions for a petition in the Court of Review. Another part of the bill referred to attending on the

petitioner's solicitor:—Held, that as it appeared the second petition must be a different one from the first, and the court in which the second petition was presented could not be collected from the bill, it was insufficient under 6 & 7 Vict. c. 73. s. 37. *Dimes v. Wright*, 19 Law J. Rep. (n.s.) C.P. 137; 8 Com. B. Rep. 831; 7 Dowl. & L. P.C. 292.

(c) Taxation of.

(1) In general.

Parties contributing to a highway rate are not entitled to apply for taxation of an attorney's bill, for conducting an indictment, and other business, pursuant to the direction of the surveyor of the highways, such ratepayers not being parties "liable to pay" the bill within the meaning of 6 & 7 Vict. c. 73. s. 38.

Semble—That section 37. gives a common jurisdiction to all the common law courts to order taxation of such bill. *In re Barber*, 15 Law J. Rep. (n.s.) Exch. 9; 14 Mee. & W. 720; 3 Dowl. & L. P.C. 244.

The decision in *Robins v. Mills*, 1 Beav. 227, is inapplicable when the merits of the cause must enter into discussion. *Webb v. Grace*, 12 Beav. 489.

Where neither a case of pressure is proved against a solicitor, nor improper items of charge shewn by a third party applying for an order to tax the bill, the application, will be refused with costs. *In re Evans*, 15 Law J. Rep. (n.s.) Chanc. 115.

On a taxation in equity, a question arose as to the liability of a client to pay the costs of a consolidated action at law. Leave was given to the solicitor to bring his action. *In re Anderson*, 10 Beav. 399.

Where on taxation (not in a cause) a sum is found due from solicitor to client, proceedings to compel payment must be under the old practice, and not under the 11th Order of August 1841. *In re Lovell*, 9 Beav. 332.

A solicitor having in his bill of costs knowingly fixed the rate of his charges for business cannot afterwards on taxation increase it, but on a special application leave may be given to carry in an additional bill for specified items of undercharge and omission arising from errors and mistake. *In re Walters*, 9 Beav. 299.

Order for taxation obtained by an insolvent debtor of a bill of costs incurred prior to his insolvency, discharged, with costs. *In re Halsall*, 11 Beav. 163.

The provisions of the 37th section of 6 & 7 Vict. c. 73, as to the signature of bills of costs, are intended for the protection of the client only, and therefore a bill which has been delivered, though not signed by the solicitor, or inclosed in a letter signed by him referring to it, may be referred by the Court for taxation.

A client obtained an order of course to tax a solicitor's bill of costs which had been delivered to him, and therein the solicitor was directed to deliver up all papers, &c. belonging to the client on payment of the amount to be found due. The solicitor had other papers, which related to business transacted for a deceased person, who was now represented by the petitioner, and in respect of which he claimed to have a lien for other costs; but the Court, under the circumstances adduced, declined to discharge the order for irregularity. *In*

re Pender, 16 Law J. Rep. (n.s.) Chanc. 25; 2 Ph. 69.

[*In re Gaitskell*, 5 Law J. Dig. 53; 1 Ph. 577.]

(2) *What bills are taxable.*

The 37th section of 6 & 7 Vict. c. 73. is retrospective in its operation, and applies to all bills for business done before the statute, whether previously taxable or not. *Brooks v. Bockett*, 16 Law J. Rep. (n.s.) Q.B. 178; 9 Q.B. Rep. 847.

Defendant, a London attorney, employed plaintiff, also a London attorney, to go to Cambridge and defend a party indicted for bribery. In 1841 and 1842 plaintiff sent to defendant his bill of costs, and having in February 1847 re-delivered copies of the bills, duly signed, in March commenced an action against the defendant for the work done:—Held, that the bills were taxable under the 6 & 7 Vict. c. 73. s. 37. *In re Billing*, *Billing v. Coppock*, 16 Law J. Rep. (n.s.) Exch. 265; 1 Exch. Rep. 14; 5 Dowl. & L. P.C. 126.

An attorney's bill may be referred for taxation under 6 & 7 Vict. c. 73. s. 37. though not signed by him, or inclosed in a letter signed by him and referring to it. *Young v. Walker*, 16 Mee. & W. 446.

An agency bill is taxable, under the provisions of the 6 & 7 Vict. c. 73. s. 37. *Smith v. Dimes*, 19 Law J. Rep. (n.s.) Exch. 60; 4 Exch. Rep. 32; 7 Dowl. & L. P.C. 78.

(3) *Order of Course for, under 6 & 7 Vict. c. 73. s. 37.*

Previously to a solicitor proceeding to solicit an act of parliament on behalf of the plaintiffs, a deed was executed by them, by which it was agreed that the solicitor should be paid at the rate of three guineas per day during his employment. The solicitor having brought his action against the plaintiffs to recover the amount of his bill, the latter obtained the common order directing the taxation of the bill, omitting all mention of or reference to the special agreement:—Held, that that was the correct course, and that it was unnecessary to obtain a special order or notice.

The statute 6 & 7 Vict. c. 73. has a retrospective operation, not only on bills for business which was taxable before that act, but also on bills for business which was, by that act, first made taxable.

Whether the validity of a special agreement, which applies to the whole of a bill of costs, can be decided on petition, or whether the filing of a bill is necessary—*quære*. *In re Eyre*, 17 Law J. Rep. (n.s.) Chanc. 62; 10 Beav. 569; affirmed, 17 Law J. Rep. (n.s.) Chanc. 277; 2 Ph. 367.

After an agreement by which a solicitor was to take a sum in full of all demands, an order obtained for taxation is irregular. *In re Mackrill*, 11 Beav. 42.

An order of course to tax directed that on payment, all papers of the client should be delivered up. The solicitor claimed a specific lien beyond the costs:—Held, no ground for discharging the order, but that the solicitor would be protected when application was made to the Court for delivery of the papers. *In re Teague*, 11 Beav. 318.

Mortgagee's solicitor retained the amount of his lien out of the produce of the sale of the mortgaged estate, and charged it as an account delivered to

the mortgagor:—Held, that an order for taxation within twelve months might be obtained of course, and a petitioner who had presented a special petition was ordered to pay the costs. *In re Bigbold*, 9 Beav. 269.

A B, a solicitor, agreed to act for C D, another solicitor, in his personal business, on the terms of principal and agent. C D neglected to take out his certificate during part of the time:—Held, that the agreement was not invalid, and an order of course to tax was sustained. *In re Smith*, 11 Beav. 456.

An order to tax obtained by a third party liable to pay on an allegation that he had employed the solicitor, discharged. *In re Gabriel*, 10 Beav. 45.

The order on a solicitor for payment to his client of a sum found due on taxation, requires personal service, but where it appeared that he was absenting himself to avoid service, an order for substituted service was made. *In re Lloyd*, 10 Beav. 451.

On a motion to discharge an order of course to tax or to give security for costs, the Court ordered the latter only:—Held, that the client could not afterwards by mere notice abandon the orders and file a bill for the same matter: such proceedings having been taken by the client, they were stayed until he had paid the costs consequent on the order of course and the application. *Foley v. Smith*, in *re Smith*, 12 Beav. 154.

(4) *Upon Terms.*

The Attornies and Solicitors Act, 6 & 7 Vict. c. 73. s. 37, enacts that an attorney's bill may be referred to taxation, "with such directions and subject to such conditions as the Court or Judge making such reference shall think proper."

Quære—Whether an attorney's bill will be referred to taxation, without prejudice to the client's liability to pay the amount that may be found to be due, or to his right to dispute the retainer. *In re Reece*, 18 Law J. Rep. (n.s.) Exch. 137.

Where a Judge at chambers, in the exercise of his discretion, in referring an attorney's bill for taxation, under the 6 & 7 Vict. c. 73. s. 37, reserves to the client liberty to question the retainer, and restrains the attorney from bringing an action upon the bill pending the reference, the Court will not interfere without strong ground for so doing. *In re Pyne*, 5 Com. B. Rep. 407.

(5) *Upon special Circumstances after Verdict, Writ of Inquiry or Expiration of a Year, under 6 & 7 Vict. c. 73. s. 37.*

A solicitor had been employed by three persons, A, B and C, carrying on business together, and had also transacted business for A, one of the three, separately. He afterwards sued the three at law for the amount of his bill of costs, in respect of the business transacted by him for the three, as well as for the one of them only; and he appeared in the action for A as his solicitor, and entered up judgment in the action against him. On the petition of B and C, seeking the taxation of the solicitor's bill of costs, the Court, under the circumstances, ordered the taxation of the bill, notwithstanding the judgment; being of opinion that the question of retainer was always for the Master's consideration on the taxation of bills of costs, and that the fact of A not

joining in the petition was no objection to the order referring the bill being made by the Court. *In re Hare*, 16 Law J. Rep. (N.S.) Chanc. 163; 10 Beav. 187.

The clients of a town solicitor, on the delivery of his bill of costs, objected that it was not complete, inasmuch as it did not contain items in respect of business done by a country solicitor whom the clients designated as the town solicitor's agent, but whom the town solicitor claimed a right to treat as employed directly by the clients. More than a year after the delivery of the bill, the clients presented a petition to have it taxed:—Held, that the dispute as to the completeness of the bill was a special circumstance rendering it fit to direct a taxation after the lapse of a year. *In re Bagshawe*, 2 De Gex & S. 205.

(6) *Upon special Circumstances after Payment, under 6 & 7 Vict. c. 73. s. 41.*

Payment of a bill is, *prima facie*, an admission of its correctness; and, after payment, special circumstances must be shewn to entitle a party to an order for taxation of the bill. The special circumstances usually relied on are, first, when pressure has been exercised by the solicitor, and immediate payment required, where delay in completing the business would be inconvenient to the party paying; and, secondly, error or overcharge in the bill. Errors or overcharges may be such as of themselves amount to evidence of fraud, in which case only very slight circumstances of pressure are necessary, if necessary at all. A petition, seeking taxation of a bill of costs, after payment, must point out and particularize items of overcharge.

A client may pay his solicitor a bill of costs, without ever having seen or had delivered to him any bill; but such a course would be bad conduct in the solicitor, and imprudent in the client. *In re Harding*, 16 Law J. Rep. (N.S.) Chanc. 288; 10 Beav. 250.

Taxation after payment ordered on proof of pressure and on shewing grounds for thinking that the bill would be considerably reduced. *In re Sladden*, 10 Beav. 488.

The fact that on the transfer of a mortgage, a mere draft of the bill of costs of the mortgagee's solicitor is for the first time produced and paid, is not without pressure or fraud a "special circumstance," to authorize taxation after payment.

The taxation of a bill at the instance of a third party "liable to pay" is regulated by the relations existing between the solicitor and his client, and not between the solicitor and the third party. *In re Fyson*, 9 Beav. 117. See *Dunt v. Dunt*, *Ibid.* 146.

The special circumstances under which a bill may be taxed are such as existed at the time of payment, or appear on the face of the bill itself. Where payment is extorted or there are improper charges even of small amount; or where the charges are so gross as to evince fraud and oppression, taxation will be directed after payment.

The delivery of a promissory note held under the circumstances to be payment of a bill of costs. *In re Currie*, 9 Beav. 602.

A mere protest against a bill of costs, and the impropriety of the items contained therein at the

time of payment, will not entitle the party making the payment to an order to tax the bill.

A mortgagor, seeking to tax the bill of costs of the mortgagee's solicitor relative to the mortgage transactions, will only be allowed to tax the bill in the same manner, and on the same principle, as the mortgagee would be allowed to tax it; and where the bill of costs of the mortgagee's solicitor was forwarded to the solicitor of the mortgagor upwards or a fortnight before the payment of it by the mortgagor, and payment being insisted on was made by the mortgagor's solicitor before the delivery up of deeds by the mortgagee's solicitor, the Court refused an order for taxation, notwithstanding the mortgagor's solicitor, at the time of payment of the bill, stated his general objection to the items contained in the bill, as being excessive and improper, and also made the payment under protest. *In re Harrison*, 16 Law J. Rep. (N.S.) Chanc. 170; 10 Beav. 57.

A paid bill will not be referred for taxation except under special circumstances, and a mere payment under protest will not take a case out of the general rule. *In re Neate*, 10 Beav. 181.

Petition to tax a bill of costs, paid without pressure nine days after its delivery, dismissed, with costs. *In re Drew*, 10 Beav. 368.

Taxation under special circumstances, more than twelve months after payment of a bill of costs, refused.

Quære—Whether giving a promissory note and signing a memorandum of settlement amounts to payment. *In re Harper*, 10 Beav. 284.

A *cestui que trust* agreed that her trustee, if he acted as solicitor in a suit, should receive full costs. A bill was delivered, and soon after the solicitor ceased to act. Afterwards and under other professional advice the bill was paid with some deduction. An application to tax within twelve months was refused. *In re Wyche*, 11 Beav. 209.

Proof of overcharge alone is insufficient to obtain taxation of a paid bill; but it is a necessary ingredient. *In re Stirke*, 11 Beav. 304.

Taxation refused where payment had been made under protest and no sufficient evidence given of undue pressure. *In re Welchman*, 11 Beav. 319.

Application by residuary legatee, more than twelve months after payment, for taxation of a solicitor's bill against the executor refused, notwithstanding some agreement between the legatee and solicitor, and that payment had afterwards been made behind the back of the legatee.

Order for taxation discharged, with costs, where the petition misrepresented the facts. *In re Rees*, 12 Beav. 256.

A meeting was appointed to settle important matters on August 23rd, and the costs were to be paid by H B. The bill of costs was delivered the evening before, and payment was then insisted on, though the bill was objected to. Upon evidence of overcharge, taxation was ordered after payment.

Two suits attached to the Vice Chancellor's Court were compromised. In one there was an order to dismiss on the payment of costs, and the other was stayed only. The costs of both were paid under pressure, and there were overcharges:—Held, that the Master of the Rolls had jurisdiction to order taxation. *In re Elmslie*, 12 Beav. 538.

(7) *Entering up Judgment, under 6 & 7 Vict. c. 73. s. 43.*

An attorney's bill of costs was, by Judge's order, on the application of the client, and by consent, referred to taxation. The order contained no undertaking by the client to pay, nor any direction to him to pay what should be found due on taxation, and was made without prejudice to the client disputing the retainer. By agreement between the parties, the question of retainer was submitted to the Master, who decided that it was made out to his satisfaction, and made his allocatur in the usual form, "Allowed, R:—Held, that the order, and the allocatur in pursuance thereof, authorized the Court to order judgment to be entered up, under the 6 & 7 Vict. c. 73. s. 43. for the amount, as 'certified to be due and directed to be paid.'" *In re* or *Ex parte Lowless*, 17 Law J. Rep. (N.S.) C.P. 222; 5 Dowl. & L. P.C. 793; 6 Com. B. Rep. 123.

(8) *Notice of Taxation.*

Where in a notice of taxation the date is insensible, it will take effect from the day of delivery. *Grant v. Mackenzie*, 16 Law J. Rep. (N.S.) Exch. 255; 1 Exch. Rep. 12; 5 Dowl. & L. P.C. 129.

(9) *Appeal from Judge's Order for Taxation.*

An attorney undertook to conduct a suit for plaintiff upon the following undertaking:—"Should the damages and costs not be recoverable in this action, under the circumstances, I shall charge you costs out of pocket only." The plaintiff obtained a verdict, with damages 600*l.*, and entered up a judgment for that sum, together with 91*l.* 4*s.* 6*d.* for costs. The defendant having afterwards petitioned the Insolvent Court, a dividend of 272*l.* 3*s.* 4½*d.*, being more than the amount of the attorney's bill, was declared to be due to the plaintiff. The Master, in taxing the bill, allowed the attorney costs out of pocket only, but referred the matter to a Judge at chambers. The Judge directed the taxation to be as for costs out of pocket, and, on a subsequent application to him to direct a review of the taxation, dismissed the summons:—Held, first, that the second application to the Judge was not in the nature of an appeal to him, which precluded the attorney from applying to the Court; secondly, that the costs ought not to be taxed as costs out of pocket only. *In re Stretton*, 15 Law J. Rep. (N.S.) Exch. 16; 14 Mee. & W. 806; 3 Dowl. & L. P.C. 278.

(10) *Costs of Taxation.*

[*Doe d. Potts v. Jinders*, 5 Law J. Dig. 59; 2 Dowl. & L. P.C. 986.]

On petition to confirm the Master's report, after an order of reference to tax the respondent's bill of costs (more than one-sixth of the amount of the bill having been struck off), and for reference back to tax the costs of taxation, the costs of and incidental to the original petition and the petition for reference back to the Master were ordered to be paid by the respondent, after deducting therefrom the costs of an action brought by the respondent previously to the date of the order directing the taxation of the respondent's bill of costs.

On petition to confirm the Master's report, after reference to tax a bill of costs, it is too late to object

that the petition to tax ought not to have been a special one. *In re Hair*, 17 Law J. Rep. (N.S.) Chanc. 247; 11 Beav. 96.

After action brought by a solicitor on his bill, an order was made in equity for taxation. The solicitor was found to be overpaid, but the action at law was in such a state by the misleading of his client, that if it had proceeded a balance would have been found due to the solicitor. On an application for an order on the solicitor to refund and pay the costs of the taxation, the Court made such order, but gave no costs of the action or of the application. *In re Smith*, 11 Beav. 468.

Upon taxation, a solicitor put in an insufficient examination. He was ordered, on motion, to pay the costs occasioned thereby and of the four-day order and of the application. *In re Bainbrigg*, 11 Beav. 620.

(d) *Remedies for.*(1) *Against whom.*

In an action by A and B, who were attorneys, against surveyors of highways of a parish, for business done in procuring an order of magistrates to divert highways in the parish, and on an appeal against that order, it appeared that A and B, in their bill, charged for drawing a resolution of a parish meeting held before the order was applied for, which resolution stated that the order was to be applied for "at the instance and at the expense of the B and G Railway Co."—Held, that A and B must be considered to have undertaken the business on those terms, unless there was an express employment of them by the defendants, and on their credit, of which there ought to be direct proof. *Spurrier v. Allen*, 2 Car. & K. 210.

A member of a committee, formed for the purpose of promoting an improvement bill in parliament, is not liable to the solicitor of the committee, for work done by him for the committee as such solicitor, before he became a member of the committee. *Bremner v. Chamberlayne*, 2 Car. & K. 560.

If the attorney of a lessor, who is not attorney for the lessee, prepare the lease, the lessor is the person liable to pay the attorney for it, and the lessor can recover over against the lessee; and this is so whether the lessee takes up the lease or refuses to do so. *Baker v. Meryweather*, 2 Car. & K. 737.

(2) *By Action.*

Plaintiff sued defendant on a bill of costs, in which there were certain items amounting to 3*l.* 3*s.* 6*d.*, for business done in endeavouring to procure money to pay off a mortgage. The first of these items was in October 1837, and the last on the 20th of January 1838; and it appeared on the face of the bill that applications were made and negotiations entered into with more than one person, with a view to raise the money; and that on the failure of any of these, the defendant was applied to for further orders. The action was commenced on the 12th of January 1844:—Held, that such business was not done in pursuance of a continuous employment of the plaintiff by the defendant, so as to take the earlier items out of the Statute of Limitations.

The defendant, in 1844, paid a bill of costs for business done by the plaintiff in bringing actions of

ejectments at the suit of B for land, which the defendant had mortgaged to B, and which bill was made out to B: Afterwards the bill was taxed, and on taxation a sum of 10*l.* was under the Judge's order and allocatur ordered to be refunded to the defendant.—Held, that the sum of 10*l.* could not be set off against the plaintiff's demand in the present action. *Phillips v. Broadley*, 16 Law J. Rep. (N.S.) Q.B. 72; 9 Q.B. Rep. 744.

An attorney admitted in one of the superior courts may (since 6 & 7 Vict. c. 73.) maintain an action for his costs in proceedings carried on in another court in which he is not admitted in the name of attorneys of the latter. *Hulls v. Lea*, 10 Q.B. Rep. 940.

The 37th section of 6 & 7 Vict. c. 73. applies to bills for business done before as well as after the passing of the statute.

A plea which refers to the cause of action as fees, &c. "claimed and demanded" in the declaration, sufficiently confesses a cause of action. *Scadding v. Eyles*, 15 Law J. Rep. (N.S.) Q.B. 364; 9 Q.B. Rep. 858.

Assumpsit, first count for work, labour, care, diligence and attendance of plaintiff as attorney; second count for money paid. The plea commenced as a plea to the whole declaration, and stated that the action was for recovery of certain fees, charges, and disbursements, and for certain business done by plaintiff as an attorney, as in the first count in that behalf mentioned, and then denied a delivery to defendant of a signed bill, in the terms of 6 & 7 Vict. c. 73. s. 37. Demurrer and joinder:—Held, that the plea was pleaded to the whole declaration, and that the disbursements applied to the count for money paid.

Held also, that it is sufficient in such plea to negative the delivery of a signed bill in the terms of the statute. *Tate v. Hitchins*, 18 Law J. Rep. (N.S.) C.P. 256; 7 Com. B. Rep. 875.

(3) By Execution under 1 & 2 Vict. c. 110. s. 18.

A Judge's order, under 6 & 7 Vict. c. 73. s. 43, ordering judgment to be entered up for the amount found by the Master's allocatur to be due on an attorney's bill of costs, has the same force as a rule of court for the payment of money under the 1 & 2 Vict. c. 110. s. 18. No action, therefore, need be brought on such order, and if brought the costs of the writ, declaration, and appearance will not be allowed. *Griffiths v. Hughes*, 16 Law J. Rep. (N.S.) Exch. 176; 16 Mee. & W. 809; 4 Dowl. & L. P.C. 719.

(L) LIEN FOR COSTS.

The Court will not order an attorney to deliver up papers on which he has a lien for balance of a bill, although an offer is made to pay the amount into court, subject to the verdict of a jury.

The lien of an attorney remains although the claim is barred by the Statute of Limitations. *In re Broomhead*, 16 Law J. Rep. (N.S.) Q.B. 355; 5 Dowl. & L. P.C. 52.

An attorney who has done professional work for a partner in a firm on his private account, and also for the firm, has no lien upon a private deed of the partner in respect of the debt due to him from the

firm. *Turner v. Deane*, 18 Law J. Rep. (N.S.) Exch. 343; 3 Exch. Rep. 836.

The lien of an attorney attaches upon money received by way of compromise; though the verdict and judgment be against his client. Upon an application to give effect to such lien, the affidavit should shew the amount claimed by the attorney. *Davies dem., Lowndes ten.*, 3 Com. B. Rep. 823.

P, the solicitor for the plaintiff in a cause, agreed with the plaintiff not to sue him personally for the costs, but to rely on the fund sought to be recovered. P was also mortgagee of three-fourths of the fund. P having been arrested and lying in prison, an order was made upon a petition presented by the plaintiff, that P should deliver up the papers in the cause to the plaintiff's new solicitor, the new solicitor giving an undertaking to hold them, subject to the lien of P, and the new solicitor and the plaintiff undertaking to abide by any order of the Court respecting it. *Scott v. Fenning*, 15 Law J. Rep. (N.S.) Chanc. 88.

A solicitor has not a general lien on a fund, and it extends only to costs in the cause and costs immediately connected with costs in the cause. *Lucas v. Peacock*, 9 Beav. 177.

A solicitor's lien for costs extends to articles delivered to him for the purpose of being exhibited to witnesses on the trial of an action. *Friswell v. King*, 15 Sim. 191.

A solicitor, without notice of an incumbrance either legal or equitable prior to his possession of the title deeds of the property affected by it, has no right of lien on the deeds as against the incumbrancer.

Where a solicitor, under such circumstances, is also mortgagee of the property, with priority over another incumbrancer, the right of lien does not extend beyond his claim as mortgagee.

An existing right of lien will not be destroyed by the entering of a solicitor into partnership.

The costs of an incumbrancer unsuccessfully contesting with the solicitors of the mortgagor their right of lien on title deeds relating to the mortgaged property are to be added to the mortgaged debt.

The mortgagee of two distinct estates, each of which is subject to a prior mortgage to different mortgagees, is entitled as against the mortgagor to a decree for the redemption or foreclosure of either or both of the mortgaged estates.

Observations on the withdrawal by the plaintiff of a gratuitous offer in his bill.

Reference for an inquiry as to substantial repairs and lasting improvements will not be ordered at the hearing on further directions, merely on the statement of counsel for an incumbrancer, that such repairs, &c. have been made; unless all parties interested consent, a petition is necessary. *Pelly v. Wathen*, 18 Law J. Rep. (N.S.) Chanc. 281; 7 Hare, 351.

The lien of solicitors of a company on the papers of the company is not affected by the Joint-Stock Companies Winding-up Act. *In re Oxford and Worcester Extension and Chester Junction Rail. Co. ex parte Potter*, 18 Law J. Rep. (N.S.) Chanc. 247; 1 De Gex & S. 728.

The lien of a solicitor cannot be allowed to prevent the completion of an order which has been

passed by him as solicitor in the cause previous to his being discharged; and he was directed to produce the order for entry on payment of 20s. costs. *Clifford v. Turrill*, 2 De Gex & S. 1.

A suit was compromised between the plaintiff and the defendant by payment by the latter to the former of a certain sum. The defendant had notice of the lien of the plaintiff's solicitors for the costs of the suit. Ordered, on the petition of the solicitors, that the plaintiff and the defendant, or one of them, should pay the solicitors their taxed costs of the suit and of the petition, not exceeding in the whole the sum paid by the defendant to the plaintiff on the compromise. *White v. Pearce*, 18 Law J. Rep. (N.S.) Chanc. 462; 7 Hare, 276.

AUCTION.

[See CONTRACT—GOODS SOLD AND DELIVERED—SALE—VENDOR AND PURCHASER.]

(A) SALE.

- (a) *When void* [Puffing].
- (b) *Conditions of* [Re-sale].

(B) AUTHORITY AND RIGHT OF AUCTIONEER.

- (a) *Revocation of Authority*.
- (b) *Right to sue*.

(A) SALE.

(a) *When void* [Puffing].

A sale by auction announced to be "without reserve," is void if the vendor employs a puff to bid on his behalf, without giving notice of the fact; and the purchaser may recover back his deposit from the auctioneer. *Thornett v. Haines*, 15 Law J. Rep. (N.S.) Exch. 230; 15 Mee. & W. 367.

An estate was put up for auction in lots. The particulars of the sale did not state, either that the sale was to be without reserve, or that the vendors intended to employ a person to bid on their behalf. A bought one of the lots at 690*l*. The vendors had given instructions privately to a person to bid for the lots up to certain sums, in order that the lots should not be sold under those prices; but not to bid beyond the sums fixed. This person bid 650*l*. for the lot, and then stopped. The bid-dings were by the conditions of sale to be not less than 5*l*. There was no allegation that A was in any way misled by what the bidder had done. In a suit for specific performance by the vendors against A,—Held, that A had not, under these circumstances, a valid defence to the suit.

In this case, A, by his answer, had stated that the auctioneer had said in the auction-room "that the sale was to be without reserve." By the evidence of the person employed to bid, it appeared that the auctioneer had said, "that the sale was to be a *bond fide* one, and if there were any puffers in the room he should hate himself."—Held, that this additional circumstance did not afford A a valid defence to the suit. *Woodward v. Miller*, 15 Law J. Rep. (N.S.) Chanc. 6; 2 Coll. C.C. 279.

(b) *Conditions of* [Re-sale].

Where goods are sold by auction, subject to a condition, that, if the purchase-money be not paid

on the following day, they may be re-sold, and the loss recovered from the bidder making default, and the right of re-sale is accordingly exercised, the deficiency cannot be recovered in an action for goods bargained and sold, as the effect of the reservation of the power of re-sale is to make the original sale conditional, and not absolute. *Lamond v. Devaille* or *Davall*, 16 Law J. Rep. (N.S.) Q.B. 136; 9 Q.B. Rep. 1030.

(B) AUTHORITY AND RIGHT OF AUCTIONEER.

(a) *Revocation of Authority*.

An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, and such revocation is valid against parties dealing without knowledge of it; therefore in a suit by a purchaser to enforce specific performance of a contract entered into by the auctioneer by mistake or inadvertence for the sale of property as to the part of which, a right of way over the land sold, his authority had been revoked, it is competent to the defendant to insist on such revocation, and parol evidence is admissible in support of that defence. *Manser v. Back*, 6 Hare, 443.

(b) *Right to sue*.

An auctioneer put in possession of fixtures for the purpose of selling them, the purchaser being bound to detach them from the freehold and remove them, is not entitled to maintain trespass *de bonis asportatis*, for the wrongful removal of them. *Davis v. Danks*, 18 Law J. Rep. (N.S.) Exch. 213; 3 Exch. Rep. 425.

[See *Brittain v. Lloyd*, MONEY PAID.]

AUDITA QUERELA.

An *audita querela* can only be granted upon affidavit and motion in open court.

Where a writ had issued without such motion and affidavit, and the plaintiff in the action subsequently became a bankrupt, he was permitted to move to set aside the writ and proceedings without shewing any assent on the part of the official assignee. *Dearie v. Ker*, 18 Law J. Rep. (N.S.) Exch. 448; 4 Exch. Rep. 82.

A proceeding by *audita querela* is an "action or suit," within 4 & 5 Anne, c. 16. s. 4, and a defendant may plead several pleas thereto. *Giles v. Hutt*, 17 Law J. Rep. (N.S.) Exch. 121; 1 Exch. Rep. 701; 5 Dowl. & L. P.C. 387.

The *venire facias* and summons to appear in an *audita querela* must be personally served, it being original process.

Quære—Whether the *venire facias* is not notice to all the world. *Williams v. Roberts*, 19 Law J. Rep. (N.S.) Exch. 269; 1 L. M. & P. 381.

A writ of *venire facias* and *supersedeas* to the sheriff, after writ of *audita querela* obtained, is absolute in the first instance. *Giles v. Hutt*, 16 Law J. Rep. (N.S.) Exch. 258; 1 Exch. Rep. 59; 5 Dowl. & L. P.C. 115.

AUTREFOIS CONVICT.

[See INDICTMENT, Pleading.]

BAIL.

[For Affidavit and Order to hold to Bail, see ARREST, Affidavit and Order. And see WRIT OF ERROR—FOREIGN ATTACHMENT—PRISONER, Discharge of.]

- (A) BAIL-BOND.
 - (a) Cancelling.
 - (b) Action on by Sheriff's Assignees.
- (B) JUSTIFYING.
- (C) ADDING [AFTER RECOGNIZANCE COMPLETED].
- (D) DISCHARGE OF.
- (E) TAKING MONEY DEPOSITED IN LIEU OF, OUT OF COURT.
- (F) IN CRIMINAL CASES.
 - (a) Upon Removal of Conviction by Certiorari.
 - (b) Liability for Costs of Prosecutor.

(A) BAIL-BOND.

(a) Cancelling.

Where upon a Judge's order and writ of *capias* the defendant gave bail to the sheriff, and on appeal against the order it appeared that the defendant had no intention of leaving England for two months, but that the plaintiff would not be able to get judgment in that time, the Court, considering the arrest premature, cancelled the bail-bond; but directed the order and *capias* to stand. *Pegler v. Hislop*, 17 Law J. Rep. (n.s.) Exch. 53; 1 Exch. Rep. 437.

(b) Action on by Sheriff's Assignees.

In an action by the assignee of a bail-bond, the declaration stated that one H had been arrested under a *capias*, issued by virtue of a special order made by a Judge; and that defendant had entered into the bail-bond, with a condition, reciting that the said H had been arrested by virtue of a *capias* issued out of the Court of Queen's Bench against the said H in an action of debt at the suit of plaintiff; and that the said bond had been duly assigned to plaintiff by the sheriff according to the statute. On demurrer to the declaration, it was held, that defendant was estopped by his execution of the bail-bond from objecting that H was not arrested in an action at the suit of plaintiff.

Semble—That where in an action on a bail-bond it is alleged, that a Judge has made an order for a *capias* under 1 & 2 Vict. c. 110, it will be presumed that all facts necessary to give him jurisdiction existed, and were proved before him.

The writ of summons was stated in the declaration to have issued on the same day as that on which the bail-bond was assigned to the plaintiff:—Held, that the declaration was good, as it did not necessarily appear that plaintiff's title accrued after action brought. *Barnes v. Keane*, 19 Law J. Rep. (n.s.) Q.B. 309; 15 Q.B. Rep. 75.

(B) JUSTIFYING.

Shares in a railway company in actual operation are property in respect of which bail may justify. *Pierpoint v. Brewer*, 15 Law J. Rep. (n.s.) Exch. 81; 15 Mee. & W. 201; 3 Dowl. & L. P.C. 487.

(C) ADDING [AFTER RECOGNIZANCE COMPLETED].

Where bail have become incompetent after recognizance completed, a party cannot be called upon to find fresh bail either in civil or criminal proceedings.

An application of this nature ought to be made at chambers. *Regina v. Shirley*, 12 Law J. Rep. (n.s.) Q.B. 346.

(D) DISCHARGE OF.

[*Phillips v. Don*, 5 Law Dig. 39; 6 Dowl. & L. P.C. 527.]

Where an indictment had been removed by *certiorari*, and defendant being convicted had become liable to costs, the Court refused to discharge the recognizances of the bail to the *certiorari* until the costs were paid, although the recognizances made no mention of costs; but they stayed the proceedings on the recognizances with respect to the defendant *propter paupertatem*. *Regina v. Thornton*, 19 Law J. Rep. (n.s.) M.C. 113; 4 Exch. Rep. 820; 1 L. M. & P. 192.

(E) TAKING MONEY DEPOSITED IN LIEU OF, OUT OF COURT.

A defendant arrested by a Judge's order deposited a sum of money in lieu of bail, and then applied to the Court for a return of the deposit. The Court thought that, but for the matters disclosed on the affidavits on shewing cause, the defendant would have been entitled to a return; but the affidavits having raised a question whether the defendant had not since his arrest broken up his establishment and gone abroad, on which point the defendant had had no opportunity of being heard, the Court referred that question to the Master, before deciding on the return of the deposit. *Graham v. Sandrinelli* and *Talbot v. Bulkeley*, 16 Law J. Rep. (n.s.) Exch. 67; 16 Mee. & W. 191, 193; 4 Dowl. & L. P.C. 317.

The Court will not order the sum paid into court in lieu of special bail to be paid out to defendant on perfecting special bail, unless that is done before issue joined; stat. 1 & 2 Vict. c. 110, making no alteration in the practice in this respect. *Welshman v. Sturgess*, 18 Law J. Rep. (n.s.) Q.B. 168; 13 Q.B. Rep. 556; 6 Dowl. & L. P.C. 739.

(F) IN CRIMINAL CASES.

(a) Upon Removal of Conviction by Certiorari.

Where a *certiorari* has issued to bring up a conviction, under which a party is in prison, the Court will admit him to bail until the case is determined by the Court. *Regina v. Lord*, or *Ex parte Lord* 16 Law J. Rep. (n.s.) M.C. 15; 4 Dowl. & L. P.C. 405.

(b) Liability for Costs of Prosecutor.

The defendant had removed an indictment by *certiorari*, and had entered into the usual recognizances with two sureties. After a verdict of guilty at the assizes, he obtained a rule for a new trial, on payment of costs. Without paying the costs, he gave notice of trial for the next assizes to the prosecutor, who obtained a Judge's order, by which, if the costs were paid by a certain day, the notice of

trial, was to stand good, but otherwise to be set aside. The defendant did not pay the costs, did not try the indictment, and died within a few weeks. The prosecutor obtained a side-bar rule to tax his costs to be paid by the defendant or his bail:—Held, that the bail were not liable to pay the prosecutor's costs, because they are only liable when the principal has been convicted, and that after the granting the rule for a new trial it could not be said that there had been a conviction within the true meaning of the recognizance; and that neither the defendant's default in paying the costs, nor the Judge's order setting aside the notice of trial, did away with the rule for a new trial or restored the original verdict.

Held, also, that whether liable or not, the bail ought not to have been mentioned in the side-bar rule for the taxation of costs. *Regina v. Bowen*, 19 Law J. Rep. (N.S.) Q.B. 63; 7 Dowl. & L. P.C. 312.

BAILMENT.

[See CARRIER—DETINUE—HACKNEY CARRIAGE—INNKEEPER—LARCENY.]

BANK OF ENGLAND.

[See EVIDENCE—STOCK EXCHANGE.]

BANKER AND BANKING COMPANY.

[For Banker's Cheques, see BILLS OF EXCHANGE AND PROMISSORY NOTES. And see CONTRACT—FORGERY—JUDGMENT—PARTNERS.]

(A) RIGHTS AND LIABILITIES.

- (a) *Payment of Bills.*
- (b) *Nature of Contract on Deposit.*
- (c) *Bond for faithful Service of Clerk.*
- (d) *Extent in chief.*
- (e) *Payment into Bank.*
- (f) *Transfer or Set-off of Account.*

(B) LIEN OF BANKERS.

(C) PUBLIC OFFICER [ACTIONS AND SUITS].

(D) SCIRE FACIAS TO CHARGE MEMBERS OF COMPANY.

- (a) *Concurrent Writs.*
- (b) *Declaration and Pleas.*
- (c) *Retired Members.*
- (d) *Executors.*
- (e) *Suppression of Facts.*
- (f) *Waiver of Irregularity.*
- (g) *Husband of female Shareholder.*

(A) RIGHTS AND LIABILITIES.

(a) *Payment of Bills.*

The defendants, bankers, holding in their hands 20*l.* on account of the plaintiff, paid a bill of exchange, accepted by the plaintiff, payable at their banking house, for 42*l.*, when it became due and was presented to them by the holder. No orders to pay the acceptance had been given by the plaintiff, nor had he countermanded the authority contained in the acceptance:—Held, that the defendants

had authority to apply the funds of the plaintiff in their hands in payment of the acceptance.

Quære—Whether the defendants could recover from the plaintiff the difference between the amount of the bill and the monies in their hands.

The fact of the defendants, after payment of the bill, having endeavoured to get back the money, and having treated the payment as made by mistake, and subsequently honouring a cheque drawn by the plaintiff, cannot alter or destroy the pre-existing authority. *Kymer v. Laurie*, 18 Law J. Rep. (N.S.) Q.B. 218.

Where a bill of exchange is accepted, payable at a banker's, having on it at time of acceptance, the forged indorsement of the payee, the bankers are responsible to the acceptor if they pay the party wrongfully claiming under such forged indorsement.

It is the practice of the Pelican Insurance office to pay the loss on a country policy by means of a bill of exchange, drawn by the local agent on the London office, payable to the persons entitled to the money, or their order, pursuant to a "leave to draw" sent to such agent. A, who was insured in the office, died in the country, and his death being certified to the office, a leave to draw was sent in the ordinary course to the local agent, who drew a bill of exchange for the amount of the policy, payable to A's executors or order, and handed it to W, their solicitor. W forged the signature of the executor to the bill and paid it to his bankers in the country, by whom it was forwarded to Messrs. J L, & Co., in London. Messrs. J L, & Co. presented the bill at the office of the Pelican Company for acceptance, and it was accepted by them, having such forged indorsements on it, and made payable at the bank of the defendants, their bankers, by whom it was subsequently paid and the amount debited to the company. The forgery of the signature of the payees being afterwards discovered, the insurance office was obliged to pay the amount of the bill to them:—Held, in an action by the insurance office against the defendants for wrongfully paying the bill, that the defendants were liable, as there was nothing to exempt them from the ordinary responsibility of bankers to ascertain that payment is made by them to the person entitled. *Tucker v. Robarts*, 18 Law J. Rep. (N.S.) Q.B. 169.

(b) *Nature of Contract on Deposit.*

Money deposited by a customer in a banker's hands is money lent, with the superadded obligation that it is to be repaid when called for by cheque; and if it remain in his hands for six years without any payment by him of the principal or allowance of interest, the Statute of Limitations is a bar to its recovery. *Pott v. Cleg*, 16 Law J. Rep. (N.S.) Exch. 210; 16 Mee. & W. 321.

(c) *Bond for faithful Service of Clerk.*

C entered into the service of bankers as their clerk at B, and gave a bond with sureties for the faithful discharge of his duties, and they covenanted thereby to make good all losses which might accrue to the bankers through the negligence, &c. of C. D, a customer of the bank, lived twelve miles from B, and requested the bankers to send over a person to receive his rents on a certain day. C was accordingly sent over, received the cash from D, and

lost it on his way home. In an action of covenant against the sureties for the amount of the money lost by C, the jury found that it was not the custom for bankers at B to send over and receive money from their customers in the country:—Held, that the money was received by C in the course of his employment as banker's clerk; that the receipt of the money by C was a receipt by the bankers; and that they were entitled to recover. *Melville v. Doidge*, 18 Law J. Rep. (N.S.) C.P. 7; 6 Com. B. Rep. 450.

(d) *Extent in chief.*

An extent in chief may issue against a banker for the recovery of interest allowed by him on the half-yearly balance of a tax collector's account in which his own and the Crown monies are blended together. *Regina v. Adams*, 2 Exch. Rep. 299; s.p. *Rex v. Ward*, *Ibid.* 301, n.

Also to recover the amount of a banker's promissory note in the hands of a tax-collector, and received by him in payment of taxes. *Regina v. Adams*, 2 Exch. Rep. 299.

(e) *Payment into Bank.*

Payment into a London banker's, who were agents to a country bank, held a payment into the latter bank, and that the former were not liable for such payment in consequence of the failure of the country bank the day afterwards. *Williams v. Deacon*, (in error), 4 Exch. Rep. 397.

(f) *Transfer or Set-off of Account.*

A and B, traders, had a joint account at their bankers, and A had also a separate account at the same bank. The bankers suspended payment; at that time the joint account of A and B was indebted to the bankers, but the bankers were indebted to A upon his separate account. A and B, in pursuance of an arrangement between themselves, gave a notice to the bankers, desiring them to transfer the money standing to the separate account of A to the joint account of A and B. The bankers omitted to comply with this order, and afterwards became bankrupts, and their assignees brought an action against A and B for the balance due to the bankers upon their joint account. A and B filed a bill to restrain the proceedings at law:—Held, that the bankers, after a suspension of payment, could not transfer or set off one account against another; that they had no lien upon the separate balance in their hands for the money due to them upon the joint account; and that A and B had no right to be relieved from the proceedings at law; and the bill was dismissed, with costs. *Watts v. Christie*, 18 Law J. Rep. (N.S.) Chanc. 173; s.c. 11 Beav. 546.

(B) LIEN OF BANKERS.

The general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange.

A banker's lien does not arise on securities deposited with him for a special purpose, as where Exchequer bills are placed in his hands to get interest on them, and to get them exchanged for new bills. Such a special purpose is inconsistent with the existence of a general lien.

Where a person who is in reality the agent of another, deposits Exchequer bills with his own bankers, without informing them whose property the bills are, the bankers may be held entitled to consider the bills as the depositor's property, and to hold them as security for any money due to them from him, if the mode of deposit, or the circumstances attending it, give them a lien on the bills as against him.

A was the London agent of B, a Portuguese merchant, and in that character purchased Exchequer bills for him, received interest on them, and at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A kept an account with C, as his banker, and at C's banking-house had several tin boxes, in which he deposited these Exchequer bills, and of which he kept the keys. On the 1st of December 1836, A took out of a tin box several Exchequer bills, which he delivered to C, requesting C to get the interest due on them, and to get the Exchequer bills exchanged for others. C did so. Before A came to take back the Exchequer bills acceptances of his beyond the amount of his cash credit account, were presented at C's bank and paid. A afterwards became bankrupt:—Held, that C had not a lien on the Exchequer bills in his hands for the balance due to him on A's account.

The original judgment of the Common Pleas, 1 Man. & G. 908, affirmed; and that in the Exchequer Chamber, 6 Man. & G. 630, reversed. *Brandao v. Barnett*, 12 Cl. & F. 787; 3 Com. B. Rep. 519.

By the deed of settlement of a joint-stock bank, it was provided, "that the directors should have a lien on the shares and stock of every shareholder for all debts due to the company, and that such lien should at all times be the paramount lien on the shares and stock of such shareholder; and the directors were empowered to cancel and declare forfeited the shares, or to sell and dispose of them, or otherwise deal with the same to obtain payment of the said debts":—Held, that the company had a lien against a shareholder who had overdrawn his account, not only on the shares, but also on the dividends arising from them. *Hague v. Dandeson*, 17 Law J. Rep. (N.S.) Exch. 269; 2 Exch. Rep. 741.

[See (f) *Transfer or Set-off of Account.*]

(C) PUBLIC OFFICER [ACTIONS AND SUITS].

In an action by the public officer of a banking company the plaintiff was described as one of the public registered officers, for the time being, of and for certain persons, &c.; and the declaration stated that the defendant had been summoned to answer the plaintiff as such public officer as aforesaid:—Held, on special demurrer, that this was a sufficient statement of the plaintiff having been public officer at the commencement of the action.

The statute 7 Geo. 4. c. 46. was recited in the declaration as an "Act made and passed in the seventh year of the reign of her present Majesty &c., for, amongst other things, the better regulating co-partnerships of bankers in England:"—Held, that the act was sufficiently recited. *Esdaile v. Maclean*, 16 Law J. Rep. (N.S.) Exch. 71; 15 Mee. & W. 277.

In an action of *indebitatus assumpsit* against the

public officer of a joint-stock banking company, the defendant pleaded, setting out the deed of the company, and stating the necessary averments as to the due making of calls upon certain original shares held by the plaintiff, and that the plaintiff was indebted to the company upon and by virtue of the premises, in the amount of the calls, and sought to set off that amount. The plaintiff replied that he was not nor is indebted to the company *modo et formâ*.—Held bad, upon special demurrer.

The replication was also held bad, where the plea sought to set off in like manner the amount of calls due upon shares that the plaintiff had purchased.

Held, also, that the pleas were good. *Milvain v. Mather*, 19 Law J. Rep. (N.S.) Exch. 227; 5 Exch. Rep. 55; 1 L. M. & P. 220.

A deed of co-partnership of a banking company, carrying on business under 7 & 8 Geo. 4. c. 46, by which the shareholders covenant with the parties of the first part (*inter alia*) to pay calls duly made, does not enable such parties to sue upon the covenant, but the action must be brought in the name of one of the public officers of the company, pursuant to the 9th section of that statute, the words in that section "*shall and may*" being obligatory and not merely permissive. *Chapman v. Milvain*, 19 Law J. Rep. (N.S.) Exch. 228; 5 Exch. Rep. 61; 1 L. M. & P. 209.

A bill was filed against A as the registered public officer of the Yorkshire Banking Company. A by his answer stated that he had ceased to be such public officer, and that B then was the public officer of the company.—Held, that under the terms of 7 Geo. 4. c. 46. s. 9, it was not necessary to file a supplemental bill, or to obtain any order for the purpose of bringing the new public officer before the Court.

Under the circumstances of the case, the Court ordered the production of documents admitted by A to be in the possession of the company; the notice of motion being served on A, and the new public officer of the company. *Butchart v. Dresser*, 16 Law J. Rep. (N.S.) Chanc. 198.

(D) SCIRE FACIAS TO CHARGE MEMBERS OF COMPANY.

(a) Concurrent Writs.

It is no answer to an action on a *scire facias*, to have execution against a member for the time being of a banking co-partnership, under 7 Geo. 4. c. 46. s. 13, that the plaintiff had previously issued another *sci. fa.*, and had obtained an award of execution against another member for the time being of the same co-partnership. *Burmester v. Crompton*, 18 Law J. Rep. (N.S.) Exch. 142; 3 Exch. Rep. 397; 6 Dowl. & L. P.C. 430.

It is no answer to a declaration in *sci. fa.* against a member of a banking company, founded upon a judgment against the public officer of such company, that another writ is pending on the same judgment against another member of the company. *Nunn v. Lomer*, 18 Law J. Rep. (N.S.) Exch. 247; 3 Exch. Rep. 471.

(b) Declaration and Plea.

Quære—Whether a declaration in *sci. fa.* on a judgment recovered against the public officer of a

banking co-partnership is bad, which alleges that the defendant at the time of judgment recovered was and from thence hitherto hath been and still is a member of the said co-partnership.

Semble—That a writ in that form would be quashed on application to a Judge at chambers. *Esdaille v. Trustwell*, 16 Law J. Rep. (N.S.) Exch. 316; 1 Exch. Rep. 371; 5 Dowl. & L. P.C. 219.

The Court quashed a writ of *scire facias* on a judgment recovered against the public officer of a banking co-partnership, which alleged that A B, "at the time of the commencement of the said action in which," &c., "and at the time of the recovery and giving of the said judgment was, and from thence continually has been and still is, a member of the said co-partnership," &c. *Bank of Scotland v. Fenwick*, 17 Law J. Rep. (N.S.) Exch. 92; 1 Exch. Rep. 792; 5 Dowl. & L. P.C. 377.

Where a declaration in *scire facias* upon a judgment against a public officer of a banking company under 7 Geo. 4. c. 46. referred in one part to the "statute," and in another to the "statutes,"—Held, on special demurrer, that it was good, as the reference to the statutes was mere surplusage.

Held, also, that the defendant was sufficiently described as "now a member of the said co-partnership." *Nunn v. Lomer or Claxton*, 18 Law J. Rep. (N.S.) Exch. 342; 3 Exch. Rep. 712; 6 Dowl. & L. P.C. 637.

A declaration in *scire facias* stated that the plaintiff, by the judgment of the Court of, &c. recovered against B, one of the public officers of certain persons united in co-partnership, &c. for the purpose of carrying on the business of bankers in England, according to the 7 Geo. 4. c. 46, a debt of 3,000*l.*, and damages 23*l.* 3*s.* 6*d.*, whereof B, as such public officer, was convicted, as on inspecting the said rolls of our Exchequer appears. Plea, that S was possessed of a share in the funds of the co-partnership and was a member thereof; that he appointed the defendants his executors, and that by the ways and means and manner aforesaid, and not otherwise, they became executors of the will of S, and entitled to the share of S and members of the co-partnership by reason of their share and interest as such executors, and not otherwise, and that they have fully administered all the goods of S.—Verification:—Held, first, on special demurrer, that the plea was bad, as amounting to an argumentative denial of membership. Secondly, that the declaration was good, and that it was not a valid objection on general demurrer that it omitted to state that the co-partnership was actually carrying on the business of bankers. *Ness v. Bertram*, 18 Law J. Rep. (N.S.) Exch. 476; 4 Exch. Rep. 195.

(c) Retired Members.

In order to issue a *sci. fa.* against retired shareholders in a joint-stock banking company, under 7 Geo. 4. c. 46. s. 13, it is sufficient if reasonable and *bonâ fide* attempts have been made to obtain satisfaction from the existing shareholders; and it is not essential that executions should have been issued against every existing shareholder, if it appear probable that such executions would have been ineffectual.

Judgment was signed against the public officer of a banking company in an action brought on contracts entered into at various dates between August 1845 and January 1846. The name of B appeared as a shareholder in a return made the 24th of March 1845 and in all subsequent returns up to September 1845, when it was omitted. It was stated that this last return was informal, and that it was believed B was still a shareholder. No return of B's retirement was ever made:—Held, to be *prima facie* evidence that B was a shareholder when the contracts were entered into.

The fact that B was not then a shareholder may be pleaded to the *sci. fa.*

It is no answer to the application that there has been a fraudulent transfer of shares from a person who might have been proceeded against, but to which the plaintiff is not shewn to have been a party.

The plaintiff is not compelled to proceed against an insolvent shareholder, who is entitled in equity to reimbursement from other solvent persons.

If a *sci. fa.* issues against a person who was a shareholder when part only of the contracts recovered upon were entered into, the Court will limit the execution against him to the amount for which he is liable.

Judgment having been signed in an action of debt against the public officer by default for the nominal debt in the declaration, the Court will grant leave to issue a *sci. fa.* on that judgment against former shareholders upon an undertaking not to levy for more than is really due. *Harvey v. Scott*, 17 Law J. Rep. (N.S.) Q.B. 9; 11 Q.B. Rep. 92.

Where execution has issued against one or more of a banking co-partnership, established under 7 Geo. 4. c. 46, and no satisfaction has been obtained, and the Court sees grounds for believing that plaintiff has used due diligence to obtain satisfaction from the existing members of the company, it will allow a *scire facias* to issue against former members; and it is not necessary that execution should have first issued against all the existing members, (*Wilde, C.J. dubitante*).

The Court will grant a *scire facias* against parties upon *prima facie* evidence of their having been members at the time of the contract, there being no affidavit upon their part in contradiction.

Semble—That where judgment has been obtained against a public officer of a bank, sued under the above statute, the partnership effects of the bank may be seized in execution.

It is not a sufficient ground for shortening the time within which parties have to shew cause, that otherwise the three years mentioned in the above statute as the limit of a retired partner's liability might elapse. *Field v. McKenzie*, 16 Law J. Rep. (N.S.) C.P. 203; 5 Dowl. & L.P.C. 172; 4 Com. B. Rep. 705.

A creditor of a joint-stock banking company, established under the 7 Geo. 4. c. 46, before obtaining a *scire facias* to have execution against a member of the company at the time of the contract, is bound to shew that he has previously made *bona fide* efforts to render the execution effectual against all who were members of the company at the time of the execution.

Where a member of a joint-stock company had sold his shares before the date of the contract on which the company was sued, and his name had been omitted in the return entered at the Stamp Office, the form of Schedule A in the statute having been used by mistake instead of that of Schedule B, —Held, that the question as to his being a shareholder was matter to be tried by *scire facias*.

Also where a *fi. fa.* has issued against the public officer who is also a member of the company, it is a question to be tried whether it issued against him as a member for the time being, or nominally against him as a public officer.

Semble—That a *scire facias* for execution against members at the time of the contract ought to state the prior execution against those who were members at the time of the execution. *Bank of England v. Johnson*, 18 Law J. Rep. (N.S.) Exch. 238; 3 Exch. Rep. 598.

(d) Executors.

The deed of settlement of a joint-stock banking company provided that the executor of a deceased shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or at his option to become a member on complying with certain provisions as to giving notice of his desire to become a member, and specifying the shares in respect of which he claimed to be such member, and if he did not elect to become a member, he was not to be entitled to any dividend accruing due after the testator's death:—Held, that defendant, the executor of a deceased shareholder, who had not complied with these provisions, did not, by receiving a single dividend in respect of the testator's shares, accrued due since his death, render himself liable to be sued in *scire facias* as a member of the company. *Ness v. Armstrong*, 18 Law J. Rep. (N.S.) Exch. 473; 4 Exch. Rep. 21.

(e) Suppression of Facts.

It is no ground for setting aside a rule for a *sci. fa.* granted against former partners of a banking company under 7 Geo. 4. c. 46. s. 13, that plaintiff had a collateral security from the bank, which, by care and management, might have been made productive, and which he had omitted to mention in the affidavits on which the rule was granted. *Field v. McKenzie*, 17 Law J. Rep. (N.S.) C.P. 98; 5 Dowl. & L.P.C. 348; 4 Com. B. Rep. 725.

(f) Waiver of Irregularity.

Plaintiff obtained judgment against the public officer of a banking company, and issued a *sci. fa.* against defendants, under 7 Geo. 4. c. 46. s. 13. The writ described defendants as executrix and administrators of J H B and H J respectively, and it was stated therein that, at the time of recovering the judgment, defendants were and still are members of the co-partnership, and the writ called upon defendants to shew cause why execution should not issue against them to satisfy the said judgment. The declaration alleged that J H B and H J were at the time of the recovering of the said judgment, members of the company, and so remained till their death, which occurred after the judgment; that defendants were their exe-

cutrix and administrators respectively, and prayed for execution to satisfy the said judgment to be levied of the goods and effects which were of J H B and H J respectively. Defendants obtained time to plead on the usual terms on two several occasions, and on a third application for time it was granted, "without prejudice to any motion to set aside the declaration as inconsistent with the writ." The *sci. fa.* was issued without leave of the Court, and no notice thereof was given to defendants. On motion to set aside the writ and all subsequent proceedings for irregularity,—Held, that the irregularities complained of were of a substantial nature, and therefore obtaining time to plead was not a waiver of them.

Per Williams, J., that the irregularities were accompanied with fraud, and, under these circumstances, taking a subsequent step in the cause did not constitute a waiver.

Quære—Whether under this statute recourse can be had against the estates of deceased members of the copartnership. *Ricketts v. Bowhay*, 16 Law J. Rep. (N.S.) C.P. 153; 3 Com. B. Rep. 889.

(g) *Husband of female Shareholder.*

A married woman purchased out of her separate property, with consent of her husband, the defendant, shares in a joint-stock banking company, and was registered as a shareholder. Defendant received some dividends on these shares, and signed receipts for them as her agent; he also attended some meetings of the company, at which none but shareholders were entitled to be present. A clause in the deed of settlement provided that the husband of any female shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or at his option to become a member on complying with certain provisions, as to giving notice of his desire to become a member, and specifying the shares in respect of which he claimed to be a member:—Held, that defendant who had not complied with these provisions, was not liable to be sued in *scire facias* as a member of the company for the time being, on a judgment obtained against the public officer, under 7 Geo. 4. c. 46. s. 13. *Ness v. Angas*, 18 Law J. Rep. (N.S.) Exch. 470; 3 Exch. Rep. 805; 6 Dowl. & L.P.C. 46.

BANKRUPTCY.

[Of Railway and other Companies, see COMPANY, Winding-up Acts. And see INTERPLEADER—PRACTICE, Setting aside Proceedings—SHERIFF, Escape—WARRANT OF ATTORNEY AND COGNOVIT.]

(A) COURT OF BANKRUPTCY AND COMMISSIONERS.

- (a) *General Jurisdiction of.*
- (b) *Court of Review.*

(B) PERSONS LIABLE TO BECOME BANKRUPT.

(C) ACTS OF BANKRUPTCY.

- (a) *By Lunatics.*
- (b) *Proceedings under 1 & 2 Vict. c. 110. s. 8.*
- (c) *Refusal to admit Demand on Summons.*
- (d) *Compounding with Petitioning Creditor to former Fiat.*

(e) *Procuring own Goods to be taken in Execution.*

(f) *Fraudulent Conveyance.*

(g) *Filing Declaration of Insolvency.*

(D) PROTECTION FROM PROCESS.

(E) PETITIONING CREDITOR.

(F) ADJUDICATION AND ADVERTISEMENT.

(G) TRANSACTIONS NOT AFFECTED BY BANKRUPTCY.

(a) *Under 6 Geo. 4. c. 16.*

(b) *Under 1 Will. 4. c. 7.*

(c) *Under 2 & 3 Vict. c. 29.*

(d) *Cases of fraudulent Preference.*

(H) WARRANTS OF ATTORNEY, COGNOVITS, AND JUDGES' ORDERS.

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(L) PROOF OF DEBT.

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(m) *Legacy.*

(n) *Costs.*

(o) *Contingent Debts.*

(p) *Amount proveable.*

(q) *Election.*

(r) *Evidence and Practice.*

(M) FIAT.

(a) *Date and Issuing.*

(b) *Changing Venue.*

(c) *Amending.*

(d) *Superseding.*

(e) *Annulling.*

(1) *Causes for.*

(2) *Practice, Petition, and Order for annulling.*

(N) OF THE BANKRUPT.

(a) *Surrender.*

(b) *Examination and Committal.*

(c) *Allowance of Costs.*

(d) *Discharge.*

(O) AUDIT OF ACCOUNTS.

(P) DIVIDENDS.

(Q) CERTIFICATE OF CONFORMITY.

(R) ARRANGEMENT BY DEED.

(S) EVIDENCE.

(T) PRACTICE.

- (a) *In general.*
- (b) *Petition.*
- (c) *Accounts.*
- (d) *Contempt.*
- (e) *Affidavit of Debt.*

(U) SOLICITOR TO THE FIAT.

(W) COSTS.

The laws relating to bankrupts amended and consolidated by 12 & 13 Vict. c. 106; 27 Law J. Stat. App. viii.

(A) COURT OF BANKRUPTCY AND COMMISSIONERS.

[See 12 & 13 Vict. c. 106. ss. 6—11.]

(a) *General Jurisdiction of.*

[See 12 & 13 Vict. c. 106. ss. 12—25.]

[Commissioners of the Court of Bankruptcy empowered to order the release of bankrupts from prison in certain cases by 11 & 12 Vict. c. 86; 26 Law J. Stat. App. v.]

The plaintiff having obtained judgment against F in an action of assault sued out a *ca. sa.* whereon F was arrested and committed to the Queen's Prison, of which the defendant was the keeper. F afterwards petitioned the Court of Bankruptcy for his discharge under the 5 & 6 Vict. c. 116. and the 7 & 8 Vict. c. 96, and having obtained from the commissioner an order for his discharge, he was discharged by the defendant accordingly. In an action brought by the plaintiff against the defendant for an escape,—Held, (affirming the judgment of the Court below) that whether the commissioner was right or wrong in discharging F from the judgment in an action of tort, yet that he had such jurisdiction in the matter as to protect the defendant, who had obeyed the order. *Thomas v. Hudson*, 17 Law J. Rep. (N.S.) Exch. 365; 16 Mee. & W. 885.

The jurisdiction of the Court of Bankruptcy as to the appointment of new trustees in the place of persons having been made bankrupt, and the transfer of the trust funds, has been removed to the Court of Chancery by the Bankrupt Law Consolidation Act. *Ex parte Walker re Debaufre*, 19 Law J. Rep. (N.S.) Bankr. 3.

Where a trader sold an estate, and conveyed it as tenant in fee simple with the usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the commissioner should be at liberty to execute a deed of confirmation to the purchaser. *Ex parte Fripp re Phelps*, 1 De Gex, 293.

A person, who was formerly a Commissioner of Bankrupts, and entitled to an annuity, by way of compensation, under the 5 & 6 Vict. c. 122. s. 58, took the benefit of the Insolvent Debtors Act. A petition presented by his assignee to one of the Vice Chancellors in Bankruptcy, praying for a direction to the Accountant General in Bankruptcy to pay the annuity to the assignee, was dismissed. *Ex parte Spooner re Payne*, 17 Law J. Rep. (N.S.) Bankr. 11; 1 De Gex, 575.

The Commissioner may exercise a discretion as to the truth of the affidavit of the form A b. in the

Schedule to the Bankrupt Law Consolidation Act, referred to in the 212th section, without the matter being brought before him adversely by a creditor. *Ex parte Edmonds re Edmonds*, 19 Law J. Rep. (N.S.) Bankr. 4.

[See (K) Assignees—(f) *Actions and Suits*—(O) *Audit of Accounts.*]

(b) *Court of Review.*

The Court of Review abolished and its jurisdiction in insolvency transferred to the county courts by 10 & 11 Vict. c. 102; 25 Law J. Stat. 274.

One of the Vice Chancellors made a court of appeal in Bankruptcy by 12 & 13 Vict. c. 106. ss. 12, 13.

Where bankrupts are entitled in possession to the income of some of the trust funds of which one of the bankrupts was trustee:—*Semble*, that the Court of Review cannot appoint a new trustee without assignees joining as petitioners. *Ex parte Cousen re Cousen*, 1 De Gex, 451.

(B) PERSONS LIABLE TO BECOME BANKRUPT.

[Enumerated 12 & 13 Vict. c. 106. s. 65.]

A person who keeps a lodging-house and supplies the lodgers with food and wine is a trader within the meaning of the bankrupt laws. *King v. Simmonds*, 1 H.L. Cas. 754.

The plaintiff, a barrister, bought land in two several places, and commenced building a number of houses thereon, which he sold as opportunities occurred. He had also built and sold another house in a different place, and had on one occasion accepted a bill describing him as a builder. The jury found that these were isolated transactions:—Held, that he was not liable to be made a bankrupt as a builder.

Quare—Whether if he had made it a regular practice to employ his capital to build and sell houses in this way, he would have been a builder within the bankrupt laws. *Stuart v. Sloper*, 18 Law J. Rep. (N.S.) Exch. 321; 3 Exch. Rep. 700.

A party, by profession a barrister, took a lease of three pieces of building ground, and at his own expense erected thereon upwards of two hundred houses, which he let as opportunity offered. Upon a trial at law, the jury found that he did not buy and sell building materials for profit, was not a builder, in the sense of being ready to build a house for any one who would give him an order, and meant to confine himself to the above-mentioned speculations, and did not intend generally to embark in other building speculations,—Held, (on a petition to annul a fiat issued against him as a builder) that he was not a builder within the meaning of the bankrupt laws. *Ex parte Stewart re Stewart*, 18 Law J. Rep. (N.S.) Bankr. 14.

A had a farm of about 100 acres, cultivated by him in such a manner that no live stock was required to be kept by him on it. A had for some years four cows, which were kept by him solely for the purpose of making a profit by their milk and calves. All the milk produced was from time to time sold, and none of it was used for A's family:—Held, that A was not a "cowkeeper" within the meaning of the 5 & 6 Vict. c. 122. s. 10. *Ex parte Dering re Cramp*, 16 Law J. Rep. (N.S.) Bankr. 3; 1 De Gex, 398.

(C) ACTS OF BANKRUPTCY.

[Provisions as to 12 & 13 Vict. c. 106. ss. 67—88.]

(a) *By Lunatics.*

Semble—A lunatic cannot commit an act of bankruptcy by omitting to pay or give security. *Ex parte Stamp re Spence*, 1 De Gex, 345.

(b) *Proceedings under 1 & 2 Vict. c. 110. s. 8.*

[See 12 & 13 Vict. c. 106. ss. 69-75.]

Semble—The 1 & 2 Vict. c. 110. s. 8 is not repealed by 5 & 6 Vict. c. 122. *Ex parte Goodall re Goodall*, 1 De Gex, 580.

In an action against the original debtor, on a bond given under statute 1 & 2 Vict. c. 110. s. 8,—Held, that a plea alleging that no writ of *capias ad satisfaciendum* had issued in the original action was a good plea. Held, also, that where the declaration alleged that the defendant did not render himself according to the terms of a Judge's order, a plea averring that such order had been obtained *ex parte* by the plaintiff was bad, and that the proper course for the defendant, if it had been irregularly obtained, was to apply to set it aside. Held also, that where the declaration alleged that a Judge's order had been made for the render within a given time, which time had been extended till the fifth day of term by a subsequent Judge's order, and that a rule *nisi* had been obtained within that period, calling on the plaintiff to shew cause on a subsequent day why the defendant and his bail should not have further time to render, and that in the mean time proceedings against the defendant and his bail should be stayed, a plea alleging that upon that rule *nisi* a rule absolute was made on the 22nd day of term, directing a render within a given period, and that a subsequent render was made within that time, was a good plea. Held also, that such a bond was not a bond within 6 Geo. 4. c. 16. ss. 52 and 56, and that the plaintiff's claim was not barred by the bankruptcy of the defendant and his certificate after the commencement of, but before judgment obtained in, the original action. Held also, that a plea stating that an action had already been brought by the plaintiff for recovery of the sum mentioned in the bond at the time the bond was given, was no plea to an action on a judgment obtained in another action subsequently commenced. *Hinton v. Acraman*, 15 Law J. Rep. (n.s.) C.P. 52; 3 Dowl. & L. P.C. 426; 2 Com. B. Rep. 367.

(c) *Refusal to admit Demand on Summons.*

[12 & 13 Vict. c. 106. ss. 78—86.]

B being indebted to R in the sum of 149*l.* 4*s.*, proceedings were taken against him by R, under the statute 5 & 6 Vict. c. 122. B thereupon signed an admission that he was indebted to R in 149*l.* :—Held, there being no intention on the part of B to dispute the 4*s.*, which was omitted by mistake, that this was an admission of the whole debt, and not of part only, within the 15th section of the statute.

Within fourteen days of the admission, B and R came to an agreement that B should give R a Judge's order for the amount due, and also deposit with him six bills of exchange as security :—Held, that this was a compounding of the debt to the satisfaction of the creditor, so as to prevent any

act of bankruptcy, under the provisions of the statute, although the Judge's order was not in fact given, nor the bills of exchange deposited in pursuance of the agreement, until more than fourteen days after the filing of the admission. *Pennell v. Rhodes*, 15 Law J. Rep. (n.s.) Q.B. 352; 9 Q.B. Rep. 114.

A creditor served a debtor with particulars of demand, under the 5 & 6 Vict. c. 122. s. 11, stating that the debt arose from returned bills. The creditor then made an affidavit, stating that the debt had been incurred for goods sold and delivered. The debtor was summoned to appear before the commissioner, in pursuance of the act, but did not appear, and did not satisfy the creditor within fourteen days. A fiat issued against the debtor on the act of bankruptcy, alleged to have been committed by him under the above circumstances. On a petition to annul the fiat,—Held, first, that the creditor had not complied with the forms required by the act; and, secondly, that the debtor's non-appearance before the commissioner did not amount to a waiver by him of the irregularity. *Ex parte Greenstock re Greenstock*, 15 Law J. Rep. (n.s.) Bankr. 5; 1 De Gex, 230.

(d) *Compounding with Petitioning Creditor to former Fiat.*

[See 12 & 13 Vict. c. 106. s. 71.]

Defendants, being creditors of B, on the 3rd of December 1840 filed an affidavit, and gave notice under 1 & 2 Vict. c. 110. B did not pay or compound within the twenty-one days; and on the 31st of December a fiat issued on the petition of the plaintiffs; and, on the 30th of January 1841, that fiat was annulled on the petition of the defendants, who, on the following day, issued a second fiat. They did not proceed on that fiat, and on the 9th of September 1842, the second fiat was annulled, and a third fiat issued on the petition of the plaintiffs, who were chosen assignees under it. Defendants, on the 17th of February 1841, while the second fiat was in force, received a sum of money in payment of their debt, being more in the pound than the other creditors :—Held, first, that as this payment constituted an act of bankruptcy, under 6 Geo. 4. c. 16. s. 8, the fiat of the 9th of September 1842, which though it issued more than a year after such payment, issued before the 5 & 6 Vict. c. 122. came into operation, was well supported by such payment. Secondly, that the plaintiffs were entitled to sue as assignees, in the absence of any special appointment by the commissioner of a person to sue.

Semble—That the affidavit of the 3rd of December 1840, would not, alone or coupled with the first fiat, support the third fiat. *Ellis v. Russell*, 16 Law J. Rep. (n.s.) Q.B. 428; 10 Q.B. Rep. 952.

(e) *Procuring own Goods to be taken in Execution.*

[See 12 & 13 Vict. c. 106. s. 67.]

A trader's procuring his goods to be taken in execution has no effect as an act of bankruptcy, under the 4 Geo. 4. c. 16. s. 3, until the goods be actually taken.

There is no relation back from the time of the actual taking of the goods in execution, to any antecedent period, so as to make any of the proceedings on which the execution is founded an act

of bankruptcy. *Belcher v. Gummow*, 16 Law J. Rep. (N.S.) Q.B. 155; 9 Q.B. Rep. 873.

If execution be taken out in the name of two parties, jointly interested, as co-plaintiffs, and one knows of an act of bankruptcy already committed by the defendant, his knowledge is *prima facie* the knowledge of both; and the execution is not protected by stat. 2 & 3 Vict. c. 29. s. 1; even though the execution be in fact sued out by one party only, of whose knowledge there is no evidence.

Per *Coleridge J.*—*Quære*, whether the knowledge of one co-plaintiff would not affect the other, even if it were proved that he in fact was ignorant of the prior act of bankruptcy.

Under stat. 6 Geo. 4. c. 16. s. 3. (and see stat. 12 & 13 Vict. c. 106. s. 67.) a party procuring bills of exchange, his property, to be taken in execution with intent to defeat creditors, after the passing of stat. 1 & 2 Vict. c. 110, committed an act of bankruptcy, though, at the time when the act of Geo. 4. passed, bills of exchange were not liable to be taken in execution. *Edwards v. Cooper*, 11 Q.B. Rep. 33.

(f) *Fraudulent Conveyance.*

[12 & 13 Vict. c. 106. s. 67.]

By a composition deed between A and B and scheduled creditors of A, reciting that B agreed to join in securing the payment of a composition by A on having the assignment therein contained made to him, it was witnessed that A and B covenanted to pay the creditors the composition; that in consideration of this covenant, A assigned all his stock in trade, &c. to B, to hold as B's own goods and chattels; that the creditors covenanted on receiving the composition to release A. At the same time, leasehold trade premises were assigned by A to B, with the privity of the creditors. All the assigned property was then in the possession of certain mortgagees of the leasehold premises and machinery, who afterwards gave up possession to B, on his guaranteeing payment of the mortgage money. Immediately after the execution of the deed, B gave the creditors his promissory notes for the composition. B remained in possession until he became bankrupt, and after his bankruptcy a fiat was sued out against A by a creditor who knew of the deed, but had not executed it. He was a friend of A, and indifferent to the payment of his debt, but permitted his name to be used by the creditors who had signed the deed:—Held, first, that the composition deed was an act of bankruptcy and not a sale for value. Secondly, that the assigned property was not in the reputed ownership of B. Thirdly, that, under the circumstances, B's assignees might recover the property. *Re Marshall*, 1 De Gex, 273.

(g) *Filing Declaration of Insolvency.*

[12 & 13 Vict. c. 106. s. 70.]

Under 5 & 6 Vict. c. 122. s. 22, the filing of a declaration of insolvency is of itself a complete act of bankruptcy, without being followed by an advertisement of the same in the *Gazette* under the 6 Geo. 4. c. 16. s. 6.

Therefore, where a trader gave execution creditors notice that he had filed a declaration of insolvency, and thereby committed an act of bankruptcy, this was held a sufficient notice of a prior act of

bankruptcy to deprive the creditors of the protection of the 2 & 3 Vict. c. 29.

A trader having been arrested on a *ca. sa.* at the suit of the defendants, who, as well as the sheriff's officer, had received a notice of a prior act of bankruptcy, paid over a portion of his assets to the officer in order to procure his discharge, and the officer paid over the amount to the defendants:—Held, that the bankrupt's assignees were entitled to recover back from the defendants the amount so paid, in an action for money had and received. *Follett v. Hoppe*, 17 Law J. Rep. (N.S.) C.P. 76; 5 Com. B. Rep. 226.

(D) PROTECTION FROM PROCESS.

An order for temporary and limited protection from arrest of a petitioning debtor, made under 7 & 8 Vict. c. 70. s. 7, by a Commissioner of the Court of Bankruptcy, on examination of the petition, cannot be renewed or extended beyond the time originally limited by it. *Mazeman v. Davies*, 15 Law J. Rep. (N.S.) Q.B. 111; 3 Dowl. & L.P.C. 145.

Where a defendant was brought up in custody of a gaoler, for the purpose of being charged in execution, and it appeared that a Commissioner of Bankrupts had, on the preceding day, granted an interim order for his protection, the Court refused to allow him to be charged in execution. *Sloman v. Williams*, 4 Dowl. & L.P.C. 49.

The protection given by the 12 & 13 Vict. c. 106. s. 216. only protects the debtor from arrest at the suit of persons being creditors at the date of his petition, and having had the notices required by section 215. Therefore, where the acceptor of a bill of exchange obtained an order of protection under the act, while the bill was running, and the notices were given to the drawer, supposed to be the holder, an indorsee prior to the petition was held not to be affected by the order of protection.

Semble—That it would have made no difference if he had become the indorsee after the petition; but *quære*, as to the effect of express notice at the time of the indorsement, that the indorser had received the notices pursuant to the act. *Levy v. Horne*, 19 Law J. Rep. (N.S.) Exch. 260; 5 Exch. Rep. 257.

On the 12th of November 1849, the defendant presented a petition to the Bankruptcy Court for protection for his person and property under the 12 & 13 Vict. c. 106. s. 211, and obtained a protection. On the 28th of November an action against him was tried, in which the present plaintiff recovered 29*l.* damages, the costs of which were, on the 12th of December, taxed at 57*l.* 14*s.* 3*d.* On the 7th of December, the defendant filed an account of his debts, in which he described the plaintiff's debt thus:—"Southgate William, clerk, &c., of &c., has got judgment for debt estimated at 22*l.*, and 50*l.*" On the 20th of December the defendant made a proposal, which was accepted, to certain of his creditors to pay them 7*s.* 6*d.* in the pound "with a satisfactory guarantee." On the 31st of January all the creditors who had proved debts to the amount of 10*l.* and upwards agreed to the terms above proposed, *provided* the amount of such composition were *guaranteed by two parties* named,

This agreement was sanctioned by the Court of Bankruptcy:—Held, that the debt of 22*l.* was correctly described in the account; that the verdict obtained being therein treated as a judgment was immaterial; and that the defendant, who had been arrested during the continuance of his protection, was entitled to his discharge both from the debt and costs, the latter being an accessory only to the principal debt.

Held, also, that whatever difficulty the form of guaranties might create as to enforcing it, the protection was valid under the 211th section. *Southgate v. Saunders*, 19 Law J. Rep. (N.S.) Exch. 331; 5 Exch. Rep. 565.

A person, in pursuance of the 1 & 2 Vict. c. 110. s. 8, gave a bond with two sureties. An action was brought on the bond, and judgment recovered on the 30th of November. On the 3rd of December a fiat in bankruptcy issued against the obligor, and he was adjudged a bankrupt. On the 6th of December he surrendered to the fiat, and obtained protection under the 5 & 6 Vict. c. 122. s. 23. Afterwards, on the same day, he surrendered himself in discharge of the bond, and was committed to prison. An application was made by him to a Judge for his discharge, and refused. A similar application made to the Court of Bankruptcy was also refused. *Ex parte Oldaker re Oldaker*, 17 Law J. Rep. (N.S.) Bankr. 3.

[See *post*, (Q) Certificate of Conformity.]

(E) PETITIONING CREDITOR.

Public officer of a corporation permitted to make the docket affidavit, where the corporation is the petitioning creditor. *Ex parte Collins re Rickett*, 1 De Gex, 381.

A bankrupt is a competent witness to prove the petitioning creditor's debt since 6 & 7 Vict. c. 85; the ground of his exclusion before that statute having been that of "interest." *Groom v. Watson*, 19 Law J. Rep. (N.S.) C.P. 364; 8 Com. B. Rep. 217.

(F) ADJUDICATION AND ADVERTISEMENT.

[See 12 & 13 Vict. c. 106. s. 101.]

The adjudication in a bankruptcy was made on the 18th of October. The days appointed for the surrender were the 15th and the 29th of November; and an advertisement, intended to be inserted in the *London Gazette*, was prepared accordingly. By an accident the advertisement was not inserted until the 3rd of November. The commissioner was declared to be at liberty to insert a new advertisement in the *Gazette*, with fresh days of surrender, without prejudice, however, to the question of its validity. *Re Stringer*, 18 Law J. Rep. (N.S.) Bankr. 1.

(G) TRANSACTIONS NOT AFFECTED BY BANKRUPTCY.

(a) Under 6 Geo. 4. c. 16.

A deed of assignment amounting to an act of bankruptcy, under the 3rd section of the 6 Geo. 4. c. 16, is not void as against the future creditors of the assignor. *Oswald v. Thompson*, 17 Law J. Rep. (N.S.) Exch. 234; 2 Exch. Rep. 215.

Plaintiff being surety for the bankrupt, paid the amount after the fiat:—Held, the bankrupt having obtained his certificate, that the plaintiff's debt was

barred by sections 52 and 121 of 6 Geo. 4. c. 16. *Earle v. Oliver*, 2 Exch. Rep. 71.

R D gave D a warrant of attorney to confess judgment, upon which judgment was entered up. A *fi. fa.* issued on the 24th of August, and the sheriff seized on the 26th. On the 9th of September the sheriff sold the goods (a quantity of iron) in lots, at so much per ton, and received a deposit in money on each lot. The iron was not separated into parcels at the time of sale. On the 11th of September a fiat in bankruptcy issued against R D. On the 19th of September and following days the iron was weighed out and delivered to the several purchasers, and the sheriff paid over the price to D the execution creditor. In an action by the assignees of R D against D,—Held, that the sale was only inchoate at the date of the fiat in bankruptcy, and therefore the money was the money of the assignees. After the seizure, and before the sale was completed, the goods in the hands of the sheriff were a security for the creditor, and therefore the execution was not protected by 6 Geo. 4. c. 16. s. 108. *Ward v. Dalton*, 18 Law J. Rep. (N.S.) C.P. 236; 7 Com. B. Rep. 643.

(b) Under 1 Will. 4. c. 7.

A defendant sued adversely consented to a Judge's order to pay debt and costs forthwith, upon which judgment was entered up, and a writ of *fi. fa.* issued on the 9th of February, under which the sheriff seized the goods, &c. at two o'clock of the same day. At three o'clock on the same 9th of February, a declaration of defendant's insolvency was filed, pursuant to 6 Geo. 4. c. 16. s. 6. A fiat issued on the 10th of February, and notice was given on the same day to the sheriff. Defendant was adjudged a bankrupt, and assignees were appointed on the 25th of February. In an action by the assignees against the creditor (pursuant to the order of a Judge) to try whether the execution was valid against the title of the assignees,—Held, that the judgment was a judgment by *nil dicit*, and the execution protected by 1 Will. 4. c. 7. s. 7. *Bell v. Bidgood*, 19 Law J. Rep. (N.S.) C.P. 15; 8 Com. B. Rep. 763.

(c) Under 2 & 3 Vict. c. 29.

[See 12 & 13 Vict. c. 106. ss. 133, 134.]

Notice of a prior act of bankruptcy given to a clerk of an attorney, who had issued a writ of execution, at the office and in the absence of his master, such clerk not being shewn to have had personally the conduct of the suit in which execution issued, will not operate to defeat the execution under the proviso in the 2 & 3 Vict. c. 29. s. 1, until communicated by the clerk to his master. *Pike v. Stephens*, 17 Law J. Rep. (N.S.) Q.B. 282; 12 Q.B. Rep. 465.

A trader, being indebted to the defendants, on the 1st of July filed a declaration of insolvency, pursuant to 5 & 6 Vict. c. 122. s. 22, and, on the following day, gave notice thereof to the defendants; at a subsequent period of the same day the defendants levied an execution on the trader's goods. A fiat of bankruptcy issued on the day following:—Held, that the act of bankruptcy dated from the time of filing the declaration of insolvency, and that the defendants, having had notice thereof, were not

entitled to the proceeds of the execution within the meaning of the 2 & 3 Vict. c. 29, s. 1. *Green v. Laurie*, 17 Law J. Rep. (N.S.) Exch. 61; 1 Exch. Rep. 335.

Certain goods were deposited with a trader, upon terms that he should retain possession of them for a year upon payment of a sum of money, and enabling the owner to resume possession if money not paid, which he did, and sold them before the issuing of the fiat:—Held, that this was a transaction protected by the 2 & 3 Vict. c. 29, s. 1. *Young v. Hope*, 2 Exch. Rep. 105.

Pending a negotiation to settle an action by Judge's order, the clerk of the attorney for the debtor said to the clerk of the attorney for the creditor, that the debtor had committed an act of bankruptcy, and that notice would be given if the creditors pressed. Upon the trial of an issue between the assignees of the debtor, who became bankrupt, and the creditor, the Judge ruled that this was a sufficient notice to the creditor within 2 & 3 Vict. c. 29:—Held, a misdirection; no evidence having been given that the notice was communicated to the creditor's attorney by the clerk.

Quere—As to the effect of a notice to the managing clerk of the attorney in the action. *Pennell v. Stephens*, 18 Law J. Rep. (N.S.) C.P. 291; 7 Com. B. Rep. 987.

(d) Cases of fraudulent Preference.

In an action by assignees of bankrupts to recover back from defendant, who was a creditor of the bankrupts, the amount of a debt paid him by the bankrupts which the assignees alleged to have been paid by way of fraudulent preference, the Judge directed the jury, first, that if the bankrupts were induced to make the payment by the pressure of defendant, the verdict should be for the defendant; secondly, that if they were not influenced by the pressure, but acted voluntarily and with a view to give a preference to defendant in the event of a bankruptcy, the verdict should be for the plaintiffs; and thirdly, that if the payment was made under the influence of the pressure of the defendant, and also with a desire to give a preference to the defendant in the event of a bankruptcy, the verdict should be for the defendant:—Held, that the direction was right. *Brown v. Kempton*, 19 Law J. Rep. (N.S.) C.P. 169.

The defendant's wife having, before her marriage, become, as surety, joint and several maker with F, of a promissory note, afterwards, at the suggestion of her husband, applied to F for money to enable him to take up the note. F being then insolvent, voluntarily paid the amount of the note to the defendant in contemplation of bankruptcy and by way of fraudulent preference. The defendant afterwards paid the money to an indorsee of the note:—Held, that the assignees of F, who afterwards became bankrupt, were entitled to recover the money from the defendant as money had and received to their use. *Groom v. Watts*, 19 Law J. Rep. (N.S.) Exch. 154; 4 Exch. Rep. 727.

A trader being indebted to his bankers gave them a receipt for 1,000*l.*, purporting to be in full for the purchase of the furniture, &c. and effects in his house, but no possession was given till a year afterwards, when the trader's solicitor applied to the

bankers for a loan of 10,000*l.*, stating that a creditor of the trader's would obtain judgment on which he could issue execution, but that if the creditor refused to give the trader time he would protect himself and his other creditors. The day after, in consequence of this communication the bankers took possession, and on the same day the trader filed a declaration of insolvency and sued out a fiat against himself:—Held, not to be a fraudulent preference.

Quere—As to the effect of a joint possession of the servants of the bankrupt and of the owner of goods as to reputed ownership.

Semble—An examination of a party before the Commissioner may be received to discredit an affidavit of the same witness made on a petition. *Ex parte Marjoribanks re Rainer*, 1 De Gex, 466.

(H) WARRANTS OF ATTORNEY, COGNOVITS, AND JUDGES' ORDERS.

[See 12 & 13 Vict. c. 106, ss. 136, 137.]

Effect of not Filing.

The 12 & 13 Vict. c. 106, s. 137, which enacts that a judgment and execution upon a Judge's order given by a trader not being duly filed within twenty-one days is to be void to all intents and purposes whatever, does not avoid such judgment and execution as against the trader himself, but only as against his assignees if he becomes bankrupt. *Bryan v. Child*, 19 Law J. Rep. (N.S.) Exch. 264; 5 Exch. Rep. 368.

(I) MORTGAGES AND LIEN, AND MUTUAL CREDIT.

A, being possessed of twenty tons of oil, deposited in a railway company's warehouse, and being indebted to B, on the 3rd of June gave B an authority to take the oil, and sell it, and place the produce to A's account. On the 5th of June (a Saturday) A gave B an order on the railway company to deliver the oil to B. B, on presenting the order, on Monday morning, found that the oil had, the same morning, been removed to A's manufactory. On the 11th of June A became bankrupt:—Held, that B had a lien on the twenty tons of oil. *Ex parte Bell re Tunstall*, 17 Law J. Rep. (N.S.) Bankr. 9; 1 De Gex, 577.

A, by a memorandum in writing, stated that he had placed in the possession of B seven leases of seven pieces of ground, messuages and premises, numbered respectively (mentioning the numbers); and undertook to execute proper mortgages of the same to B, to secure a sum advanced by B to A. A became bankrupt. B presented the usual equitable mortgagee's petition:—Held, that B was entitled to the "tenant's fixtures" which were in the houses agreed to be mortgaged. *Ex parte Cowell re Inwood*, 17 Law J. Rep. (N.S.) Bankr. 16.

An accountant has, as against the assignees, a lien on books intrusted to him for examination and arrangement by a bankrupt before the bankruptcy—*semble*. *Ex parte Southall re Hill*, 17 Law J. Rep. (N.S.) Bankr. 21.

The plaintiffs and defendants being, by agreement between them, jointly entitled to the benefits of a charter-party, the plaintiffs assigned their interest in it, by indorsement, to D, their creditor, at the same time giving the defendants notice of

such assignment, and afterwards became bankrupts. The assignees of the charter-party having sued upon it in the names of the plaintiffs, the defendants pleaded the bankruptcy of the plaintiffs, by which the right to their choses in action vested in their assignees. Replication, setting forth the assignment by the plaintiffs of their interest in the charter-party to D, and notice to the defendants of that assignment given by them before the bankruptcy of the plaintiffs, and that the plaintiffs sued on account of D. Rejoinder (after terms to rejoin gratis and issuably had been imposed), setting up the previous agreement between the plaintiffs and defendants, that they should share the benefits of the charter-party, by way of a mutual credit between the parties, on which an account should be stated, and one demand set against the other, under 6 Geo. 4. c. 16. s. 50:—Held, not issuable, and bad in substance, for at the time of the bankruptcy no mutual credit existed between the plaintiffs and defendants. *Boyd v. Mangles*, 16 Mee. & W. 337.

(K) ASSIGNEES.

(a) Official Assignee.

An official assignee of a bankrupt or insolvent, who has been made a plaintiff in an action without his authority, is entitled to an indemnity from costs. *Laws v. Bott*, 16 Law J. Rep. (n.s.) Exch. 279; 16 Mee. & W. 300.

The official assignee represents the creditors sufficiently to enable the Court to suspend the advertisement by consent before the choice of creditors' assignees, although the bankruptcy is not disputed. *Ex parte Potts re Potts*, 1 De Gex, 326.

In the case of a defaulting official assignee the Court ordered that no sum should be paid in respect of monies due to him in any bankruptcy, until he had made good all the amounts due from him in other bankruptcies. *Ex parte Graham re Gray*, 1 De Gex, 328.

It is the duty of the official assignee to examine the lists of creditors prepared by the solicitors to the fiat, before he signs them; and he is liable for the consequences of the omission of any creditors from the lists. *Ex parte Hall re Carey*, 16 Law J. Rep. (n.s.) Bankr. 10; 1 De Gex, 555.

A mortgaged estate belonging to a bankrupt was bought at a sale by auction by the mortgagee, who had obtained liberty to bid for 500*l*. An application to open the biddings at an advance of 750*l*., on the grounds that the title was much embarrassed at the time of sale, and that the commissioner had stated that the biddings might be opened, was granted. *Ex parte Lee re Higginson*, 18 Law J. Rep. (n.s.) Bankr. 6.

(b) Choice of.

A fiat issued against a bankrupt on his own petition. At the meeting of creditors for the choice of assignees, A tendered a proof of a debt, which was adjourned by the commissioner. The choice of assignees was then proceeded with. The solicitor who had been concerned for the bankrupt represented all the other creditors at this meeting. A was afterwards admitted to prove for the whole of his debt. On the petition of A, the choice of assignees was ordered to be set aside. *Ex parte*

Morse re Layt, 16 Law J. Rep. (n.s.) Bankr. 9; 1 De Gex, 478.

(c) Rights and Liabilities.

B, being indebted to the defendant in 500*l*., delivered to him a bill of exchange for 600*l*., which defendant agreed to discount on the terms of retaining 100*l*. and the ordinary discount, and paying over the difference to B. Defendant kept the bill, and paid no part of the difference to B, who became bankrupt shortly afterwards, when his assignees brought an action upon the contract against the defendant. The Judge directed the jury that the assignee stood in the same situation as the bankrupt, if solvent, would have stood in, and were entitled to recover the amount of the bill, minus the 100*l*. and the discount:—Held, that this was no misdirection; and the jury, having found for the plaintiffs, damages 495*l*., allowing 5*l*. per cent. discount, the Court refused to disturb the verdict. *Alder v. Keighley*, 15 Law J. Rep. (n.s.) Exch. 100; 15 Mee. & W. 117.

A fiat in bankruptcy having issued against D, the petitioning creditor came before the commissioner, but being unable to prove his debt, other creditors were permitted to prosecute the fiat under the 5 & 6 Vict. c. 122. s. 4. That section enacts, that if the fiat shall not be opened by the petitioning creditor within three days after it shall have been transmitted, the Court may at any time within fourteen days next following, open it on the application of any other creditor to the requisite amount, and may adjudicate thereon upon proof of the debt of such creditor, and of the "other requisites" to support such fiat. The prosecuting creditors accordingly proved their debt, the trading, and the act of bankruptcy, and D was declared a bankrupt, and the plaintiffs appointed his assignees:—Held, on an issue raised as to the title of the plaintiffs as assignees, first, that the words of the statute "opening the fiat" included all the proceedings previous to adjudication, and therefore that the fiat had not been opened by the petitioning creditor. Secondly, that the petitioning creditor's debt was not one of the "other requisites" to support the fiat, and therefore was unnecessary to be proved before the commissioner. Thirdly, that an order of the Lord Chancellor, under the 6 Geo. 4. c. 16. s. 18, for substituting a new petitioning creditor's debt was unnecessary; and therefore that the title of the plaintiffs as assignees was proved. *Kynaston v. Davis*, 15 Law J. Rep. (n.s.) Exch. 336; 15 Mee. & W. 705.

On the 4th of March the sheriff of London entered upon the premises of B under a writ of *fi. fa.* in his hands, at the suit of defendant, an execution creditor. When the sheriff entered all the goods of B were in possession of an officer of the Lord Mayor's Court, who had taken them in execution, at the suit of one L, and the goods were also under a distress put in by the landlord for rent. On the 9th of March a fiat issued against B. On the 6th of April the landlord sold all the goods, and paid himself and L, and paid the surplus into court to abide the event of an issue directed to be tried between the assignees of B and defendant:—Held, that the assignees could not impeach the title of the defendant, by setting up the claims of the landlord, or of L.

Held, also, if the assignees had intended to deny

that there was a "seizure" within the meaning of the 108th section of the 6 Geo. 4. c. 16, they should have done so before the Judge directed an issue. *Belcher v. Patten*, 18 Law J. Rep. (N.S.) C.P. 69; 6 Com. B. Rep. 608.

Where an assignee bought in without an order, he was ordered to make good the loss occasioned by a re-sale. *Ex parte Gover re Humphryes*, 1 De Gex, 349.

(d) *Affirmation of Sale by.*

After an act of bankruptcy, committed by A, the plaintiffs, who were subsequently appointed assignees, directed A's shop to be kept open as usual. Defendants, with notice of act of bankruptcy, purchased goods at the shop, which were delivered to them on the 28th of February, and plaintiffs were appointed assignees on the 24th of March. Applications were made on the 9th and 23rd of April to defendants, by the direction of plaintiffs, as assignees, for payment for the goods supplied on the 28th of February, and a formal demand of them was made and refused on the 14th of May:—Held, that the above facts furnish no evidence of an affirmation by the assignees of a contract of sale, and that defendants were liable in trover. *Valpy v. Sanders*, 17 Law J. Rep. (N.S.) C.P. 249; 5 Com. B. Rep. 886.

(e) *Allowance of Costs.*

Trustees under an assignment for the benefit of creditors employed an agent to proceed to America to recover part of the property. Afterwards the debtors became bankrupt, and three of the trustees were appointed assignees:—Held, that the assignees should be allowed the expense of employing the agent.

Expenses will be allowed if there was a fair probability of their benefiting the estate. It is not necessary to shew they have actually done so. *Ex parte Shaw re Robbins*, 1 De Gex, 242.

A petitioner, in the matter of a petition for the sale of some property which had been mortgaged to him by the bankrupt, employed the solicitor who acted for the creditors' assignees. The official assignee appeared at the hearing of the petition by separate counsel:—Held, that the official assignee was, under the circumstances, entitled to the costs of such separate appearance. *Ex parte Bromage re Jones*, 16 Law J. Rep. (N.S.) Bankr. 13; 1 De Gex, 375.

Where creditors' assignee omitted to pay over to the official assignee the balance in his hands, and the commissioner had directed the payment, with 20l. per cent. on the amount,—Held, that application should be made to the commissioner to enforce his order, and creditors were not allowed the extra costs occasioned by applying to the Court of Review.

The 6 Geo. 4. c. 16. s. 104, directing payment of 20l. per cent. by assignees retaining part of the estate in their hands, means 20l. per cent. per annum.

Semble—that the offer of a cheque on a banker at a town where the estate has no banker, is not a proper tender by a creditors' assignee to the official assignee. *Ex parte Cunliffe re Archer*, 1 De Gex, 408.

(f) *Actions and Suits.*

A declaration in trespass stated a breaking and entering, damaging the doors, hinges, and locks; spoiling the grass and fruit-trees; and exposing the plaintiff's goods to sale on his premises; by means of which, &c. the plaintiff was not only disturbed in the possession of his house, but prevented from carrying on his business, and deprived of the enjoyment of his goods. The defendant pleaded that, before the action brought, the plaintiff became a bankrupt:—Held, on general demurrer, (affirming the judgment of the Court below), that as there were some causes of action included in the declaration which would not pass to the assignees, the plea which embraced the whole, and was not addressed to any particular portion of the declaration, was insufficient and bad. *Rogers v. Spence*, 12 Cl. & F. 700.

The creditors' and official assignees have, by the 1 & 2 Will. 4. c. 56. s. 25, a joint title to the bankrupt's estate, so that if one of them die pending a suit in which they are co-plaintiffs, the suit may be continued by the other. *Man v. Ricketts*, 15 Law J. Rep. (N.S.) Chanc. 79; 1 Ph. 617.

Assignees who had brought an action against an annuity creditor of the bankrupt on a cross-demand were, on the petition of the creditor submitting to the jurisdiction of the Court, restrained from proceeding in the action.

Semble—that the commissioner has no jurisdiction to value the annuity for the purpose of its being set off in the action. *Ex parte Law re Kennedy*, 1 De Gex, 378.

(g) *What Property passes to.*

(1) *In general.*

A entered into an agreement with B and C to serve them for seven years, at fixed wages, at three guineas weekly, "the party making default to pay to the other the sum of 500l. by way or in nature of specific damages." A was dismissed; he became bankrupt, and after the bankruptcy brought an action of assumpsit on the agreement to which the defendants pleaded his bankruptcy:—Held, that this plea was an answer to the action, for that the right of action in respect of this breach of the agreement passed to the assignees. *Beckham v. Drake*, 2 H.L. Cas. 579.

Trespass for breaking and entering the plaintiff's dwelling-house, and making a great noise and disturbance therein, and damaging the doors, &c., and seizing certain goods of the plaintiff, and exposing them to sale on the premises without his leave, whereby the plaintiff and his family were greatly disturbed and annoyed in the peaceable possession of the dwelling-house, and the plaintiff was prevented carrying on his lawful business. Plea, in bar of the further maintenance of the action, that the plaintiff became bankrupt after action brought, and that an official assignee had been appointed, who accepted the appointment, whereby and by virtue of and by force of the statutes, the said causes of action became vested in the said official assignee. On demurrer to that plea, judgment was given for the plaintiff; and on writ of error, it was held, affirming the judgment of the Court of Exchequer, that the primary personal injury to the bankrupt being the principal and

essential cause of action, it still remained in the bankrupt and did not pass to the assignee; therefore, that the plea was bad. *Rogers v. Spence*, 15 Law J. Rep. (n.s.) Exch. 49; 13 Mee. & W. 571.

In November 1847, A, a trader, by deed, assigned all his effects to trustees for the benefit of his creditors. In January 1848, A filed a declaration of insolvency under the 7 & 8 Vict. c. 96, upon which a fiat issued. This fiat, however, was not prosecuted by A. In February, on the application of B, a creditor of A, whose debt would have been sufficient for a petitioning creditor's debt, and was prior in date to the deed of November, the commissioner made the adjudication in the bankruptcy, and assignees were appointed:—Held, that the money realized by the trustees under the trust deed ought to be administered in the bankruptcy. *Ex parte Jackson re Ferens*, 17 Law J. Rep. (n.s.) Bankr. 19.

[And see *ante*, *Re Marshall* (C)—(f); *Follett v. Hoppe*, *ante* (C)—(g).]

(2) Wife's Property.

Household furniture, linen, and plate belonging to B were assigned by him by deed, in contemplation of his marriage, to plaintiffs in trust after the marriage to stand possessed thereof during the joint lives of B, the settlor, and his intended wife, for her sole and separate use, independently of A. The marriage took place, and B afterwards became bankrupt. The settled furniture, &c. was then in the house in which he resided with his wife:—Held, that it was not, at the time of his bankruptcy, "in his order and disposition, with consent of the true owners," so as to pass the property in it, under 6 Geo. 4. c. 16. s. 72, to the defendants, his assignees; and the fact of the furniture, &c. not having been the wife's before the marriage was immaterial. *Simmons v. Edwards*, 16 Mee. & W. 838.

(3) Order and Disposition and reputed Ownership.

[See 12 & 13 Vict. c. 106. s. 125.]

B on the 1st of July fraudulently bought from the plaintiffs a quantity of goods, without an intention of paying for them. After the sale and delivery he became a bankrupt, and a fiat issued against him on the 8th of July. The defendants, who were his assignees, thereupon took possession of the goods, as being in the order and disposition of the bankrupt with the consent of the true owner, within the 72nd section of the Bankrupt Act, 6 Geo. 4. c. 16, whereupon the plaintiffs brought an action of trover for the goods:—Held, that as at the time of the bankruptcy, the bankrupt was not the apparent but the real owner of the goods, the section did not apply, and the plaintiffs were entitled to recover.

Quere—Whether the case would have fallen within the 72nd section if the plaintiffs had discovered the fraud long before the act of bankruptcy, and had omitted, for an unreasonable time, to rescind the contract. *Load v. Green*, 15 Law J. Rep. (n.s.) Exch. 113; 15 Mee. & W. 216.

A employed the local agent of an insurance office as his attorney, to effect a policy on the life of B in such office, and to get it assigned by B to A as security for a debt; B having become bankrupt,—Held, that the circumstance of the company's authorizing their agent to receive notices of assignment for them, though no notice was, in fact, given

to the head office of the company in this instance operated to prevent the policy from being within the order and disposition of the bankrupt; and that the case was not altered by the notice being received by the agent in his character of attorney for A. *Gale v. Lewis*, 16 Law J. Rep. (n.s.) Q.B. 119; 9 Q.B. Rep. 730.

In 1843, H, residing in Australia, being indebted to B in 771*l.* 3*s.* 4*d.*, B on the 8th of January 1844 assigned the debt to W, and on the 22nd of January joined W in a letter to H apprising him of the assignment, and requiring him to pay the debt to W. This letter was posted by W to H, in Australia, in the ordinary way in which letters to that country are posted, and could not have reached Australia before the 10th of February had it been posted on the 8th of January. On the 10th of February a fiat in bankruptcy issued against B. On the 29th of January 1844 a bill for 50*l.* was remitted by H in Australia, who had no notice of the bankruptcy, to the bankrupt, and by him handed over to W. The assignees of the bankrupt having brought an action against W to recover the amount of the bill,—Held, that W having done all in his power to prevent the debt from remaining in the possession of the bankrupt it could not be said to be, by the consent of the true owner, in the order or disposition of the bankrupt at the time of his bankruptcy, and that the assignees were not entitled to recover. *Belcher v. Bellamy*, 17 Law J. Rep. (n.s.) Exch. 219; 2 Exch. Rep. 303.

A being indebted to B, and pressed by him for payment, gives him a promissory note made by C, payable to A, (without the words "or order") and indorsed by A. B takes the note, but in consequence of its not being negotiable, returns it to A, in order that A may give him a negotiable security instead of it; and C does, at A's request, accept negotiable bills of exchange, drawn by A upon him, instead of the note, and at the same time that this is done, A desires C to hand the bills to B; and on the same day, A absconds to France, thereby committing an act of bankruptcy:—Held, that it not appearing, on this state of facts, that C had any notice of the transaction that had passed between A and B, or that the bills were given in substitution of the note, or that he had assented to B's title in any way, A's assignees were entitled to them. *Belcher v. Campbell*, 15 Law J. Rep. (n.s.) Q.B. 11; 8 Q.B. Rep. 1.

Books in possession of a bookseller, to be sold by him on commission and mixed with his general stock, do not pass to his assignees under his commission, as goods in his possession, order and disposition as reputed owner within the 6 Geo. 4. c. 16. *Whitfield v. Brand*, 16 Law J. Rep. (n.s.) Exch. 103; 16 Mee. & W. 282.

By a deed of trust, W, a horse contractor and jobber, assigned, until such time as all his then debts should be paid off, all his stock in trade, &c. to certain trustees for the benefit of his creditors, to hold upon certain trusts, *inter alia*, that so long as W should observe the orders of the trustees he was to be allowed to carry on business, subject to the orders of the trustees; that if he refused to comply with those orders, the trustees might immediately determine such permission; that the trustees should have power to sell any portion of the stock they pleased; that all monies received

in the business were to be paid to the account of the trustees, and all monies paid by their cheques; and that W was to receive a weekly salary for carrying on the business. The creditors also agreed to advance a large sum of money for the purposes of the business. This sum was advanced, and the business was carried on for some time under the terms of the deed, but W having refused to comply with certain orders of the trustees, the trustees, on the 22nd of July 1847, determined the permission to W to carry on the business, and W thereupon admitted in writing that the trustees had his leave to assume possession of the stock in trade, &c. Several of the horses used in the business were at that time let out on hire to various persons, and the trustees on that day served notice upon each of those persons that the horses in their possession belonged to them as trustees. On the 24th of July W committed an act of bankruptcy. Upon an interpleader issue to try the title to these horses as between the trustees and the assignees,—Held, upon these facts, first, that by the deed no partnership was created between W and the trustees.

Secondly, that by allowing W to carry on the business in his own name the trustees were not estopped from relying upon their own title to the property under the deed as against the assignees.

Thirdly, that the horses were not at the time of the bankruptcy in the possession, order, or disposition of the bankrupt within the meaning of 6 Geo. 4. c. 16. s. 72. *Price v. Groom*, 17 Law J. Rep. (n.s.) Exch. 346; 2 Exch. Rep. 542.

London sub-mortgagees of shipments at Ceylon and Hong Kong sent thither directed to the parties in possession notices of their security by the next direct mail, there being another earlier mail by a different route by which the notices might possibly have sooner reached their destination. Before, however, this could have taken place by either mode of transmission, the sub-mortgagees became bankrupt:—Held, that the notice was sufficient to take the goods out of their reputed ownership.

A man may give a valid security on merchandise at sea belonging to him, although at that time he is ignorant of the particulars of which it consists. *Ex parte Kelsall re Beattie*, 1 De Gex, 352.

A worsted-dyer, by deed, mortgaged fixtures used by him in his business, which were in a house occupied by him as tenant, and which he had a right to remove, to B. He continued to be in possession of the fixtures after the mortgage, and was in possession of them at the time of his bankruptcy. A petition by B to have the benefit of his security was dismissed, with costs, upon B's declining to file a bill in equity to have the question tried in a suit. *Ex parte Sykes re Clarke*, 18 Law J. Rep. (n.s.) Bankr. 16.

[See *ante*, (C) Acts of Bankruptcy, (f) *Fraudulent Conveyance*—(G) Transactions, (d) *Cases of Fraudulent Preference*—(M) *Fiat*, (d) *Superseding*.]

(L) PROOF OF DEBT.

[See 12 & 13 Vict. c. 106. s. 164.]

(a) *In general.*

A entered into a charter-party with the owners of a vessel stated to be of the burthen of 310 tons, by

which it was provided that she should proceed to Ichaboe, and there take in a full cargo of guano and return to Liverpool, and that A should pay for freight 4l. 10s. for every ton delivered; and that he would provide and put on board a full cargo at his own expense; and the parties mutually bound themselves in the penalty of 1,800l. for due performance of the contract. A having failed to supply a cargo, and an action having been brought on the charter-party for this breach, before interlocutory judgment by default was signed, a fiat in bankruptcy issued against him, under which, before the execution of the writ of inquiry, he obtained his certificate, subject to six months' suspension. Upon the execution of that writ, the damages were assessed on this, among other claims, at 1,644l. 3s. 9d., and A was arrested on a *ca. sa.*:—Held, upon motion for his discharge, that this was not a proveable debt under the fiat, and that he was not entitled to be discharged. *Woolley v. Smith*, 16 Law J. Rep. (n.s.) C.P. 81; 4 Dowl. & L. P.C. 469; 3 Com. B. Rep. 610.

A, the owner of a ship at sea, agreed to sell her to B for 4,000l. when she should arrive within the United Kingdom, and should have discharged her cargo and been repaired. B was then to give promissory notes in payment, and, in case of default on his part, A was to be at liberty to resell the ship, and B was to make good any loss arising from the sale. Before the arrival of the ship, B became bankrupt, and his assignees refused to purchase the ship when she arrived. She was then sold by A for less than 4,000l., and he afterwards applied to prove against B's estate for the deficiency:—Held, (reversing the decision of the Court below), that the agreement to purchase was contingent, and that no debt was created, and that A was, therefore, not entitled to prove against B's estate. *Re Gales, ex parte Jonassohn*, 15 Law J. Rep. (n.s.) Bankr. 9.

A was indebted to B in 20,000l. An interview took place between B and C, a son of A, in respect of the debt. A bond was subsequently drawn out and executed by A and C, whereby they became jointly and severally bound to pay B 10,000l. by instalments of 1,000l. a-year, with interest on such instalments as should be in arrear. The terms of the agreement under which the bond was executed, were not put into writing. It was stated by B that the agreement, made at the above-mentioned interview was, that the old debt should not be cancelled until the bond was satisfied; but it was stated by C that the agreement was that the old debt should be at once cancelled on the execution of the bond. A became bankrupt. A proof for the old debt, tendered by B, was rejected on the ground that the old debt was extinguished by the bond. *Ex parte Her-naman re Ewens*, 17 Law J. Rep. (n.s.) Bankr. 17.

(b) *Bonds.*

A gave a voluntary bond to B in 1812 for 3,000l. and interest, with an agreement that, on regular payment of interest, the principal was not to be called in until five years after the death of A. B bequeathed this bond to her three children, and died in 1840. In 1841 an arrangement was made between A and the children, under which the old bond was cancelled, and a new bond was given to each of the children, for 1,000l. and interest, with like

agreement to that on the old bond as to the calling in of the principal. In 1847 A, who carried on business as a banker, was made a bankrupt. In 1841, when the bond was given, the debts of A considerably exceeded his assets, and this state continued until the bankruptcy; but there was no suggestion of any fraud, *mala fides*, contrivance to defeat creditors, or of the contemplated bankruptcy of A, on the part either of the obligor or obligees:—Held, that, under these circumstances, the new bonds ought to be admitted to proof. *Ex parte Hookins re Gundry*, 18 Law J. Rep. (N.S.) Bankr. 11.

(c) *Annuity.*

[See 12 & 13 Vict. c. 106. s. 175.]

The bankrupt, before bankruptcy, covenanted by indenture that in the event of marriage between W and M, he would, during the lives of them and their issue, pay to trustees such sum yearly as should, either alone, until any estate should vest in them or their issue under a previous indenture, or together with the annual value of such estate when vested, amount to 150*l*. The marriage took place, and one child (still alive) was born before the bankruptcy; no estate vested under the previous indenture; the fiat issued on the 24th of October 1842:—Held, that the trustees were not entitled to prove against the separate estate for instalments of the annuity accrued since the 25th of March 1843, up to which time all arrears had been paid in full. *In re Foster*, 19 Law J. Rep. (N.S.) C.P. 274.

(d) *Shares.*

A, a shareholder in a joint-stock-banking company directed to be wound up under the Joint-Stock Companies Winding-up Act, 1848, had a call made on him in respect of his shares, and was shortly after made a bankrupt:—Held, that the official manager had a right to prove for the amount against the estate of A. *Ex parte Brown re Fenwick*, 19 Law J. Rep. (N.S.) Bankr. 4.

A, having applied for shares in a railway company, received, on the 30th of September 1845, a letter of allotment, whereby he was informed that ten shares had been allotted to him, and that a deposit of 5*l*. 5*s*. a share was to be paid on a certain day, and that the banker's receipt would have to be exchanged for scrip certificates, on the parliamentary contract and subscribers' agreement being signed, and that those instruments must be signed within a month from the transmission of the letter of allotment. A paid the deposit on the 9th of October, but never signed the parliamentary contract or subscribers' agreement, alleging, but not proving, that he had been prevented by the servants of the company. He also stated certain acts of misconduct on the part of the directors in the management of the affairs of the company. A fiat in bankruptcy issued against the company in October 1846:—Held, that A had no right of proof in the bankruptcy in respect of the deposit paid by him. *Ex parte Clarke re Tring, Reading, &c. Rail. Co.*, 17 Law J. Rep. (N.S.) Bankr. 13.

(e) *Joint and Separate Debts.*

Where a partner gives a separate security for a joint debt and becomes bankrupt, the other partners

remaining solvent, the creditor may have under the separate fiat the usual order for sale, but can only have liberty to prove for the deficiency against the joint estate. *Ex parte Leicestershire Banking Co. re Wilders*, 1 De Gex, 292.

A wine-merchant carrying on business under the firm of J R & Co., announced by a circular that he had taken his nephew into partnership. The business was thenceforth carried on under the style of J R sen. & Co., but as between the uncle and nephew the latter received a salary only, and did not participate in the capital, profits or losses of the concern. On both becoming bankrupt,—Held, that a creditor who supplied goods to the firm might prove against the separate estate of the uncle.

Part of the stock in trade consisted of wines in the docks, which the uncle on announcing the partnership directed the dock company to deliver to the order of the new firm:—Held, that these wines were in the reputed ownership of the two, and ought to be administered as joint estate.

Other wines were in the hands of a lien creditor of the uncle, and after the announcement of the partnership some of these were withdrawn and replaced by others in the name of the new firm:—Held, that the possession of the creditor did not prevent section 72. applying, and that these wines should, subject to the lien, be administered as joint estate.

Where a large number of creditors had a right of election to prove against a joint or separate estate, and the estates were not so ascertained as to enable the creditors to elect, a temporary order was made that no larger dividend should be declared of the one than of the other estate. *Ex parte Arbouin re Reay*, 1 De Gex, 359.

(f) *Mortgages.*

A lessee annexed tenant's fixtures and then deposited his lease by way of mortgage, with a memorandum, not noticing the fixtures:—Held, on his becoming bankrupt, that the security extended to the fixtures. *Ex parte Tagart re Mackie*, 1 De Gex, 531.

(g) *Partners.*

A note was issued by a bank in this form:—"I promise to pay the bearer, on demand, 5*l*., for A, B, C, and D.—Signed A;" A, B, C, and D. being the partners in the bank:—Held, that the holder of the note had not a right of separate action against A, and that, on the bankruptcy of the firm, he had not a right of proof against the separate estate of A.

On the hearing of an appeal, upon a special case from the Court of Review, the Lord Chancellor may direct a case to be sent for the opinion of a court of law. *Ex parte Buckley re Clarke*, 15 Law J. Rep. (N.S.) Bankr. 3.

B, a trader, being indebted to A, entered into partnership with C. After the formation of the partnership, a parol agreement was entered into between A, B, and C, that the debt due from B to A should be converted into a debt to be due from B and C as partners, to A. Some time after this agreement B and C were made bankrupts:—Held, that A had a right of proof against the joint estate of B and C, in respect of the debt. *Ex parte Lane*

re London, 16 Law J. Rep. (N.S.) Bankr. 4; 1 De Gex, 300.

Three partners of a firm of six carried on a distinct trade in partnership, and indorsed a promissory note made by the six, which was discounted by a person who believed at the time from general reputation that the three were partners in the greater firm, but that the firms were distinct:—Held, not a case for double proof. *Ex parte Hinlin re Acraman*, 1 De Gex, 550.

(h) *Sureties.*

[12 & 13 Vict. c. 106. s. 173.]

The plaintiff, the defendant and another party were co-sureties for one A, by a joint and several promissory note payable on demand. The defendant afterwards became a bankrupt, at which time the plaintiff had not paid his share of the debt, but subsequently he had paid more than his proportion:—Held, in an action for contribution, that the bankruptcy of the defendant was no answer, as the case was not within the 52nd section of 6 Geo. 4. c. 16, the plaintiff not being a "person liable for" the bankrupt's debt within the meaning of that section. *Wallis v. Swinburne*, 17 Law J. Rep. (N.S.) Exch. 169; 1 Exch. Rep. 203.

(i) *Arrears of Poor-rates.*

Arrears of poor-rates due from a bankrupt before his bankruptcy are proveable under the fiat; and the certificate is a bar to levying the amount under 43 Eliz. c. 2, by distress and sale of his subsequently acquired goods. *In re Wetherell*, 19 Law J. Rep. (N.S.) M.C. 115.

[See as to assessed taxes, 12 & 13 Vict. c. 106. s. 166].

(k) *Servants.*

[See 12 & 13 Vict. c. 106. ss. 168, 169.]

In June 1844, A entered the service of B as book-keeper and cashier, and continued as such until December 1848, without coming to any agreement as to the amount of his salary. It was stated by A that in December 1848 it was agreed between him and B that the salary should be at the rate of 250*l.* a year, from June 1844, and that the reason that such arrangement was not made before was that B was engaged in making experiments in a certain manufacture, from which he hoped to derive a considerable fortune, out of which A expected to be paid. B became bankrupt in February 1849:—Held, that A was a clerk and not a partner, and was entitled to prove for his salary. *Ex parte Hickin re Ellins*, 19 Law J. Rep. (N.S.) Bankr. 8.

(l) *Broker.*

A purchase by brokers in pursuance of the order of a customer, of shares in a projected railway company, provisionally registered, held not illegal, but a sufficient ground for admitting a proof tendered by the brokers occasioned by the non-completion of the purchase by the customer. *Ex parte Barton re Charles*, 1 De Gex, 316.

(m) *Legacy.*

A testator, by his will, gave all his property to his wife for her life, and after her decease to his children. The testator declared that it should be

lawful for his wife to retain in her hands, and to use and employ any sum not exceeding 6,000*l.*, in carrying on his trade. The testator died in June 1832, and his will was proved by her wife and his son. In August 1832 the testator's widow and his son began to carry on the testator's business in partnership together, and continued to carry it on until their bankruptcy. All the monies received in respect of the testator's estate, and in respect of the business carried on from the testator's death, until the bankruptcy, were paid into the bank to the joint account of the widow and son; and all the monies paid in respect of the business were paid out of this mixed fund. The net monies received in respect of the testator's estate exceeded the sum of 6,000*l.*:—Held, that the legatees, under the testator's will, had no right of proof against the joint estate of the widow and son, for the 6,000*l.*; but that their right of proof was restricted to such part of the testator's assets employed in the business as exceeded the 6,000*l.* *Ex parte Butterfield re Butterfield*, 17 Law J. Rep. (N.S.) Bankr. 10; 1 De Gex, 570.

A testator devised the rents of real estate, and bequeathed the interest of a legacy to B for life, with remainders over. At the date of the will, and at the time of the death of the testator, his personal estate, out of which the legacy was to come, was in the hands of B, who became bankrupt. The amount of the legacy was proved in the bankruptcy, and a dividend paid in respect of it was invested in stock:—Held, that the dividends of this stock ought to accumulate during the life of the bankrupt towards making good the legacy in favour of the persons entitled in remainder, but that the rents of the real estate were not liable to such equity, and belonged to the assignees of the bankrupt. *Ex parte Barff re Cousen*, 17 Law J. Rep. (N.S.) Bankr. 22.

(n) *Costs.*

[See 12 & 13 Vict. c. 106. s. 181.]

Where a bill of exchange was dishonoured by the acceptor and actions were brought by the holder against the drawer as well as the acceptor, and the former became bankrupt after judgment signed, and a reference to the Master to compute, and afterwards the acceptor paid the amount due upon the bill,—Held, that the holder could prove for the costs. *Ex parte Cocks re Barwise*, 1 De Gex, 446.

(o) *Contingent Debts.*

[See 12 & 13 Vict. c. 106. ss. 177, 178.]

A, in May 1847, in consideration of 1*l.* per cent., guaranteed to B the payment of a bill, payable eight months after the 18th of May, drawn by B on, and accepted by a firm which became bankrupt in October. A also became a bankrupt in October, and had not obtained his certificate, and no dividend had been declared. A proof by B against the estate of A, in respect of the guarantee, was allowed. *Ex parte Brook re Willis*, 17 Law J. Rep. (N.S.) Bankr. 8.

A lent B 750*l.*, and B and C as his surety, by a bond, dated the 16th of June 1847, became bound to pay the premiums of a policy of assurance which had been deposited with A, and also to pay A 750*l.*, by three instalments, on the 16th of June in three

successive years, with interest; and there was also a condition that if B or C should become bankrupt, they should, at the option of A, give additional security, or pay the principal and interest then due. B, and D his partner, then by a separate deed covenanted to indemnify C in respect of the bond. On the 26th of October 1847 B and D became bankrupt. On the 17th of January 1848 C paid the principal and interest, and tendered a proof against the bankrupts' estate:—Held, that the proof was not admissible. *Ex parte Meyer re Meyer*, 18 Law J. Rep. (N.S.) Bankr. 4.

A claim under a guarantee for a sum certain when due is proveable as a debt, and before it is due it is proveable as a debt due on a contingency under 6 Geo. 4. c. 16. s. 56.

A bought wool from B, payable by the buyer's acceptance at eight months, and one-half of the sum was secured by the guarantee of C. Before the bill became due a fiat in bankruptcy issued against C, and a few days afterwards one against A, and no dividend was declared under either fiat. The bill was dishonoured when due:—Held, that the claim upon the guarantee was proveable as a debt against the estate of C. *In re Willis*, 19 Law J. Rep. (N.S.) Exch. 30; 4 Exch. Rep. 530.

(p) Amount proveable.

Merchants at Liverpool, being owners of a ship, subject to a mortgage to a party who had never taken possession, consigned the ship to M, in America, with directions to send to them a quantity of cotton by that vessel. M accordingly sent a quantity of cotton in the vessel and defrayed sundry expenses, which were required for her. Before she arrived at Liverpool the merchants had become bankrupt, and M's agents there took possession of the goods on his behalf, claiming a right of stoppage *in transitu*. They afterwards sold the goods, and gave credit to M for the proceeds. An action of trover was afterwards brought by the assignees of the bankrupts, who recovered the value of the goods:—Held, that M was entitled to prove against the bankrupts' estate for the whole amount of the value of the goods, and of his disbursements in respect of the ship. *Re Humberston*, 15 Law J. Rep. (N.S.) Bankr. 10; 1 De Gex, 262.

(q) Election.

[See 12 & 13 Vict. c. 106. s. 182.]

A creditor, who had proved his debt and joined other creditors in opposing the granting the bankrupt his certificate, restrained from suing the bankrupt for the debt in a small debts court. *Ex parte Flower re Flower*, 16 Law J. Rep. (N.S.) Bankr. 9; 1 De Gex, 503.

(r) Evidence and Practice.

Where all parties acted under an impression that a security was for the whole of a debt, and twenty-one years had elapsed since it was given, but no evidence could be produced of any contract except one for a security to a limited amount, which was exceeded by the amount received upon the security, —Held, that the creditor ought not to be called on to refund. *Ex parte Follett re Cuthbert*, 1 De Gex, 212.

Dividend stayed to give opportunity of proving

to creditors who had delayed proving for eleven years, no dividend having been declared for upwards of ten years after the fiat issued. *Ex parte Sturton re Pulvertoft*, 1 De Gex, 341.

Opening dividend at instance of one creditor lets in others to prove. *Ex parte Bowmer re Pulvertoft*, 1 De Gex, 343.

Mother of creditor of weak intellect permitted on her application *ex parte* to prove on his behalf. *Ex parte Oxtoby re Oxtoby*, 1 De Gex, 453.

(M) FIAT.

[By 12 & 13 Vict. c. 106. s. 89, all proceedings to obtain adjudication are to be by petition without fiat.]

(a) Date and Issuing.

A country fiat in bankruptcy was sealed by the Lord Chancellor at ten minutes before twelve, A.M. and remained in the custody of the Secretary of Bankrupts, for the purpose of being transmitted, until between four and five, P.M. when it was posted by a clerk in the office. A sale of the bankrupt's goods under an execution upon a judgment by warrant of attorney was completed at a quarter before four the same day:—Held, that it was a protected transaction within 2 & 3 Vict. c. 29, having been completed "before the date and issuing of the fiat." *Freeman v. Whitaker*, 19 Law J. Rep. (N.S.) Exch. 351; 4 Exch. Rep. 834.

The Bankruptcy Law Amendment Act, 5 & 6 Vict. c. 122. s. 4, enacted, that fiats in bankruptcy should be issued and transmitted by the Lord Chancellor's Secretary of Bankrupts, in such manner as the Lord Chancellor should by any order direct, to the Court to which such order should be directed. The Chancellor by an order directed that every fiat directed to any district court of bankruptcy should be sent through the General Post Office to the deputy registrar of such court. A fiat in bankruptcy was signed by the Chancellor on the 7th of June at 10 o'clock, was brought to the office of the Secretary of Bankrupts at 5 minutes past 12, and at 4 o'clock on that day was posted by the secretary in a letter to the registrar of the District Court of Bankruptcy at Exeter, by whom it was received on the following day:—Held, that the fiat was to be considered as "issued" when it was put into the post. *Hernaman v. Coryton*, 19 Law J. Rep. (N.S.) Exch. 353; 5 Exch. Rep. 453.

(b) Changing Venue.

A bankrupt's usual place of business for two years before the bankruptcy had been at Hounslow, but he had taken for his family a house at D near Bristol, where he had resided for some months previous to his bankruptcy and contracted debts. A Bristol fiat describing him as of D, and naming him Clarke instead of Clark, was transferred to the London Court, to which a fiat with a correct description had been issued, and the proofs were ordered to be transferred, the Bristol fiat being impounded. *Ex parte Burbidge re Clark*, 1 De Gex, 266.

The fact that the majority of the creditors and a large proportion of the debtors to an estate reside within the jurisdiction of a district court within which the trading took place and out of which the bankrupt removed shortly before his bankruptcy,

with the view of having a friendly fiat issued against him in a court where his conduct could not be easily investigated, that other bankruptcies connected with the one in question were in prosecution in the district court, and that many of the creditors were unable to afford the expense of a journey to London, —Held, insufficient ground for transferring the fiat from London to the district court, on a petition of the creditors presented two months after the choice of assignees and opposed by the assignees and the bankrupt.

It is not correct for the assignees to employ as their solicitor the partner of one of themselves who is a solicitor. *Ex parte Downes re Garbett*, 1 De Gex, 390.

The place of business of a bankrupt was in a town situate partly in one county and partly in another, but was actually in the county belonging to the more remote district court:—Held, that the fiat ought not to be transferred on this account to the nearer court. *Ex parte Bayliss re Gibbs*, 1 De Gex, 440.

Three persons carried on business at L, in Carmarthenshire, two of the partners residing there, and managing the business, and the third, a dormant partner, residing in London. All the partnership property was at L. A fiat was sued out by the son of the dormant partner against the firm, and the fiat was transmitted to the Court of Bankruptcy in London. On the petition of some of the creditors of the bankrupt firm, the fiat was removed to Bristol. *Re Grylls*, 17 Law J. Rep. (N.S.) Bankr. 7.

(c) Amending.

Where one of the bankrupts died before the adjudication under a joint fiat, the fiat was ordered to be amended by omitting his name. *Ex parte Hall re Blackburn*, 1 De Gex, 332.

An application to amend a fiat after it had been opened, by the alteration of the Christian name of the bankrupt, was refused. *Re Chambers*, 18 Law J. Rep. (N.S.) Bankr. 17.

(d) Superseding.

A *procedendo* ordered to issue where a commission had been superseded three years previously by consent of the creditors, on the ground that the bankrupt had not disclosed the fact of his being entitled to shares in a waterworks company, his defence being that the shares were subject to a mortgage for more than their value, but which turned out to be invalid for want of notice to the company.

Shares in such a company held subject to the law of reputed ownership, the company's act declaring them to be personal property. *Ex parte Lawrence re Bowring*, 1 De Gex, 269.

(e) Annuling.

(1) Causes for.

A applied to the commissioner for protection from process under the 5 & 6 Vict. c. 116. s. 1; on which occasion B successfully opposed A, on the ground that A was a trader. A afterwards caused a fiat to be issued against him on his own petition. B presented a petition that the fiat might be annulled on the ground that A was not a trader:—Held, that, even assuming the fiat to be invalid, on

the ground that A was not a trader, B could not be heard to impeach the fiat on that ground. *Ex parte Mitchell re Harris*, 15 Law J. Rep. (N.S.) Bankr. 8; 1 De Gex, 257.

Bankrupt's own fiat annulled with his consent and that of assignees, to enable a creditor's fiat to be sued out, under which, transactions between the bankrupt and others might be impeached. Form of order as to costs. *Ex parte Louch re Dutchman*, 1 De Gex, 463.

A fiat issued against a person on his own application. He had before his bankruptcy executed certain deeds which it was proposed to impeach in the bankruptcy. An application by him and a creditor of his whose debt was prior to the date of the deeds, that the fiat should be annulled with costs to be paid out of the bankrupt's estate, the creditor undertaking to issue a new fiat, was granted. *Ex parte Thomas re Thomas*, 17 Law J. Rep. (N.S.) Bankr. 21.

A fiat issued by a bankrupt against himself may be legally and equitably valid, though he may have been party to acts of fraudulent preference.

It is not sufficient ground for annulling such a fiat that it was issued mainly to protect the bankrupt against proceedings at law or without a predominant wish to benefit his creditors.

Where at the time of a fraudulent preference the bankrupt was a trader, and there remains a debt which was then owing and which would support a creditor's fiat—*semble*, that such fraudulent preference may be impeached under the bankrupt's own fiat.

Such a fraudulent preference does not of itself constitute a sufficient ground for annulling such a fiat, against the bankrupt's consent, at the instance of a creditor who proposes to sue out a new fiat, especially if there be any doubt as to the competency of such creditor to sue out a fresh fiat. *Ex parte Norton re Robinson*, 1 De Gex, 504.

The 5 & 6 Vict. c. 122. s. 8, providing that no fiat shall be invalid by reason of the act of bankruptcy being concerted does not enable a creditor to sue out a fiat founded on a trust deed executed with his concurrence, and such a fiat may be annulled at the instance of another creditor. *Ex parte Payne re Taverner*, 1 De Gex, 534.

A fiat in bankruptcy issued against a trader who had carried on business in the City, the alleged act of bankruptcy being a denial to creditors, evidenced by a statement that inquiry had been made for him at his place of business, and that the housekeeper had denied all knowledge of him. In support of a petition to annul the fiat on the ground of no act of bankruptcy, it was stated that he had carried on business in partnership, but had ceased to carry on business in July 1848; that the fiat issued in January 1849; that an entry had been made in the diary kept at the place of business that letters for him were to be forwarded to a district post-office in London; that he lived near that place and might have been found by inquiries at that post-office. The respondents not requiring further investigation, the fiat was ordered to be annulled. *Ex parte Addison re Hooper*, 18 Law J. Rep. (N.S.) Bankr. 13.

On a petition presented by the bankrupt, with the consent of his creditors, to the Lord Chancellor seeking to annul the fiat issued against him pre-

viously to the passing of the Bankrupt Law Consolidation Act, the Lord Chancellor granted the order to annul the fiat, but on the express grounds of there being proceedings pending. *In re Harwood*, 1 Hall & Tw. 572.

(2) *Practice, Petition, and Order for Annuling.*

On a petition to annul a fiat with consent of creditors, the commissioner declined to certify the consent without payment of the office fees of 10*l.* and 20*l.* Assignees had been chosen, but it was stated that there were likely to be no assets. The Court requested the commissioner to certify his opinion whether there were any available assets. *Ex parte Davis re Davis*, 1 De Gex, 267.

Where a bankrupt sued out a fiat against himself and only one creditor proved, and assignees were chosen, but there were no assets, and the office fees of 10*l.* and 20*l.* had not been paid, the Court refused to dispense with the usual certificate of the commissioner on an application to annul with the consent of the creditor. *Ex parte Nicholls re Nicholls*, 1 De Gex, 331.

Where a country solicitor, admitted as a solicitor of the Court of Review, had by mistake taken an affidavit of debt (as a Master Extraordinary in Chancery) to serve as a foundation for an act of bankruptcy, and appeared upon a petition to annul the fiat, and submitted to the jurisdiction of the Court, he was ordered to pay the costs of annulling the fiat. *Ex parte Benbow re Benbow*, 1 De Gex, 443.

A fiat issued against A on the 19th of September. On the 9th of October there was a choice of assignees. The 14th of December was the day appointed for granting the bankrupt his certificate. On the 12th of December notice was given by the petitioner of an intention to present a petition to annul the fiat, on the ground that A was not a trader; and on the 14th of December a petition was presented:—Held, that the petitioner was not precluded from being heard, on the ground of delay. *Ex parte Dering re Cramp*, 16 Law J. Rep. (N.S.) Bankr. 3; 1 De Gex, 398.

By a deed of settlement of a company, twelve persons were appointed to be the committee of management; and it was declared that the majority of the members of the committee of management for the time being present as members of such committee, consisting of not less than five persons, should have power to bind the company. A meeting of the committee was summoned, at which three members only attended. At this meeting a resolution was passed that the company was unable to meet its engagements; and a declaration and minute were filed as required by the 7 & 8 Vict. c. 111; and a fiat issued against the company. On a petition presented by two other members of the committee, that the fiat should be annulled,—Held, *first*, that the petition could not be heard without serving some other members of the committee who dissented from the views taken by the petitioners; and, (on a further hearing of the petition) *secondly*, that the resolution passed in this case was not a resolution “duly passed,” within the meaning of the act 7 & 8 Vict. c. 111, and that the fiat ought to be annulled. *Ex parte Morrison re London and Birmingham Extension and Northampton, Daventry, &c. Rail.*

Co., 16 Law J. Rep. (N.S.) Bankr. 11; 1 De Gex, 539.

(N) OF THE BANKRUPT.

(a) *Surrender.*

The felony of not surrendering at a district court to a fiat in bankruptcy, under the stat. 5 & 6 Vict. c. 122. s. 32, is committed at the place where the district court is situate; and an indictment for this offence cannot be sustained in a different county, in which the person was a trader, or in which he committed an act of bankruptcy.

The stat. 38 Geo. 3. c. 52. s. 2, which relates to the trial of offences in an adjoining county, only applies to cities and towns corporate which are counties of themselves, and not to towns corporate which are not counties of themselves. *Regina v. Milner*, 2 Car. & K. 310.

On an indictment for not appearing and surrendering to the district court of bankruptcy in M, over which there were two judges, F and S, practically presiding over two courts, and hearing the fiats allotted in rotation, the bankrupt's summons being signed by F, requiring him to appear before him at the said district court of bankruptcy in M; the bankrupt never appeared before F or S, or at any other place:—Held, that the conviction for not surrendering at the proper court was proper; that the fiat having in fact issued, the summons need not inform the party that the fiat had been referred to the M district court, nor that the party had been duly adjudged a bankrupt. *Regina v. Dealtry*, 2 Car. & K. 521; 1 Den. C.C. 287.

Form of order for director of a company which has become bankrupt under 7 & 8 Vict. c. 111, to surrender after the time limited. *Ex parte Barber re Tring, &c. Rail. Co.*, 1 De Gex, 381.

The Court refused to interfere with the discretion of the commissioner as to not allowing liberty to the bankrupt to surrender. *Ex parte Gordon re Gordon*, 19 Law J. Rep. (N.S.) Bankr. 12.

In January 1848 a fiat issued against A. In November A presented a petition, stating that in September 1847 he had left England in consequence of family disagreements, and in the full belief that he had left enough to pay all his creditors in full, and that he had lately returned to this country, and praying for liberty to surrender. The assignees appeared on this petition, and, no objection having been made, it was ordered that the bankrupt should be at liberty to surrender, and that his costs should be paid out of his estate. The bankrupt afterwards made a statement to the commissioner to the effect that he had left England from pecuniary embarrassments, taking away a good deal of his property with him. A petition by the assignees that the above-mentioned order should be discharged, was dismissed, with costs. *Ex parte Pennell re Turner*, 18 Law J. Rep. (N.S.) Bankr. 7.

(b) *Examination and Committal.*

A bankrupt was examined before one of the London commissioners, and, not having satisfactorily answered the questions put to him, was committed to the custody of a messenger of the court. The bankrupt was afterwards brought before a subdivision court, by which court, after another examination, he was committed to Newgate. After his

committal the bankrupt was brought up before Mr. Commissioner S, in whose jurisdiction the fiat was, and after some questions put and answers given, was re-committed to Newgate on the old warrant:—Held, that the bankrupt was entitled to his discharge, on the ground that a record ought to have been made of his last examination before Mr. Commissioner S.

The warrant of committal by the sub-division Court directed the keeper of the prison to keep the bankrupt "until such time as he shall submit himself to us, or to any of the Commissioners of the Court of Bankruptcy, and answer make to the questions put to him by us."—Whether the warrant was not, on this account, legal—*quære*. *Re Martin*, 16 Law J. Rep. (N.S.) Bankr. 6; 1 De Gex, 485.

A warrant of commitment of a bankrupt for not giving satisfactory answers to a commissioner of a district court of bankruptcy at L, for which two commissioners were appointed, in which it was stated "that a fiat was duly directed to the Court at L, and that the bankrupt did surrender himself to one M J W, a commissioner of the said court, authorized to proceed in the said fiat," sufficiently shews jurisdiction, without any allegation that the fiat was allotted to M J W, or that the other commissioner was absent.

The warrant set out all the questions and answers, and concluded "which answers of the said (bankrupt) are not, nor are any of them, satisfactory to me, the said commissioner":—Held, sufficiently specific. *Ex parte Ward*, 15 Law J. Rep. (N.S.) Q.B. 233; 3 Dowl. & L. P.C. 756.

The Court will not take judicial notice of the general rules and orders made by the Commissioners of Bankruptcy, for the regulation of the practice of courts under 5 & 6 Vict. c. 122. s. 70.

By statute 8 & 9 Vict. c. 48, it is not only unnecessary, but illegal, to examine a bankrupt upon oath. *In re Ramsden*, 15 Law J. Rep. (N.S.) Q.B. 234; 3 Dowl. & L. P.C. 748.

On a rule in the nature of a *habeas corpus* to discharge a bankrupt from gaol, it appeared that he had been committed by a commissioner of bankruptcy, under a warrant which stated, that the bankrupt had made and signed the declaration substituted for an oath by 8 & 9 Vict. c. 48, and then set out at length the questions put to him in examination, and the answers given, and stated that the answers were unsatisfactory, and required his detainer till he should submit to make answer to the satisfaction of the commissioner. The bankrupt was after his committal brought up again before the commissioner, and again committed by another warrant, which was indorsed on the first warrant, and which stated that his former examinations having been read over to him, he had made no further statement; and that the answers, whereof copies were within set out, were unsatisfactory. This second warrant did not state that the bankrupt had again made and signed the declaration required by 8 & 9 Vict. c. 48, and was issued on a day after the rule had been moved for:—Held, first, that the second warrant could be looked at by the Court, and that the rule must be decided as if a *habeas corpus* had actually issued, and the warrants were set out on a return.

Secondly, that the allegation in the second warrant, that the answers referred to were unsatisfactory, was sufficient.

Thirdly, that it was not necessary that the bankrupt should make and sign a fresh declaration when brought up to be examined previous to the making of the second warrant. *In re Bull*, 15 Law J. Rep. (N.S.) Q.B. 235; 3 Dowl. & L. P.C. 763.

By statute 3 Geo. 4. c. 23. s. 2, it is enacted "that after examination and adjudication by any two Justices, all subsequent proceedings to enforce obedience may be by either of the same, or any other Justice of the county in like manner as if done by the same Justices who heard and adjudged the complaint:"—Held, that a warrant which recited that a party was summoned before two Justices to shew cause why he should not pay rates, without alleging that they were the same Justices by whom the warrant was issued, must also shew that such first-named Justices adjudicated in the complaint. *In re Ramsden*, 15 Law J. Rep. (N.S.) M.C. 113; 3 Dowl. & L. P.C. 748.

A bankrupt, on being examined before a single commissioner, was committed to the custody of the messenger, to be brought before a sub-division court. The fiat was allotted to Commissioner S. The bankrupt was brought before the sub-division court, but another commissioner sat for Commissioner S, who was unwell. The sub-division court, not being satisfied with the bankrupt's answers, committed him to Newgate. He was subsequently brought up before Commissioner S, and made a statement in reference to his answers before the sub-division court, but the commissioner remanded him to Newgate on the former warrant. The bankrupt obtained a *habeas corpus*, and the return set out the warrant of commitment, containing the examination before the sub-division court. A motion was made for the discharge of the bankrupt, on the ground that the warrant in the return did not set out the first or the last examination before a single commissioner, nor the manner in which the sub-division court was constituted, and did not allege that the Court had been duly summoned:—Held, that the return need only set out the examination on which the sub-division court committed the bankrupt to Newgate.

Held, also, that affidavits may be received on behalf of the bankrupt to shew facts not appearing on the face of the return. *In re Martin*, 16 Law J. Rep. (N.S.) Q.B. 286; 4 Dowl. & L. P.C. 768.

Where a bankrupt has been committed under the 6 Geo. 4. c. 16. s. 36, for not answering questions to the satisfaction of the commissioner, the Court will not discharge him out of custody, unless the story contained in his answers is sufficient to satisfy a reasonable person of its truth.

The bankrupt Act, 6 Geo. 4. c. 16. s. 36, authorizes the Commissioners of Bankrupts, where a bankrupt does not answer fully to their satisfaction, to imprison him "until he shall full answer make to their satisfaction to such questions as *shall be put* to him." The warrant of commitment set out the examination of the bankrupt, the whole of which related to a sum of money which was not forthcoming, and which the bankrupt stated had been stolen by thieves, who had broken into his house. The

warrant then proceeded, "which answers of, &c. are not nor are any of them satisfactory;" and it then directed the bankrupt to be imprisoned until he should full answer make to the satisfaction of a commissioner "to the questions so put to him by me as aforesaid." The warrant was directed "To the messenger of the said court, and to his assistants, and to the governor or keeper of Her Majesty's gaol of the castle of York, in the county of York:"—Held, first, that the warrant was good. *Quære*—Whether it would have been bad had it ordered the bankrupt to be committed until he should satisfactorily "answer such questions as shall be put to him." Secondly, that the bankrupt was committed on account of answers which, taken as a whole, were unsatisfactory. Thirdly, that the warrant of commitment was not bad by reason of its not containing the name of the messenger. *In re Lord*, or *Ex parte Lord*, 16 Law J. Rep. (N.s.) Exch. 118; 16 Mee. & W. 462.

(c) Allowance of Costs.

[See 12 & 13 Vict. c. 106. ss. 194—197.]

Bankrupt allowed his expenses arising from changing the venue of the fiat after adjudication. *Ex parte Chesborough re Fearnley*, 1 De Gex, 333.

A petition was presented by *cestuis que trust*, for liberty to prove against the estate of a bankrupt defaulting trustee, whom they had put into prison for contempt, for not obeying an order for the payment of the money, made by the Court of Chancery in a suit instituted against him in respect of the breach of trust. The bankrupt appeared on the petition, and applied to be discharged from custody. The Court, under these circumstances, allowed the bankrupt 40s. for his costs of appearing on the petition. *Ex parte Rylands re Crowdon*, 18 Law J. Rep. (N.s.) Bankr. 9.

(d) Discharge.

On an application to discharge a bankrupt, who had obtained his certificate, from execution for a debt proveable under the commission,—Held, that the Judge at chambers might receive affidavits to shew the certificate void, under 5 & 6 Vict. c. 122. s. 38. The Court has no original jurisdiction in such matter. *Clark v. Smith*, 3 Com. B. Rep. 982.

The Court has no jurisdiction to order the discharge of a bankrupt out of custody under 5 & 6 Vict. c. 122. s. 42, such jurisdiction being given by a statute to a "Judge of the Court." *Wearing v. Smith*, 16 Law J. Rep. (N.s.) Q.B. 1; 9 Q.B. Rep. 1024.

Under the 23rd section of 5 & 6 Vict. c. 122, which provides that "if such bankrupt shall be arrested, &c., he shall, on producing his summons, &c., be immediately discharged," the words "such bankrupt" are not restricted exclusively to persons who really are bankrupts *de jure*, but comprise all persons against whom a fiat has issued and who have been thereupon by the proper Court adjudged to be bankrupt. *Norton v. Walker*, 18 Law J. Rep. (N.s.) Exch. 234; 3 Exch. Rep. 480.

See *ante*, (D) Protection from Process; (L) Proof of Debt, (a) *In general*; and *post*, (Q) Certificate of Conformity.]

(O) AUDIT OF ACCOUNTS.

[See 12 & 13 Vict. c. 106. ss. 185, 186.]

Where the solicitor to the fiat received and paid all monies on account of the estate, and at the audit the accounts were verified by his affidavit as to their accuracy, and by the affidavit of the assignees that they had neither received nor paid anything except what had been so received and paid by the solicitor, but there was nothing to shew that either of the assignees had, as to information or belief, verified the accounts:—Held, that the accounts ought to be opened and retaken, although three years had passed since the audit.

The solicitor had retained and been allowed at the audit his bill of costs as taxed by the commissioner:—Held, not such a payment as precluded re-taxation.

Whether a commissioner has jurisdiction to open accounts passed and audited by commissioners under the said jurisdiction—*quære*.

Examinations before the commissioner cannot be read in evidence on a petition. *Ex parte Rees re Scowcroft*, 1 De Gex, 205.

Where there has been no audit of the assignees' accounts and large sums had been received by them, it was held that the official assignee acted properly in calling for an audit, though twenty-five years had elapsed since any step had been taken, and no creditor made any complaint. But it appearing that the official assignee might without difficulty and at small expense have satisfied himself that the circumstances did not require him to prosecute a claim against the creditors' assignee, he was not held entitled to his full costs as against the latter, there being no estate. *Ex parte Shaw re Robbins*, 1 De Gex, 242.

(P) DIVIDENDS.

[See 12 & 13 Vict. c. 106. ss. 187—189.]

A was made a bankrupt in 1810, and in 1812 dividends were declared, amounting altogether to 20s. in the pound on the debts proved against his estate, and a release of the surplus of his estate was made to him. The dividends payable to creditors were carried to an account kept by the assignees, called "the separate account," out of which the creditors were paid. In 1849 a sum of money, consisting of unclaimed dividends and interest allowed on them by the bankers with whom the account was left, was paid over to the official assignee:—Held, that this fund belonged altogether to the creditors who had not been paid. *Ex parte Woodford re Wilcocks*, 19 Law J. Rep. (N.s.) Bankr. 8.

(Q) CERTIFICATE OF CONFORMITY.

[See 12 & 13 Vict. c. 106. ss. 198—207.]

A bankrupt having obtained his certificate under 5 & 6 Vict. c. 122. s. 39, was taken in execution upon a judgment, signed before the confirmation of such certificate; application being made to a Judge at chambers, to discharge him on the production of the certificate under sect. 42,—Held, that it was competent to the Judge to go into an inquiry whether the certificate was not void under section 38. *Wearing v. Smith*, 16 Law J. Rep. (N.s.) Q.B. 173; 9 Q.B. Rep. 1024.

The drawer of a bill of exchange, who had paid the amount to an indorsee after a fiat in bankruptcy issued against the acceptor, may sue the latter upon the bill, before he has obtained his certificate, notwithstanding the indorsee has proved under the fiat. *Walker v. Pilbeam*, 4 Com. B. Rep. 229.

A security given to a creditor in consideration of his withdrawing his opposition at the final examination of a bankrupt is not void within the 12 & 13 Vict. c. 106. s. 202. *Taylor v. Wilson*, 19 Law J. Rep. (N.S.) Exch. 241; 5 Exch. Rep. 251.

According to the proper construction of the 198th section of the Bankrupt Law Consolidation Act, it is not necessary that the assignees should give notice to the registrar of their intention to oppose the granting of the certificate to the bankrupt. *Ex parte Wells re Wells*, 19 Law J. Rep. (N.S.) Bankr. 5.

The granting the certificate mentioned in the 225th section of the Bankrupt Law Consolidation Act is a judicial and not merely a ministerial act; and the Court which has the power of giving such certificate, ought to allow any creditor, who has received notice to attend, to put any relevant questions to the debtor or the inspectors. *Ex parte Lawrence re Whinnery*, 19 Law J. Rep. (N.S.) Bankr. 6.

[See ante, (D) Protection from Process.]

(R) ARRANGEMENT BY DEED.

[See 12 & 13 Vict. c. 106. s. 224.]

Statutes are not to have a retrospective operation, so as to deprive parties of vested rights, unless they contain express words to that effect.

The provisions of sections 224. and 225. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, by which a deed of arrangement signed by six-sevenths in number and value of a trader's creditors, is binding on the other creditors on the expiration of three months after notice, are not to be construed retrospectively, so as to deprive a creditor of his right to an action commenced by him before the act came into operation. *Marsh v. Higgins*, 19 Law J. Rep. (N.S.) C.P. 297; 1 L.M. & P. 253.

In a plea alleging that the defendant entered into a deed of arrangement with his creditors under the 224th and 225th sections of the Bankrupt Law Consolidation Act, (12 & 13 Vict. c. 106.) it is not necessary to set out the names of the six-sevenths of the creditors by whom the deed was executed, or the amount of their debts, or the trusts contained in the deed.

The plea alleging two inconsistent days as the date of the execution of the deed, the Court looked to other parts of the plea to ascertain which was to be adopted and which rejected.

The execution of a deed of arrangement, under the 224th section of the act, by a trader unable to meet his engagements with his creditors, is a suspension of payment under the 224th section.

A plea alleged that the defendant was and would be unable to pay his creditors in full, and that he executed a deed of arrangement, and then spoke of the "said suspension of payment," none having been distinctly averred:—Held, that, on general demurrer, it appeared sufficiently that there had been a suspension.

Quære—Whether the allegation would have been sufficient on special demurrer.

A plea of this sort may be pleaded against the further maintenance. *Phillips v. Surridge*, 19 Law J. Rep. (N.S.) C.P. 337; 1 L.M. & P. 458.

(S) EVIDENCE [COMPETENCY OF WITNESSES].

A statement by a bankrupt in his balance sheet, of a debt due by him is not evidence as against his assignees of the debt being due.

An accountant employed by the assignees of the bankrupt sent to the defendant an unsigned statement of the account between the bankrupt and the defendant's testator, in which he stated a balance in favour of the testator:—Held, that this was not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations as against the assignees. *Pott v. Cleg*, 16 Law J. Rep. (N.S.) Exch. 210; 16 Mee. & W. 321.

In an action by a bankrupt against his assignees to try the validity of the fiat issued against him, creditors of the bankrupt, whether they have or have not proved their debts, are rendered competent witnesses for the defendants by 6 & 7 Vict. c. 85, and are not excluded by the proviso, as being persons on whose "immediate and individual behalf" the action is defended. *Colombine v. Penhall*, 19 Law J. Rep. (N.S.) Q.B. 302; 13 Q.B. Rep. 128.

Where, in an action by the assignees, the bankrupt was not called as a witness, but a witness was examined as to certain statements of the bankrupt with respect to his affairs,—Held, that the evidence was admissible.

Where a creditor under the fiat was produced as a witness,—Held, that his evidence was inadmissible. *Belcher v. Brake*, 2 Car. & K. 658.

Since Lord Denman's Act (6 & 7 Vict. c. 85), the petitioning creditor is a good witness to support the fiat. *Johnson v. Graham*, 2 Car. & K. 808.

Where certain parts only of a book containing proceedings in bankruptcy are put in by one party, the opposite counsel have no right to refer to other parts of it. *Whitfield v. Aland*, 2 Car. & K. 1015.

[See *Ex parte Marjoribanks*, ante, (G)—(d).]

(T) PRACTICE.

(a) In general.

Affidavit of debt filed under 1 & 2 Vict. c. 110. s. 8. ordered to be taken off the file with the creditor's consent. *Anonymous*, 1 De Gex, 334.

A trust deed which could not have been impeached under a fiat sued out by any creditor held incapable of being impeached under the bankrupt's own fiat. *Ex parte Philpott re Miskin*, 1 De Gex, 346.

A creditor who before the fiat has taken a bankrupt in execution cannot be heard on the merits of his petition to stay the certificate unless he discharges the bankrupt.

Quære—Whether a creditor who detains a bankrupt in execution till he is discharged by his certificate is competent, if the fiat is annulled, to issue a new one.

Quære—Whether on the first fiat being annulled the creditor can again take the debtor in execution or whether the debt is satisfied. *Ex parte Norton re Robinson*, 1 De Gex, 504.

Where a stock legacy bequeathed to a bankrupt had been transferred into the names of the official

and creditors' assignees, and the former survived the latter and left the country and became bankrupt,—Held, that the Court might on the petition of the new official assignee served upon the bank and the assignees of the former official assignee, direct the funds to be transferred to the accountant in bankruptcy, and that a petition under Sir E. Sugden's Act was unnecessary. *Ex parte Pennell re Sustenance*, 1 De Gex, 566.

A petition and the affidavits in support of it were filed under an incorrect title. The petition was amended. The affidavits were ordered to be taken off the file, amended as to the title, and then re-sworn. *Ex parte Barton re Harvey*, 18 Law J. Rep. (N.S.) Bankr. 17.

In the case of a fiat issued previously to the statute 12 & 13 Vict. c. 106, and in which the proceedings had not been completed, the Lord Chancellor ordered the petitioning creditor's affidavit and the petition for the fiat to be produced for the purpose of being enrolled and sealed with a view to their production on the trial of an action, in which the validity of the fiat was to be decided. *In re Bishop*, 2 Hall & Tw. 220.

(b) *Petition.*

Form of order on petition of equitable sub-mortgagee. *Ex parte Powell re Vaughan*, 1 De Gex, 405.

Upon a petition to appoint new trustees, the Court of Review will not decide any question as to who are the *cestuis que trust*.

In case of doubt all who may by possibility be held to fill that character must be parties. *Ex parte Congreve re Oliver*, 1 De Gex, 267.

Petition by bankrupt to annul the fiat heard although he had not surrendered, the time for doing so having expired between the presentation of the petition and the hearing. *Ex parte Hodson re Hodson*, 1 De Gex, 374.

Where the bankrupt left England on account of his embarrassments and consequently did not hear of the fiat until after the time for surrendering had expired, he was not allowed his costs on petitioning for leave to surrender. *Ex parte Perry re Perry*, 1 De Gex, 377.

Where the creditor of a bankrupt after attending to prove, and being prevented from doing so by the other business in court, became insolvent, and the title of his assignee was not complete in time to enable the assignee to prove,—Held, that he must nevertheless pay the costs of his petition to stay the dividends and of the requisite sitting to receive his proof, and retain them out of the insolvent's estate. *Ex parte Hughes re Osborne*, 1 De Gex, 387.

(c) *Accounts.*

A fiat issued against the bankrupt in 1832. A, who was a solicitor, was appointed sole assignee, and acted as such, and as solicitor to the fiat until 1848, and was paid his costs as solicitor. The bankrupt presented a petition, praying that the accounts of A might be reviewed, with reference to the disallowance of all the costs, except the sums paid by him out of pocket. A stated that he had in 1832 applied to the other creditors, but had received no assistance from them, and that, under the circumstances—as no other creditor would come

forward, and the affairs of the bankrupt were in a state of great complication, and as there was no fund then out of which a solicitor could be paid—he had accepted the office of assignee, with the approbation of the Commissioners, and had also acted as solicitor. It appeared that the estate of the bankrupt had, under the management of A, produced nearly 20s. in the pound:—Held, that, on the ground of public policy, the accounts of A ought to be reviewed, with reference to the union of the characters of assignee and solicitor. *Re Newton*, 18 Law J. Rep. (N.S.) Bankr. 1.

(d) *Contempt.*

When a bankrupt after being committed had been twice brought up to be examined and had been recommitted, the Court declined to order him to be brought up again at the expense of the estate. *Ex parte Rothery re Rothery*, 1 De Gex, 565.

(e) *Affidavit of Debt.*

By 5 & 6 Vict. c. 122. s. 67, all affidavits to be made or used in matters of bankruptcy, or under or by virtue of any statute relating to bankrupts, or of this act, may be sworn before certain specified persons, including the registrar of the Court of Bankruptcy:—An affidavit of debt filed in the Court of Bankruptcy under 1 & 2 Vict. c. 110. s. 8. is an affidavit made "by virtue of a statute relating to bankrupts," and is made in a matter of bankruptcy within the 5 & 6 Vict. c. 122. s. 67, though at the time it was made no bankruptcy existed and might possibly never exist; and such an affidavit is properly sworn before the registrar of the Court of Bankruptcy. *Regina v. Dunn*, 16 Law J. Rep. (N.S.) Q.B. 382; 12 Q.B. Rep. 1026.

Plaintiff filed an affidavit of debt in bankruptcy against the defendant for the sum of 104*l.* 18*s.* 5*d.*, under the 5 & 6 Vict. c. 122. A summons thereupon issued against the defendant, but was dismissed on his making an affidavit that he believed he had a good defence to the demand. On the trial of the cause, the defendant proved a set-off to the amount of 29*l.* 5*s.*, and the plaintiff had a verdict for 74*l.* A certificate for speedy execution having been granted, judgment was signed and execution issued on the 7th of August. On the 21st of November following, the defendant obtained a rule under the 19th section of the above act, to enter a suggestion on the record, for the purpose of obtaining costs in the action, on the ground that the plaintiff had not any reasonable or probable cause for making an affidavit of debt to the amount of 104*l.* 18*s.* 5*d.*

Quare—Whether, under the above circumstances, the plaintiff had reasonable or probable cause for making an affidavit to the amount in question. But, held, that the motion had been made too late; that, in cases of speedy execution granted, the defendant ought to apply within the first four days of the next term, and in other cases before judgment has been signed and execution issued. *Smith v. Temperley*, 16 Law J. Rep. (N.S.) Exch. 105; 16 Mee. & W. 273; 4 Dowl. & L. P.C. 510.

Plaintiff filed an affidavit in bankruptcy, under 5 & 6 Vict. c. 122. s. 11, against defendant, for 99*l.* 19*s.* 7*d.* In the account previously delivered, as provided by that section, 10*l.* 15*s.* was given credit

for as a set-off, but the balance was made by mistake to appear 99l. 19s. 7d., instead of 89l. 19s. 7d. At the trial plaintiff recovered 86l.:—Held, that defendant was not entitled to have his costs allowed, pursuant to the 19th section.

Quare—Whether a creditor is justified under the above statute in making an affidavit for the whole amount of his demand, without noticing any set-off which he knows to exist on the other side. *Willding v. Temperley*, 17 Law J. Rep. (N.S.) Q.B. 184; 11 Q.B. Rep. 987.

(U) SOLICITOR TO THE FIAT.

Leave given to the solicitor to the fiat, under particular circumstances, to take, at a sum offered by him, a part of the bankrupt's property. *Ex parte Watts re Sedgwick*, 15 Law J. Rep. (N.S.) Bankr. 13; 1 De Gex, 265.

A, a solicitor, was the petitioning creditor in a bankruptcy, and acted as solicitor in the matter:—Held, that he was entitled to the payment of his bill in full, and not merely to the costs out of pocket. *Ex parte Chamberlayne re West*, 19 Law J. Rep. (N.S.) Bankr. 10.

(W) COSTS.

A solicitor, employed by a bankrupt, against whom a fiat had issued on his own petition, entitled to costs out of the bankrupt's estate up to the time of the choice of assignees. *Ex parte Fidgeon re Parsons*, 15 Law J. Rep. (N.S.) Bankr. 19; 1 De Gex, 342.

A mortgagee of a bankrupt's estate presenting a petition for liberty to bid is not entitled to the costs of the petition. *Ex parte Smith re Field*, 18 Law J. Rep. (N.S.) Bankr. 17.

Shares were deposited by A with B, a banker, to secure the purchase-money of the shares, but no written memorandum was given. A became bankrupt. B presented a petition for the sale of the shares and liberty to prove for the difference, supported by an affidavit that it was not the custom in the course of business to require a written memorandum under such circumstances:—Held, that B was entitled to costs, as in the case of a mortgage with a written memorandum. *Ex parte Moss re Davies*, 18 Law J. Rep. (N.S.) Bankr. 17.

Quare—Whether the bill of costs of the solicitor of the petitioning creditor is payable without reserving sufficient to pay the office fees of 10l. and 20l. payable in the event of assignees being chosen, no creditor having proved, and the bankrupt having obtained his certificate. *Ex parte Hebery re Cavenish*, 1 De Gex, 442.

Under the bankrupt's own fiat, there being no probability of any choice of creditors' assignees, and the office fees of 10l. and 20l. having been paid to the Accountant General,—Held, that they might be applied in payment of the bill of costs of the bankrupt's solicitor. *Ex parte Buchanan re Birley*, 1 De Gex, 344.

Where a bankrupt sued out a fiat against himself, which was annulled and no creditors' assignees had been chosen, the office fees of 10l. and 20l. paid by him into the bank were ordered to be returned. *Ex parte Reynolds re Reynolds*, 1 De Gex, 370.

Bill of solicitor of bankrupt suing out a fiat against himself under which no assignees were chosen, ordered to be paid out of the fund in the

hands of the Accountant General, without making any reserve for the office fees of 10l. and 20l.

The Accountant General ought not to be served with the petition for payment. *Ex parte Jerwood re Dockery*, 1 De Gex, 373.

BARON AND FEME.

[Conveyance by Married Woman, under 3 & 4 Will. 4. c. 74, see FINES AND RECOVERIES. And see ALIEN — COSTS — DIVORCE — MARRIAGE — MURDER—POWER—RECEIVING STOLEN GOODS.]

(A) HUSBAND.

(a) *Rights of, in Property of Wife.*

(b) *Liability of, on Contracts and Acts of Wife.*

(B) WIFE.

(a) *Property, and Settlement thereof.*

(b) *Consent.*

(c) *Rights of.*

(d) *Liability to Execution and Right to discharge.*

(C) SEPARATE ESTATE.

(a) *Power over and Disposition of.*

(b) *Liability in respect of.*

(D) SEPARATION OF HUSBAND AND WIFE.

(E) COHABITATION AS MAN AND WIFE.

(F) SUITS.

(G) PLEADING AND EVIDENCE.

(A) HUSBAND.

(a) *Rights of, in Property of Wife.*

[*Follett v. Tyrer*, 5 Law J. Dig. 126; 14 Sim. 125.]

An issue, whether a husband conveyed to plaintiff the reversion, of which he and his wife were seised in right of the wife, to hold to the plaintiff during the coverture, is proved by an indenture purporting to be made by husband and wife, but executed by him only, by which he professed to convey an estate during their joint lives. *Robertson v. Norris*, 17 Law J. Rep. (N.S.) Q.B. 201; 11 Q.B. Rep. 916.

A wife, living separately from her husband by agreement, received from him a weekly allowance for her support, out of which she saved 100l., which she placed in the funds, and two days before her death sold it out, and gave it to the defendant:—Held, that the husband was entitled to recover it back. *Messenger v. Clark*, 19 Law J. Rep. (N.S.) Exch. 306; 5 Exch. Rep. 388.

Reduction of stock into possession by transfer to trustees of marriage articles, entered into by wife while an infant. *Cunningham v. Antrobus*, 16 Sim. 436.

By a post-nuptial settlement, reciting that a sum of stock originally standing in the name of the wife had been transferred into those of the trustees, and that it had been agreed that a promissory note for 500l., given to the wife by her brother, should be cancelled and that he should give his bond to the trustees for the amount, it was witnessed, that the trustees should stand possessed of these funds, in trust to pay the interest, &c. to the husband for life, then to the wife for life, and on the death of the survivor to transfer the funds to the children of the marriage, and in case there should be no chil-

dren, then to such persons as the wife should by deed or will notwithstanding her coverture appoint, and in default of such appointment, to the husband, his executors, &c. There were no children of the marriage. The wife survived the husband:—Held, that in the event of the death of the wife without making a valid appointment, the fund would belong to the husband's personal representative, as having been reduced into the husband's possession by the settlement. *Burnham v. Bennett*, 2 Coll. C.C. 254.

A woman a few days before her marriage, and without the knowledge of her intended husband, transferred a sum of stock to trustees upon a parol trust, as alleged by the trustees, for her separate use for life and after her death for the benefit of her children. The fact of this transfer became known to the husband some time after the marriage. The dividends were received by the wife from the date of the marriage until her death, which took place seventeen years after. After her death the husband filed a bill, praying a transfer of the stock, and containing a statement that the dividends were duly paid to the wife during the coverture:—Held, under the circumstances, that the husband was precluded from asserting his claim to the stock as having been transferred in fraud of his marital right. *Loader v. Clarke*, 2 Mac. & G. 882.

A married woman entitled to her separate use to the dividends of certain stock standing in the names of trustees of whom her husband was one, permitted these dividends for a number of years to be paid to the husband's bankers to his separate account: it appeared also by the evidence that he made use of these funds as his own property:—Held, that a course of dealing was proved as existing between the husband and the wife, which shewed that the money was paid to the husband as husband, and not as trustee; and that this being done with the acquiescence of the wife, disentitled her from claiming any part of the money as against the estate of the husband. *Caton v. Rideout*, 1 Mac. & G. 599; 2 Hall & Tw. 33.

In March, W was engaged to be married to Miss J. In July, Miss J settled her property on herself and her relations, no benefit being given to W. In August they were married. Three years afterwards W filed a bill to upset the settlement, on the ground of its having been a fraud on his marital rights. Evidence was given on the part of the defendant that W had, before the marriage, reason to believe that a settlement was intended, and had been made:—Held, that the plaintiff was not entitled to any relief. *Wrigley v. Swainson*, and *Swainson v. Wrigley*, 18 Law J. Rep. (n.s.) Chanc. 396.

Testator gave several annuities to four unmarried nieces, a married niece, and a nephew, with a proviso for cesser on alienation; the testator declaring his intention to be that the annuities should be received as some provision towards the maintenance of the annuitants during their lives, and that the annuity of the married niece should be for her sole and separate use,—Held, that the annuity of an unmarried niece was not limited so as to exclude the marital right of a husband with whom she subsequently married. *Gilchrist v. Cator*, 1 De Gex & S. 188.

[See COPYHOLD, Surrender, Admittance.]

(b) *Liability of, on Contracts and Acts of Wife.*

The first count stated that O S made his bill directed to Mrs. W, and indorsed to the defendant, who indorsed to the plaintiff. Plea, that O S, the maker, was the plaintiff. Replication, that there was no consideration for the indorsement by the plaintiff to the defendant, but that the plaintiff indorsed to the defendant in order that the defendant might indorse to the plaintiff as a security for money due from Mrs. W to the plaintiff:—Held, that the replication was not a departure.

The second count stated that C W drew her bill on the defendant, who accepted it, and that C W indorsed it to the plaintiff. Plea, that C W before and at the time of the indorsement was and still is the wife of E W, and had no authority from him to indorse:—Held, that the plea was bad; inasmuch as a person is not entitled to dispute the power of another to indorse an instrument when he asserts by the instrument that the other has such power. And this although, as the property in the bill would pass by the indorsement of the husband, the defendant might possibly have to pay the amount twice. *Smith v. Marsack*, 18 Law J. Rep. (n.s.) C.P. 65; 6 Com. B. Rep. 486.

To a declaration alleging that the defendant made his promissory note payable to the order of S, who indorsed to the plaintiff, there was a plea denying the indorsement by S. It was proved that the wife of S had authority from her husband to indorse bills and notes; that she told her daughter to indorse the name of S on the note, which was done in the mother's presence, who afterwards handed the note to the plaintiff:—Held, that the extent of the authority given to the wife of S was a question of fact to be determined by the jury; and that there was evidence for the jury of an authority to indorse by the hand of another. *Lord v. Hall*, 19 Law J. Rep. (n.s.) C.P. 47; 8 Com. B. Rep. 627.

If husband and wife be living separate and apart, and the husband makes the wife a separate allowance of a sufficient sum for her maintenance, which is regularly paid, this is sufficient to repel the inference of agency, and he is not liable for any debt she may contract; and it is not necessary that there should be any deed of separation; but the allowance must be such as the jury shall think sufficient, reference being had to the station of the parties and the income of the husband. *Holder v. Cope*, 2 Car. & K. 437.

If husband and wife be living apart, and the husband makes the wife a sufficient allowance for her support, he is not liable in an action by a tradesman for goods supplied to her, and it is immaterial whether the tradesman knew of such allowance or not.

If a wife living apart from her husband orders goods to be addressed and sent to a third person, and they be sent to the house of such third person, that not being the place of abode of the wife, the husband is not liable to pay for those goods. *Reeve v. the Marquis of Conyngham*, 2 Car. & K. 444.

Where a sum of money was advanced to a wife who was living with her husband, and, after her decease, the husband promised to repay the sum "when convenient to him," but stated he had not been privy to the loan,—Held, that there was evi-

dence to go to the jury that the wife had borrowed the money with the sanction of the husband, or that she professed so to do, and that he had ratified her act. *West v. Wheeler*, 2 Car. & K. 714.

An estate was given to a lady for life, with a direction not to commit waste. The lady married, and acts of waste were committed by her husband. Upon her death, a bill was filed for an account of waste and dilapidations:—Held, upon demurrer, that the wife's estate having, by her marriage, become vested in her husband, her husband was alone responsible for the waste, and the legal personal representatives of the wife were not necessary parties to the suit. *Kingham v. Lee*, 16 Law J. Rep. (N.S.) Chanc. 49; 15 Sim. 396.

A bill filed by a party who had lent money to the wife of the defendant, while the defendant was abroad, for the purchase of necessaries for her maintenance and support, set forth various letters to prove that the husband had authorized his wife to borrow the money, and had authorized his agent, to whom he had given a power of attorney to sell his estates, to satisfy his wife's debts out of the proceeds of such sale. The bill sought to establish a lien upon the husband's assets in this country:—Held, that as a mere creditor of the husband the plaintiff had no equity against his assets, and that no lien was established by the letters and power of attorney. *May v. Skey*, 18 Law J. Rep. (N.S.) Chanc. 306; 16 Sim. 588.

(B) WIFE.

(a) *Property and Settlement thereof.*

A wife's equity to a settlement applies as well to the income as the principal of her choses in action; and income which accrued due during the husband's lifetime, but was not reduced by him into possession, will pass to the wife by survivorship. *Wilkinson v. Charlesworth*, 16 Law J. Rep. (N.S.) Chanc. 387; 10 Beav. 324.

A freehold estate stood limited to trustees for a term of years, on trust to secure a jointure, and subject to the term, to the use of a married woman. In a suit, by her against her husband,—Held, that she was entitled to an equity of settlement in respect of the estate. *Newenham v. Pemberton*, 17 Law J. Rep. (N.S.) Chanc. 99; 1 De Gex & S. 644.

A married woman entitled to a legacy appeared by counsel at the hearing of a cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignees sold his interest in the legacy. The solicitors for the purchaser and for the wife agreed to refer the claim of the wife to their counsel, and the counsel determined that she was entitled to a settlement of the moiety, subject to costs. Before any further steps were taken, the wife died leaving children,—Held, that the husband and those claiming under him, were, by the steps which they had taken, bound to allow a settlement of part of the fund on the wife and children; and that on the death of the wife, the children were entitled to the portion which would have been settled. *Lloyd v. Mason*, 5 Hare, 149.

A husband and wife assigned a reversionary interest in trust funds belonging to the wife, as a security for money. The husband subsequently

deserted his wife, and they both survived the tenant for life. Upon a petition by the wife,—Held, that she was entitled to a settlement, and that as between herself and her husband's assignee, her having committed adultery was immaterial, and did not deprive her of that right. *Greedy v. Lavender*, 19 Law J. Rep. (N.S.) Chanc. 494; 13 Beav. 62.

Gift to a lady, and after her death to all her children living at her death, the shares to be vested at twenty-one. The lady, being sixty-three and desirous of giving up her interest, and her children, all of whom had attained twenty-one, petitioned for payment to the children. One of the children was a feme covert. The Court would make no order. *Brandon v. Woodthorpe*, 10 Beav. 463.

When money belonging to a married woman is asked for out of court, it must be shewn that there is no settlement, or what the settlement is. *Britten v. Britten*, 9 Beav. 143.

A sum of 2,000*l.* stock had become vested in trustees in trust for A, for his life; and after his decease, in trust for his wife for her life, and after the decease of the survivor upon trust for their only child. The husband and child executed a surrender of their estates to the wife, and those three parties joined in a petition that the trust fund might be transferred to the son, and praying a transfer accordingly, or that such other order might be made as the nature of the case required. The Court dismissed the petition. *Whittle v. Henning*, 17 Law J. Rep. (N.S.) Chanc. 151; 11 Beav. 222; affirmed 18 Law J. Rep. (N.S.) Chanc. 51.

On the 14th of March 1844, in contemplation of a marriage intended shortly to be solemnized, a sum of money secured on mortgage, the property of the intended wife, was assigned to trustees, in trust for the intended wife, her executors, administrators and assigns, until the said intended marriage should have been solemnized; and immediately after the marriage, in trust, for the separate use of the intended wife during the joint lives of herself and the intended husband, without power of anticipation; and after the death of either, upon trust, for the survivor for life, with remainder to the children of the marriage; and in default of children, for the survivor of the intended husband and wife absolutely. Previously to the marriage, the intended husband and wife, by a deed-poll, dated the 27th of March 1844, reciting that the marriage between the parties was intended to be shortly afterwards solemnized, revoked the trust of the indenture of settlement, and declared that the trustees of that indenture should hold the settled fund in trust for the lady absolutely. On a bill filed by the husband claiming the settled fund absolutely *jure mariti*, against the trustees and the wife, it was held, although there was no proof of undue influence having been used by the intended husband, that the trusts of the settlement were not affected by the deed of revocation.

Semble—Where the intended husband has consulted and dealt with the late guardian of the intended wife in the light of her next friend, and a settlement has been executed of the intended wife's property, to which the late guardian was a party, as the transferrer of the intended wife's property to trustees, it is not competent for the intended husband immediately afterwards and before the marriage is

solemnized, to deal with the lady alone with reference to the settled property and the revocation of the trusts of the indenture of settlement executed in contemplation of marriage to be shortly afterwards solemnized between the parties. *Page v. Horne*, 17 Law J. Rep. (n.s.) Chanc. 200; 11 Beav. 227.

By an ante-nuptial settlement lands of the wife were released to uses during the joint lives of husband and wife and the life of the survivor, on certain trusts, with a limitation to the use of the wife in fee in an event which happened. After the death of the husband, who survived the wife, the releasee to uses with a tenant in possession under a lease from the husband made a feoffment and levied a fine to the use of himself in fee.—Held, that a court of equity might entertain a suit by the heir-at-law of the wife against the releasee to uses, to recover possession of the land and title-deeds.

Semble—that the releasee to uses after the determination of his own legal estate had no rightful title to the custody of the title-deeds; and would not be considered as holding them as trustee for the reversioner; but

Semble—that the fine was fraudulent, and that whether void at law on that ground or not, its validity should be decided by a court of law. *Reece v. Trye*, 1 De Gex & S. 273.

Where the Master reports that there is no settlement of a fund in court to which a married woman is entitled, it is the general rule that application should be made for payment to the husband by petition presented after the decree on further directions has been made, in order that it may be in evidence before the Court by affidavit, that at the date of the decree on further directions there was no settlement of the fund in court; yet when the suit is small (under 200*l.*) and all parties to the suit consent, the Court will dispense with a petition and order payment to the husband in the decree on further directions. *Hedges v. Clarke*, 1 De Gex & S. 354.

[See LEGACY, What Interest vests.]

(b) Consent.

A married woman being entitled to a reversionary interest in a fund, and having had the prior life-interest therein assigned to her, the Court ordered the fund to be transferred to the husband, the wife appearing in court and consenting. *Hall v. Hugonin*, 16 Law J. Rep. (n.s.) Chanc. 14; 14 Sim. 595.

On the marriage of an infant person a settlement was made of a fund in court, to which she was entitled. On her attaining twenty-one a petition was presented for payment to the trustees:—Held, that her consent in court or by commission was necessary. *Day v. Day*, 11 Beav. 35.

(c) Rights of.

A trustee who held in his hands the sum of 600*l.*, in trust for the separate use of a married woman, was applied to by the husband and wife for the payment of it. After some correspondence on the subject, the trustee paid the money to the husband:—Held, that he received it as trustee for his wife, and was indebted to her in that sum at his death.

A testator by his will left various benefits to his wife, to whom he was indebted in the sum of 600*l.*

She received all the benefits given her by the will, and executed a general release to her husband's executor. No notice of the debt was taken in the release:—Held, that the wife was not prevented by the release from claiming the 600*l.* from her husband's estate.

A testator was at his death indebted to his wife in the sum of 600*l.*, which had been settled for her separate use, and by his will he gave her the sum of 2,800*l.*:—Held, that the legacy was not a satisfaction of the debt. *Rowe v. Rowe*, 17 Law J. Rep. (n.s.) Chanc. 357; 2 De Gex & S. 294.

By articles of separation, dated in June 1834, the defendant agreed that he would, on or before the 1st of February 1835, effectually, by a charge on freehold estates, or by investment of an adequate sum of money, or by the best means which might be then in his power, secure to the plaintiff, his wife, an annuity of 1,000*l.* In December 1834, a deed of arrangement was executed between the defendant and his son, by which certain family estates were conveyed to trustees to raise money for the payment of various incumbrances, afterwards to such uses as the defendant and his son should appoint, and in default of appointment to the defendant for life, and then to his son absolutely, with a power for the defendant to jointure his then present or any future wife to the extent of 1,000*l.* per annum:—Held, that the plaintiff was entitled to have her jointure raised out of the estates, as against the defendant and his son. *Mornington v. Mornington*, 18 Law J. Rep. (n.s.) Chanc. 442; 17 Sim. 59.

A testator bequeathed 10,000*l.* to husband and wife, to be put in their joint names, and that of his executor, the husband and wife to enjoy the interest during their joint lives, or the life of the survivor. The fund was paid into court to the credit of the cause,—"the husband and wife, their stock account." There were dividends unreceived at the death of the husband:—Held, that they belonged to the wife by survivorship. *Laprimaudaye v. Teissier*, 19 Law J. Rep. (n.s.) Chanc. 16; 12 Beav. 206.

(d) Liability to Execution and Right to Discharge.

A married woman, where co-plaintiff with her husband, is liable to be taken in execution for costs, under stat. 23 Hen. 8. c. 15, upon nonsuit or verdict for the defendant.

And although she may be entitled to her discharge by reason of her having no separate property, yet the writ of execution pursuing the judgment is not void or illegal, and an action on the case for issuing it as without reasonable or probable cause, is not maintainable. *Newton v. Rowe* and *Newton v. Boodle*, 16 Law J. Rep. (n.s.) Q.B. 146; 9 Q.B. Rep. 948.

An action was brought against the defendant, a widow, in March 1845; in April she married, and in May judgment in that action was signed against her, and a *ca. sa.* issued, under which she was taken in execution:—Held, that she was not entitled to be discharged out of custody, although she had no separate property. *Beynon or Banin v. Jones*, 15 Law J. Rep. (n.s.) Exch. 303; 15 Mee. & W. 566; 3 Dowl. & L. P.C. 667.

The practice of discharging a married woman taken in execution is not founded upon any legal

principle, and the precedents, will only be followed in exactly similar cases.

Therefore, where after judgment against husband and wife in an action for an assault committed by the wife, the wife only was taken on a *ca. sa.*, the Court refused to discharge her, although she had no separate property, and her husband had obtained his protection from a Court of Bankruptcy.

Semble—that the provision in the Bankrupt Consolidation Act, 12 & 13 Vict. c. 106. s. 112, which enacts that a bankrupt who has obtained protection shall not be released if in custody (*inter alia*) "for any debt contracted by reason of any judgment in any action for assault," relates only to cases where the bankrupt has been sued for acts of his own. *Larkin v. Marshall*, 19 Law J. Rep. (N.S.) Exch. 161; 4 Exch. Rep. 804.

(C) SEPARATE ESTATE.

(a) Power over and Disposition of.

[*Medley v. Horton*, 5 Law J. Dig. 129; 14 Sim. 222.]

The income of trust property was directed by a testator to be paid to such person as a married woman should appoint, but not by way of anticipation; and in default of appointment, it was to be paid to her for her separate use, and her receipts were to be sufficient discharges.—Held, that the restriction as to anticipation extended to the whole gift; and, consequently, that an assignment by the married woman, not by way of appointment, but out of the interest given to her in default of appointment, was invalid; and that notwithstanding the receipt clause did not contain any negative words to direct that her receipts *only* should be sufficient discharges. *Brown v. Bamford*, 15 Law J. Rep. (N.S.) Chanc. 361; 1 Ph. 620.

A clause in restraint of anticipation in a gift to a married woman for her separate use is valid, whether the subject of the gift be real or personal estate, and whether it be a gift in fee or for life. *Baggett v. Meux*, 15 Law J. Rep. (N.S.) Chanc. 262; 1 Ph. 627.

By a marriage settlement the wife has power, notwithstanding her coverture, to appoint to the children of the marriage, and in default of such children she has a power "during and notwithstanding her coverture" to appoint to other persons. The latter power cannot be exercised during widowhood.

Quære—Whether the former can. *Burnham v. Bennett*, 2 Coll. C.C. 260.

Where a bequest of stock to a married woman for her separate use for life and after her decease for her appointees by deed or will, directs that any appointment by deed shall not operate until after her death, she is not restrained from anticipation or from appointing the fund by an irrevocable deed. *Alexander v. Young*, 6 Hare, 393.

By a post-nuptial settlement property was vested in trustees, upon trust to pay the income to such persons as H G (a married woman) should from time to time appoint, without power of anticipation; and in default of appointment, into her own hands for her separate use, independently of B G her husband; and after her decease to B G for life; and after the death of the survivor to the children of the marriage. B G died, and H G having married again, joined with her second husband in assigning

the income of the trust fund:—Held, (reversing the decision of the Court below) that upon the construction of the settlement, the restriction against anticipation was co-extensive with the life of H G, and that its effect was not cut down by the subsequent reference to the then existing coverture; and that, therefore, the assignment by the wife and her second husband was void. *In re Gaffee's Settlement*, 19 Law J. Rep. (N.S.) Chanc. 179; 1 Hall & Tw. 635; 1 Mac. & G. 541; 7 Hare, 101.

A, a married woman, conveyed her separate estate to B, in trust to sell and pay a debt and further advances not exceeding 400*l.*, and to hold the surplus for A's separate use. B made advances beyond 400*l.*, partly on account of bills drawn on him by A, with directions to charge them to her separate estate;—Held, that B could not appropriate his receipts in payment of the advances not covered by the security, and that he was bound to apply the separate estate in satisfaction of the charge, and should hold the surplus as subject to his disposition or liable to such ordinary lien as he might acquire by advancing money to her. *Smith v. Smith*, 9 Beav. 80.

A testator gave to M A, a married woman, certain leasehold houses, for her whole and sole use during her life, free from the controul of her present or any future husband, and not to be sold or mortgaged, and after her decease to her heir or heirs; and, provided her child or children should die before her, then that she at her decease might leave them to whom she would for the remainder of the term. By a deed, in which M A was named as a party, in consideration of a debt due from her husband to the defendant P, the husband and M A demised, by way of under-lease, the premises to P, for the term of twenty-six years, if M A should so long live, reserving only the rent of the original lease. P afterwards underlet the same premises successively to the two other defendants, who had no other notice of M A's interest than the circumstance that M A was a demising party in the under-lease to P:—Held, that the gift was to the separate use of the wife as well during her present as any future coverture, and that the fact of M A being a party to the under-lease to P made it incumbent upon the other defendants to inquire as to the interest of M A, and the under-leases were ordered to be set aside, but without costs. *Steadman v. Poole*, 16 Law J. Rep. (N.S.) Chanc. 348; 6 Hare, 193.

(b) Liability in respect of.

Where trustees for separate use of a wife admitted that they held a certain sum to her separate use, but refused to pay it over without her separate receipt,—Held, that an action for money had and received, and on an account stated, would not lie by husband and wife for the sum so admitted to be due to her. *Bond v. Nurse*, 16 Law J. Rep. (N.S.) Q.B. 196; 10 Q.B. Rep. 244.

In a suit against husband and wife in respect of wife's separate estate, the husband and wife put in a joint answer:—Held, that the wife's answer might be read as evidence against her.

A, before her marriage, employed C, a solicitor, in respect of an estate which, on her marriage with B, was settled to her separate use. After the marriage, C was employed by B in respect of actions

relating to this estate, and in preparing deeds for the appointment of new trustees of the settlement. C delivered his bill of costs to B, caused it to be taxed, and obtained a rule for a judgment against B. B immediately after became bankrupt, and C proved the debt in the bankruptcy, but received nothing. C then filed a bill against A, B, and the trustees of the settlement, for the purpose of recovering the debt from the separate interest of the wife in the estate:—Held, that C had no claim against A in respect of anything but the deeds of appointment of new trustees; and that, if he had any claim in respect of these deeds, he was precluded, by his proceedings against the husband, from enforcing them. *Callow v. Howle*, 17 Law J. Rep. (N.S.) Chanc. 71; 1 De Gex & S. 531.

(D) SEPARATION OF HUSBAND AND WIFE.

[*Cocksedge v. Cocksedge*, 5 Law J. Dig. 130; 14 Sim. 244; 5 Hare, 397; *Wilson v. Wilson*, 5 Law J. Dig. 131; 14 Sim. 405.]

A provision in a separation deed for all and every the children who should attain twenty-one does not include a child born after a reconciliation. *Hulme v. Chitty*, 9 Beav. 437.

Twenty years after the marriage of A and B, and when they had three children living, a deed of arrangement was executed by them respectively, by which B the wife was to have paid to her annually out of A's estate conveyed to trustees certain pin money, and also a sum of money as the means of maintaining an establishment, which was to be for her separate use, independent of A, and so much thereof as B should desire to expend was to be applied by her in a particular manner, leaving the remainder of it (if any) for A. The establishment was to be for B and for the accommodation of her children, enabling her husband to partake of it. Previously to the execution of the deed a suit had been instituted by B, for a divorce from A for cruelty, and the same was pending at the date of the deed. The discontinuance of the suit, the prevention of disputes, and the waiver by B against A of other proceedings then in contemplation, for the purpose of obtaining a proper provision for B and her children, were the considerations for the deed. A was entitled to estates, yielding an income exceeding the amount of that granted to the trustees in favour of B:—Held on demurrer, filed by A to the bill of B, to enforce the trusts of the deed, that the same was not an illegal one, and was capable of being enforced in a court of equity. *Jodrell v. Jodrell*, 15 Law J. Rep. (N.S.) Chanc. 17; 9 Beav. 45.

(E) COHABITATION AS MAN AND WIFE.

The liability of a defendant who has cohabited with a female not his wife, and has allowed goods to be supplied at her residence on his credit, continues until the parties supplying the goods have been informed of the termination of such connexion. *Ryan v. Sams*, 17 Law J. Rep. (N.S.) Q.B. 271; 12 Q.B. Rep. 460.

(F) SUITS.

It is no defence to an action of ejectment, that the defendant is the wife of one of the lessors of the plaintiff. *Doe d. Daley v. Daley*, 15 Law J.

Rep. (N.S.) Q.B. 295; s. c. *nom. Doe d. Merigan v. Daley*, 8 Q.B. Rep. 934.

By a parol ante-nuptial agreement, it was agreed that the husband should take a certain portion of the wife's property, and that the residue should be settled for her separate use. This agreement was carried out so far as related to the husband, but no settlement was made on the wife. The wife after the marriage filed her bill by her next friend, stating these facts, and praying that her interest in certain property consisting of real estate coming to her might be declared accordingly. The husband by his answer admitted the statements in the bill. A deed was then prepared purporting to be a settlement on the wife in pursuance of the agreement, and giving her a power to dispose of the property by will. This deed, though signed by the wife, was not acknowledged by her. She made a will disposing of her property in favour of her husband and other parties, and died. The husband then filed a supplemental bill, praying as against the heir of the wife that the parol agreement might be carried into effect, that the want of an acknowledgment might if necessary be supplied, and that the will of the wife might be established as a valid execution of the power given to her by the deed.—Held, first, that in a suit thus framed, there was no case established in point of proof as against the heir; secondly, that the contract so entered into before marriage, there being nothing but a marriage following, could not be carried into effect under the Statute of Frauds; and thirdly, that the Court would not supply the want of the acknowledgment as tending to destroy the protection which the law throws around married women. *Lassence v. Tierney*, 1 Mac. & G. 551; 2 Hall & Tw. 115.

A husband by his bill against his wife and the trustees of their marriage settlement claimed in his marital right part of the furniture of a house which was let furnished at an entire rent, the whole of which had been received by the wife since the marriage for her separate use, and claiming to have the rent apportioned. The wife's answer set up a parol agreement made before marriage by the husband, that the wife should have the furniture for her separate use, though not included in the settlement:—Held, that the plaintiff had no equity to sustain a suit for an account of an apportioned part of the past rent; nor for an apportionment of the rent unless he shewed he had no remedy at law to recover the furniture.

Although the parol agreement was not binding on the husband, yet if it has been acted on by the chattels being placed under the dominion of the trustees and treated as separate property, it may be made effectual. *Simmons v. Simmons*, 6 Hare, 352.

An order was made for an attachment against a married woman for want of an answer in a suit affecting her separate estate, she having obtained an order to answer separate from her husband. *Taylor v. Taylor*, 19 Law J. Rep. (N.S.) Chanc. 304; 12 Beav. 271.

A debt of a husband was secured by a mortgage of estates of husband and wife respectively, and was in 1832 paid out of the produce of the wife's estate. In 1841 a bill was filed to have the amount recouped out of the produce of the husband's estate which was in court:—Held, that the representative of the

wife was not entitled to interest on the money paid. *Lancaster v. Evors*, 10 Beav. 266.

A husband shortly after his marriage ceased to cohabit with his wife, and never provided her with a home, or contributed to her support, but left her to be supported by her sisters, whilst he received and appropriated to himself her income, and threatened her by gestures as well as words with personal violence. In a suit by the wife against the husband and the trustees of an annuity of 50*l.* (which appeared to be all her income) the Court directed the annuity to be paid to her for her support till further order. *Gilchrist v. Cator*, 1 De Gex & S. 188.

[See *Howard v. Prince*, 10 Beav. 294; *Costs*, in EQUITY, Bill. And see (C) Separate Estate.]

(G) PLEADING AND EVIDENCE.

To an action on a promissory note, the defendant pleaded, in bar, that at time of making the note the plaintiff was the wife of one G, and that the consideration for the note was money of G, advanced by the plaintiff, without G's knowledge, and that the plaintiff received and held the note without the authority of G, and never had any property in or right to the note:—Held, that this was an informal plea of coverture, and bad for not being pleaded in abatement. *Guyard v. Sutton*, 15 Law J. Rep. (N.S.) C.P. 225; 3 Com. B. Rep. 153.

To an action of slander by plaintiff and his wife, a plea that plaintiff Maria was not the wife of the plaintiff George is a good plea *in bar*. *Chanter v. Lindsey*, 16 Law J. Rep. (N.S.) Exch. 16; 16 Mee. & W. 82; 4 Dowl. & L. P.C. 339.

In an action of debt for goods, in which defendant pleads her coverture, and the plaintiff in his replication denies the coverture, and there be no other issue, defendant must begin.

On this issue the person who is alleged in the plea to be the husband of the defendant is not a competent witness for the defendant to prove his marriage with her.

On this issue, proof that the defendant and the person alleged in the plea to be her husband have cohabited together as husband and wife for four years, is some evidence of the marriage, which the Judge will leave to the jury. *Woodgate v. Potts*, 2 Car. & K. 457.

In an action on a promissory note, in which defendant pleads coverture, and the plaintiff takes issue on that plea, defendant has the right to begin; although, as the note did not bear interest on the face of it, the plaintiff claimed interest in the shape of damages.

On these pleadings it lies on the defendant affirmatively to prove the coverture; and if she does so, it is no answer to the defence that at the time of the making of the note she represented herself to be a widow. *Cannam v. Farmer*, 2 Car. & K. 746.

An order of the Court is necessary for leave for a defendant who was sued as discover, but who was then married, to put in a plea of coverture. *Higginson v. Wilson*, 17 Law J. Rep. (N.S.) Chanc. 22.

In the joint answer of a husband and wife to a creditor's bill for payment out of an estate of which the wife was administratrix, the wife alone set up the Statute of Limitations as a defence to a suit:—Held, that the interest of the wife was not so merged

in the coverture that the Court would disregard her separate defence; and that the statute was for the protection of the estate sufficiently pleaded by the wife alone. *Beeching v. Morphew*, 8 Hare, 129.

BARRISTER.

The Court of Queen's Bench will not question an order made by an inferior court granting exclusive audience to barristers. *Regina v. Justices of Denbighshire*, 15 Law J. Rep. (N.S.) Q.B. 335; s.c. *nom. Ex parte Evans*, 9 Q.B. Rep. 279.

There is no positive rule of law or of practice of the Courts which prevents a defendant in a civil suit, who has appeared in person, from having in the conduct of the cause the assistance of counsel instructed by himself instead of by an attorney; and, therefore, where the Judge at Nisi Prius refused to allow a counsel so instructed to address the jury for the defendant, the Court made absolute a rule for a new trial.

It is, however, for the benefit of suitors and for the satisfactory administration of justice, that the understanding in the profession that a barrister ought not to accept a brief in a civil suit except from an attorney, should be acted upon, and the almost uniform usage which has prevailed in this respect should be adhered to. *Doe d. Bennett v. Hale*, 19 Law J. Rep. (N.S.) Q.B. 353; 15 Q.B. Rep. 171.

A plaintiff, who was a barrister, was not allowed to be heard on his own case after counsel had addressed the Court.

A barrister, party in an action, civil or criminal, is in the same position as any other party. *Newton v. Chaplin*, 19 Law J. Rep. (N.S.) C.P. 374.

On the trial of a criminal information, a Queen's counsel ought not to be of counsel for the defendant without a licence from the Queen, or at the least a letter from the Secretary of State; and it is not enough that an application for a licence has been sent to the Secretary of State from an assize town in the country, to which no answer has been received at the time of the case being tried. *Regina v. Bartlett*, 2 Car. & K. 321.

BASTARDY.

[See POOR, Settlement—PREROGATIVE.]

(A) PROOF OF ILLEGITIMACY.

(B) ORDER OF BASTARDY.

(a) Jurisdiction to make the Order.

- (1) *Petty Sessional Division.*
- (2) *Upon Second Application.*
- (3) *After Abandonment of former Order.*
- (4) *Where Mother a Married Woman.*
- (5) *Where Child born in Foreign Country.*

(b) Form and Requisites of the Order.

- (1) *Must shew Application by and before proper Parties.*
- (2) *Must allege Proof of Service of Summons.*
- (3) *Must shew Application made within Forty Days after Summons.*

- (4) *Must shew Presence of putative Father or allege Excuse for Omission.*
- (5) *Need not state that Evidence given on Oath.*

- (C) APPEAL [NOTICE OF].
- (D) RECOGNIZANCE [NOTICE OF].
- (E) BOND OF INDEMNITY TO PARISH.

(A) PROOF OF ILLEGITIMACY.

There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered. (*The King v. Twynning*, 2 B. & Ald. 386, explained.)

A, a Scotchman, married in Scotland and went abroad; his wife cohabited with C, and had children by him. To make such children legitimate, it was held necessary for those who asserted their legitimacy to prove either a legal origin of the cohabitation, or a change in the nature of it after the death of A had become known to all the parties. The mere fact that C and the woman continued to live together was not sufficient for that purpose. Under such circumstances the children were held illegitimate, though born after the date of A's death.

C and B live together as man and wife, in the *bonâ fide* belief that A, to whom B had been lawfully married, was dead; in fact he was alive. *Quere*—will his subsequent death, during the continuance of their cohabitation, confer on it, according to the law of Scotland, the character of a legal marriage? *Lapsley v. Grierson*, 1 H. L. Cas. 498.

The illegitimacy of a child, born of a married woman, is established, beyond all dispute, by evidence of her living in adultery at the time when the child was begotten, and of her husband then residing in another part of the kingdom, so as to make access impossible. *The Barony of Saye and Sele*, 1 H. L. Cas. 507.

The child of a married woman is always presumed to be legitimate; the evidence to rebut which must always be strong, distinct, satisfactory, and conclusive. *Hargrave v. Hargrave*, 9 Beav. 352.

(B) ORDER OF BASTARDY.

(a) *Jurisdiction to make the Order.*

(1) *Petty Sessional Division.*

The fact of petty sessions for a division of a county having been usually held at several places within the limits of that division does not constitute such places separate petty sessional divisions under 8 Vict. c. 10. s. 10.

Where an order of affiliation purported on its face to be made by Justices of the county of L "at a petty sessions holden in and for the petty sessional division of H at H aforesaid," and it appeared that H was one of several places within the petty sessional division of B, where the petty sessions were usually holden, and that the Justices who made the order usually acted for the townships in the neighbourhood of H, including the place where the mother resided,—Held, that the order shewed no jurisdiction, as it did not appear to be made at a petty

sessions holden in and for the petty sessional division where the mother resided. *Regina v. Whittles*, 18 Law J. Rep. (N.S.) M.C. 96; 13 Q.B. Rep. 248.

(2) *Upon second Application.*

Where upon an application by a woman under 7 & 8 Vict. c. 101. s. 2, for an order upon a person whom she alleged to be the father of a bastard child, of which she had been delivered within twelve calendar months before the application, an objection was raised that a prior order had been made on the same complaint, and that it was incumbent on the applicant to shew that such prior order had been quashed, not on the merits, in order to entitle her to apply again, under 8 Vict. c. 10. s. 4, and no evidence was given to shew that such prior order ever existed; but the Justices at petty sessions decided that the complainant was bound, notwithstanding, to prove that the order was quashed for a defect in form, and, on her failing to do so, refused to hear the application,—Held, that they were not justified in assuming the existence of the former order: and a mandamus was granted, commanding them to entertain the complaint. *Regina v. Bridgman*, 15 Law J. Rep. (N.S.) M.C. 44.

A woman applied for an order of affiliation to the Justices of the petty sessional division in county A, and was refused. She subsequently removed into county B, and there made a second application, and the Justices made an order, which on appeal was confirmed by the Quarter Sessions:—Held, that as the petty sessions and the Quarter Sessions had general jurisdiction over the subject-matter, they were bound to hear and determine such second complaint; and that although proof of the former application having been dismissed upon the merits would have been a good answer to such second application, neither the decision of the Justices nor of the Quarter Sessions could be reviewed by this Court.

Held, also, that upon appeal by the putative father, the Quarter Sessions may confirm such order without requiring any corroborative evidence, if the appellant, after he has unsuccessfully taken objections in point of law, retires from the case. *Regina v. Justices of Buckinghamshire*, 18 Law J. Rep. (N.S.) M.C. 113.

An order of affiliation void for defects appearing upon the face of it is altogether a nullity, and may be treated just as if the Justices who made the order had never heard the case at all; and it is not necessary to proceed either by way of appeal or writ of *certiorari* in order to quash it.

Where, therefore, such a defective order had been made, and served, but not acted upon, and upon a second application in the same matter two Justices made another valid order of affiliation,—Held, that the Justices had jurisdiction to make the second order, although the first had not been got rid of upon appeal or by writ of *certiorari*, and that an indictment for disobedience of it was maintainable.

Simble—*Per Parke, B.* that the second order would have been equally valid if the Justices first applied to had, after hearing the complaint, refused to make an order. *Regina v. Brisby*, 18 Law J. Rep. (N.S.) M.C. 157; 2 Car. & K. 962; 1 Den. C.C. 416.

Where Justices in petty sessions have heard an application for an order of affiliation, and refused to make any order, on the ground that the evidence

of the mother was not corroborated in some material particular, the mother is not barred from making a second application within the period limited by 7 & 8 Vict. c. 101. *Regina v. Machen*, 18 Law J. Rep. (n.s.) M.C. 213.

(3) *After Abandonment of former Order.*

An application on summons for an order of affiliation was heard before H and B, two Justices, on the 14th of April. An adjournment took place to the 17th, when the Justices forming the Court were H and C. An order was then made, and it was appealed against, on the ground that the mother had not been re-sworn on the second occasion. Afterwards, on the 2nd of May, the attorney for the mother gave notice of abandonment of the order, and tendered 1*l.* 10*s.* for costs, which were accepted as costs of the adjournment only. A subsequent application being made to two Justices for an order in the same matter,—Held, that they were not bound to entertain the application, the full costs of the former order not having been paid.

Quære—Whether, if such full costs had been paid or tendered they could be compelled to entertain such application, the first order not having been quashed or vacated. *Regina v. Hinchliffe*, 16 Law J. Rep. (n.s.) M.C. 78; 10 Q.B. Rep. 356.

(4) *Where Mother a married Woman.*

Under 7 & 8 Vict. c. 101. and 8 & 9 Vict. c. 10, an order of maintenance may be made on the putative father of a bastard child of a married woman, though those statutes in their language only apply to single women. *Regina v. Collingwood*, 17 Law J. Rep. (n.s.) M.C. 168; 12 Q.B. Rep. 681.

(5) *Where Child born in Foreign Country.*

The 7 & 8 Vict. c. 101. does not enable a foreign woman who has been delivered abroad of a bastard child to obtain an order of affiliation against the putative father resident in England. *Regina v. Blane*, 18 Law J. Rep. (n.s.) M.C. 216.

(b) *Form and Requisites of the Order.*

(1) *Must shew Application by and before proper Parties.*

By an order of Quarter Sessions, after reciting that the overseers of the township of H had applied to the Justices of petty sessions for an order on D S, the putative father of a bastard child, and that D S had entered into a recognizance to answer the charge at the Quarter Sessions, and that the overseers at such sessions applied to the Court for an order, &c., it was, upon the hearing, &c., adjudged that D S was the father, &c., and it was ordered that he should pay to the said overseers the sums mentioned in the order, to reimburse them, &c., and for maintenance, &c.:—Held, that the order was bad on the face of it, for shewing that the application was made by the overseers, without also shewing that there were no guardians for the parish of H, or that it was not situate in a union. *Regina v. Smith*, 15 Law J. Rep. (n.s.) M.C. 41; 7 Q.B. Rep. 543.

The caption of a bastardy order stated its being made "at a petty session holden, &c., before us, A B and C D, Her Majesty's Justices of the Peace for the said riding, and a majority of the Justices

now present," and was signed by them:—Held, that it must be taken in effect to state, that A B and C D were Justices of the Peace, and a majority of those present; and that it was sufficient to state in the order that the defendant was duly served, and appeared at the hearing, and that a recital of the Justices hearing "all the evidence on oath, tendered on behalf of," &c., was sufficient. *Ex parte Boynton*, 1 L. M. & P. 12.

(2) *Must allege Proof of Service of Summons.*

Under the statute 7 & 8 Vict. c. 101. s. 3, which entitles Justices in petty sessions to make an order of maintenance on the putative father of a bastard (although he does not appear, and there has been no personal service of the summons on him), on proof that the summons "was left at his last place of abode six days at least before the petty session," the summons must be left at his present place of abode, if he has any at the time of the service; at his last place of abode, if he has none.

Proof of the proper service of the summons is essential to give the Justices jurisdiction; and, *semble*, an allegation in the order that such proof has been given, as averred in the form No. 8. in the schedule of the stat. 8 & 9 Vict. c. 10, is necessary to the validity of the order.

If the summons is left at a place which the person leaving it believes to be the last place of abode of the party summoned, and gives evidence of such service of the summons before the Justices at petty session, the latter have *prima facie* jurisdiction to make the order of maintenance; but the party summoned is at liberty to shew by affidavit that the summons was not served at his last place of abode, and if the fact be proved, this Court will grant a *certiorari* to bring the order up to quash it as being made without jurisdiction. *Regina v. Evans*, 19 Law J. Rep. (n.s.) M.C. 151; s. c. *nom.* *Ex parte Jones*, 1 L. M. & P. 357.

(3) *Must shew Application made within Forty Days after Summons.*

An order of affiliation, made under 7 & 8 Vict. c. 101. and 8 Vict. c. 10, must shew, upon the face of it, that it was applied for within forty days after the service of the summons on the putative father of the child. *Regina v. Rose*, 15 Law J. Rep. (n.s.) M.C. 6; 3 Dowl. & L. P.C. 359.

(4) *Must shew Presence of putative Father, or allege Excuse for Omission.*

An order of affiliation which stated "that S (the putative father) having been served with a summons, and now appearing in pursuance thereof, and it being now proved to us (the Justices) in the presence and hearing of the attorney attending on behalf of the said S, that the child was born a bastard, &c., and we having, in the presence and hearing of the said attorney attending on behalf of the said S, heard the evidence of such woman, &c., do adjudge, &c.,"—Held, sufficient. *Regina v. Shipperbottom*, 16 Law J. Rep. (n.s.) M.C. 113; 10 Q.B. Rep. 514.

Where putative father appears before Justices in pursuance of a summons, issued under 7 & 8 Vict. c. 101, upon application of the mother of a bastard child it must appear upon the face of the order of bastardy that the evidence upon which the order

was made was given in the presence and hearing of the putative father, or an excuse for the omission must be alleged. *Regina v. the Duke of Grafton*, 17 Law J. Rep. (n.s.) M.C. 125; 5 Dowl. & L. P.C. 568.

(5) *Need not state that Evidence given on Oath.*

The form of order given in the schedule to 8 Vict. c. 10. does not require a statement that the evidence given was on oath. *The Queen v. the Justices of Buckinghamshire* (14 Law J. Rep. (n.s.) M.C. 45,) overruled. *Regina v. Shipperbottom*, 16 Law J. Rep. (n.s.) M.C. 113; 10 Q.B. Rep. 514.

An order in bastardy, made under 7 & 8 Vict. c. 101, did not state that the evidence of the mother was given on oath, but substantially followed the form given in the schedule to 8 Vict. c. 10, which was passed for the purpose of curing defects of form in orders under the former act:—Held, that as the latter statute rendered valid all orders made according to the form given in the schedule, or to the like tenour and effect, the above omission was immaterial, and that the words “on oath” were not required to be inserted in the form given in the schedule. *Regina v. Justices of Cheshire, ex parte Fernyhough*, 15 Law J. Rep. (n.s.) M.C. 3; 3 Dowl. & L. P.C. 337.

(C) APPEAL [NOTICE OF].

At a petty sessions held on the 24th of June, the Justices present, on the complaint of the mother of a bastard child, adjudged one R to be the father, and ordered him to pay a sum weekly to the mother for its maintenance, and a copy of the order, dated the 24th of June, was served on R on the 27th of June, who, within twenty-four hours, gave notice of appeal to the mother, and entered into the necessary recognizances under 7 & 8 Vict. c. 101. s. 4. On the trial of the appeal, it being objected that the notice of appeal was given too late, evidence was tendered that the order had been in fact signed by the Justices on the 27th of June, and not on the 24th, but was rejected by the Justices, who held that the order must be presumed to have been made on the day when it bore date, and confirmed the order:—Held, that such evidence ought to have been received.

Under 7 & 8 Vict. c. 101. s. 4, requiring notice of appeal to be given “within twenty-four hours after the adjudication and making of any order on the putative father,” the time for appealing must be calculated from the signature of the order by the Justices. *Regina v. Justices of Flintshire*, 15 Law J. Rep. (n.s.) M.C. 50; 3 Dowl. & L. P.C. 537.

Service of notice of appeal, under 7 & 8 Vict. c. 101. s. 4, need not be made personally on the mother, if left at her usual place of residence. *Regina v. Justices of Cheshire*, 15 Law J. Rep. (n.s.) M.C. 114; 4 Dowl. & L. P.C. 94.

Under 8 & 9 Vict. c. 10. s. 6. the mother of a bastard child is a competent witness to prove that she had due notice of appeal under 7 & 8 Vict. c. 101. s. 4.

Sunday is to be excluded in computing the twenty-four hours within which the putative father must give notice of appeal, against the order of affiliation, under the 7 & 8 Vict. c. 101. s. 4.

Regina v. Justices of Middlesex, 17 Law J. Rep. (n.s.) M.C. 111; 5 Dowl. & L. P.C. 580.

Justices at petty sessions verbally adjudged a man to be the putative father of a bastard child, and ordered him to pay a certain sum for its maintenance. He immediately, and before the order of bastardy was drawn up and signed, gave the mother of the child verbal notice of appeal. The order was afterwards drawn up and signed, and dated the day of the adjudication, and was in such terms as to make it apparently a contemporaneous judgment with the order pronounced verbally:—Held, that the notice of appeal was sufficient, as the written order had for this purpose relation back to the time of the verbal adjudication.

A verbal notice of appeal given to the mother by the clerk of the attorney of the putative father, in the presence and by the direction of the latter, is a sufficient notice of appeal. *Regina v. Justices of Huntingdonshire*, 19 Law J. Rep. (n.s.) M.C. 127; 1 L. M. & P. 78.

(D) RECOGNIZANCE [NOTICE OF].

By 8 Vict. c. 10. s. 2, it is provided that the putative father of a bastard child entering into the recognizance conditioned for trial of an appeal, (as required by 7 & 8 Vict. c. 101. s. 4,) “shall forthwith give or send a notice in writing of his having so entered into such recognizance to the woman in whose favour the order shall have been made, and in default of his giving or sending such notice as aforesaid, the appeal shall not be allowed; provided that the sending of such notice by the post shall be taken to be sufficient.” A recognizance was entered into on the 14th (a Saturday), and notice was sent by a messenger on the 19th, who endeavoured on that and several successive days, to effect personal service ineffectually; the notice was never actually served until the 31st:—Held, that the service was too late. *Ex parte Lowe*, 15 Law J. Rep. (n.s.) M.C. 99; 3 Dowl. & L. P.C. 737.

An order of maintenance was made on the 9th of April, and on the 13th the appellant entered into recognizances, pursuant to 8 & 9 Vict. c. 10. s. 3; but the notice was not served on the respondent till the 22nd of June. On the 29th the respondent's attorney undertook to admit due service of the notice. At the trial it was objected that the notice of recognizance was not served “forthwith,” pursuant to the statute; but the Quarter Sessions overruled the objection, and quashed the order. This Court refused a *certiorari* to bring up the order of Quarter Sessions to be quashed, on the ground that the admission was evidence that the notice had been served in time. *Regina v. Justices of Gloucestershire*, 16 Law J. Rep. (n.s.) M.C. 57.

Upon an appeal against an order in bastardy being called on for hearing, and proof required of the appellants having complied with the requisitions of the 8 & 9 Vict. c. 10. s. 3, it appeared that the necessary recognizance had been entered into by the appellants, and notice thereof sent to the mother of the bastard child by the post, addressed to the place at which she resided when the order was made; but, on the part of the respondents, it was proved that when the notice was so sent by the post the mother was dead. The Sessions having

refused to hear the appeal, on the ground that the statute had not been sufficiently complied with in respect of the sending of such notice.—Held, that the appellant was to be excused for the default occasioned by the death, the duty of sending the notice being one cast upon him by law, and its performance becoming impossible by the act of God; and therefore that the Sessions were bound to hear the appeal. *Regina v. Justices of Leicestershire*, 19 Law J. Rep. (N.S.) M.C. 209; 15 Q.B. Rep. 88.

(E) BOND OF INDEMNITY TO PARISH.

[Under 54 Geo. 3. c. 170.]

In debt on a bastardy bond the breach was, that defendant suffered and permitted the child to be maintained at the expense of the parish. Plea, that after the child had passed the age of nurture, and while under the controul of the overseers, defendant was able and willing to maintain the child, and requested the overseers to deliver the child over to him, whereby he might have been maintained without being chargeable to the parish, which the plaintiffs (the overseers) refused to do, and maintained the child at the expense of the parish of their own wrong:—Held, (after verdict) that the plea was a good answer to the action without an allegation that the child was willing to go to the defendant to be maintained. *Bownes v. Marsh*, 16 Law J. Rep. (N.S.) Q.B. 443; 10 Q.B. Rep. 787.

[See STAMP.]

BATHS AND WASHHOUSES.

Public Baths and Washhouses established by 9 & 10 Vict. c. 74; 24 Law J. Stat. 187.

The 9 & 10 Vict. c. 74. amended by 10 & 11 Vict. c. 61; 25 Law J. Stat. 200.

BATTERSEA PARK ACT.

[See MANDAMUS—PROHIBITION.]

BEER AND BEERHOUSE.

Sale of beer on the Lord's Day regulated by 11 & 12 Vict. c. 49; 26 Law J. Stat. 158.

A conviction under 11 Geo. 4. & 1 Will. 4. c. 64. and 4 & 5 Will. 4. c. 85. stated that W, of the parish of Ashford, in the county of K, was convicted by two Justices in and for the county of K, acting in petty sessions in and for the division of Ashford, in the said county, for that he, being a seller of beer licensed to sell the same by retail to be consumed on the premises, under the provisions of the statutes made and provided, did at the parish of Ashford aforesaid, permit drunkenness and other disorderly conduct in the house mentioned in such licence, and situate in the said parish of Ashford, against the tenour of such licence granted under the provisions of the said statutes, and contrary to the form of the said statutes, whereby the said W had forfeited 10*l.*, this being adjudged to be his second offence against the provisions of the aforesaid statutes to permit the general sale of beer, &c. by retail in England; and the Justices thereby awarded one moiety of the penalty, after deducting the costs

of the conviction, to the informer, and the other moiety, after deducting the costs as aforesaid, to the treasurer of the county:—Held, first, that the conviction need not be by two Justices of the division within which the licensed house was situate, but that if it were necessary, it appeared from the conviction that they were so. Secondly, that it was unnecessary to allege that the conviction took place within three calendar months after the offence. Thirdly, that the offence was properly stated to be contrary to the form of the statutes. Fourthly, that the conviction need not state the names of the persons permitted to be drunk or allege that they were unknown. Fifthly, that the offence charged to have been committed was not double. Sixthly, that it was unnecessary to set out the licence in the conviction. Seventhly, that the conviction was not bad for not ascertaining the costs. Lastly, that the conviction need not be on parchment. *Wray v. Toke*, 17 Law J. Rep. (N.S.) M.C. 183; 12 Q.B. Rep. 492.

An overseer is not compellable to grant a certificate that a person is the real resident holder and occupier of a house under the provisions of 3 & 4 Vict. c. 61.

To a mandamus commanding the overseer to give such certificate to T H, he returned that he had no evidence that T H was the real resident holder and occupier, and that he had reason to believe that T H was not the real resident holder, &c., because he was rated jointly with T D. To this return there was a plea, that when the certificate was demanded, the defendant (the overseer) well knew that T H was the real holder and occupier. The jury having found a verdict for the Crown,—Held, on motion for a new trial, and in arrest of judgment, first, that defendant could not be made responsible on the facts as they appeared on the pleadings, if he judged wrong but honestly; secondly, that, at all events, the judgment ought to be arrested for insufficiency of the writ. *Regina v. Kensington*, 17 Law J. Rep. (N.S.) Q.B. 332; 12 Q.B. Rep. 654.

BENEFIT BUILDING SOCIETIES.

[See FRIENDLY AND BENEFIT SOCIETIES.]

BIGAMY.

[See MARRIAGE, Validity of.]

[*Murray v. Regina*, 5 Law J. Dig. 135; 7 Q.B. Rep. 700.]

EVIDENCE OF FIRST MARRIAGE.

- (a) *Where solemnized in a Chapel.*
- (b) *Where solemnized under 6 & 7 Will. 4. c. 85.*
- (c) *By Prisoner's Confession.*

(a) *Where solemnized in a Chapel.*

In a case of bigamy, where the first marriage was solemnized in a chapel, it is necessary to shew either that the chapel was one in which banns had been usually published before the stat. 26 Geo. 3. c. 33, or that the chapel was built and consecrated

after that act, and before the stat. 6 Geo. 4. c. 92; and proof that marriages have been solemnized there for the last twenty years is not sufficient for this purpose. *Regina v. Bowen*, 2 Car. & K. 227.

(b) *Where solemnized under 6 & 7 Will. 4. c. 85.*

In an indictment for bigamy, where the first marriage was solemnized under 6 & 7 Will. 4. c. 85, the certificate authorized by that act and 6 & 7 Will. 4. c. 86. s. 38, coupled with the identity of the parties is sufficient *prima facie* evidence of such marriage. *Regina v. Hawes*, 1 Den. C.C. 270.

(c) *By Prisoner's Confession.*

In a case of bigamy there ought to be some proof of the first marriage beyond the mere statements of the prisoner while in custody; therefore, where a man went to a police station and stated that he had committed bigamy, and when and where the first marriage took place, and while in custody signed a statement to the same effect, the Judge thought this, though some evidence of the first marriage, insufficient, and so told the jury. *Regina v. Flaherty*, 2 Car. & K. 782.

BILL OF EXCEPTIONS.

[See EVIDENCE—JUDGMENT, Nunc pro tunc—WRIT OF ERROR.]

- (A) FORM AND REQUISITES.
- (B) WHEN IT LIES.
- (C) SEALING.

(A) FORM AND REQUISITES.

A bill of exceptions to the direction of a Judge must set out in terms what the Judge's direction was: it is not sufficient to state that the counsel requested the Judge to leave certain questions to the jury, and that he refused to do so. *M'Alpine v. Mangnall*, 15 Law J. Rep. (N.S.) C.P. 298; 3 Com. B. Rep. 496.

A court of error cannot look beyond the bill of exceptions, but must decide on that alone. *Bain v. Whitehaven and Furness Junction Rail. Co.*, 3 H. L. Cas. 1.

(B) WHEN IT LIES.

Quare—Whether a bill of exceptions lies for misdirection of a Judge on the execution of a writ of inquiry. *Price v. Green*, 16 Law J. Rep. (N.S.) Exch. 108; 16 Mee. & W. 346.

If a Judge at the trial leaves as a fact for the jury to determine any matter which he should decide as a point of law, the counsel should interpose and tender a bill of exceptions; otherwise, if in the opinion of the Court the jury decide the question left to them correctly in point of law, the Judge's misdirection is no ground for a new trial. *Doe d. Strickland v. Strickland*, 19 Law J. Rep. (N.S.) C.P. 89; 8 Com. B. Rep. 724.

(C) SEALING.

Where a bill of exceptions had been tendered, and before it was sealed the Judge died, the Court allowed a motion for a new trial, although more

than a year had elapsed from the time of the trial. *Newton v. Boodle*, 16 Law J. Rep. (N.S.) C.P. 185; 4 Dowl. & L.P.C. 664; 3 Com. B. Rep. 795.

BILLS OF EXCHANGE AND PROMISORY NOTES.

[Liability of Directors on and Authority to draw, see COMPANY—And see FORGERY—INFANT, Ratification—INFERIOR COURT—INTERNATIONAL LAW—MONEY PAID—PAYMENT—PLEADING.]

- (A) FORM AND OPERATION.
- (B) STAMP.
- (C) CONSIDERATION [FAILURE OF].
- (D) ACCOMMODATION BILL.
- (E) ALTERATION.
- (F) ACCEPTANCE.
 - (a) *Varying from Tenour of Bill.*
 - (b) *Estoppel by.*
 - (c) *By Partner or Agent.*
- (G) TRANSFER AND INDORSEMENT.
 - (a) *In general.*
 - (b) *Note payable to Maker's own Order.*
 - (c) *Where Bill fraudulently drawn by one Partner.*
 - (d) *Notice of Non-acceptance to Indorser.*
 - (e) *Special Indorsement after Indorsement in Blank.*
 - (f) *After Maturity.*
 - (g) *By Agent.*
 - (h) *Re-indorsement [Effect of].*
- (H) PRESENTMENT.
- (I) PAYMENT.
 - (a) *By Appropriation of Monies received by Holder on Account of Drawer.*
 - (b) *Notes payable at particular Place.*
 - (c) *Protest for Non-payment.*
- (K) DISCHARGE OF LIABILITY ON.
 - (a) *By giving Time.*
 - (b) *By giving Security.*
 - (c) *Of Acceptor by Payment of Drawer.*
 - (d) *Proof by Indorsee on Fiat in Bankruptcy against Acceptor.*
- (L) NOTICE OF DISHONOUR.
 - (a) *Form and Requisites.*
 - (b) *By wrong Party.*
 - (c) *Misdescription of Bill.*
 - (d) *By Post.*
 - (e) *Enures to the Benefit of antecedent Parties.*
 - (f) *Excuse for and Dispensation of.*
 - (g) *Proof of.*
- (M) REMITTING BILLS [CUSTOM AS TO].
- (N) ACTIONS.
 - (a) *Against Maker and Indorser jointly.*
 - (b) *By Payee of Lost Bill.*
 - (c) *Recovery of Interest where Bill not produced at Trial.*
 - (d) *Effect of collateral Agreements and conditional Delivery.*
- (O) PLEADING.
 - (a) *In general.*
 - (b) *Names and Matters of Description.*
 - (c) *Non assumpsit.*
 - (d) *Non-issuable Plea.*

- (e) *Duplicity.*
- (f) *Argumentative Denial and Averments.*
- (g) *Plea of Stamp Law.*
- (h) *Waiver of Acceptance.*
- (i) *Traverse of Indorsement.*
- (k) *Allegation of Lapse of Time so as to include Days of Grace.*
- (l) *Agreement to accept Composition.*
- (m) *Giving Bill for and on Account of a Debt.*
- (n) *Want of Consideration and Fraud.*

(P) EVIDENCE.

- (a) *Production of Bill without Notice.*
- (b) *Secondary Evidence of destroyed Bill.*
- (c) *On Plea of Infancy.*
- (d) *Indorsement.*
 - (1) *Identity of Payee.*
 - (2) *Evidence in Reply on Traverse of.*

(Q) CHEQUES.

- (a) *Date and Place of Drawing.*
- (b) *Delivery of.*
- (c) *Payment [Presentment for and Evidence on Plea of].*
- (d) *Debt by Payee against Maker.*
- (e) *Evidence.*

(A) FORM AND OPERATION.

"Memorandum—Mr. S has this day deposited with me 500*l.*, on the sale of 10,300*l.* 3*l.* per cent. Spanish, to be returned on demand:"—Held, to be a memorandum of the deposit of money to be returned, and not a promissory note. *Sibree v. Tripp*, 15 Law J. Rep. (N.S.) Exch. 318; 15 Mee. & W. 23.

"*Drury v. Vaughan*.—In consideration of W D not taking any further proceedings in the above action, I do hereby undertake, with the said W D, that I will pay him 3*l.* 5*s.* every quarter of a year, from this day until the whole of the principal money now due from J & T V to W D, 26*l.* 1*s.*, with interest, be fully paid; the first of such quarterly payments to become due on the 30th of October next. It is understood that this undertaking is not to be a release or discharge of the note signed by J V and T V to the said W D, but as an additional security for the above-mentioned amount now due on such note, with the interest. Dated," &c. The above instrument was held not to be a promissory note. *Drury v. Macaulay*, 16 Law J. Rep. (N.S.) Exch. 31; 16 Mee. & W. 146.

After judgment by default against the maker of a promissory note, and reference to the Master to compute principal and interest upon it, it is not necessary to produce the note before the Master. Where it was produced, and it appeared to be signed E B, whereas the maker's name was E T B:—Held, that the variance was immaterial. *Davis v. Barker*, 16 Law J. Rep. (N.S.) C.P. 86; 4 Dowl. & L. P.C. 468; 3 Com. B. Rep. 606.

A note made by several persons payable to "our and each of our order," and indorsed by one of these persons, is a good promissory note within 3 & 4 Anne, c. 9. *Absolon v. Marks*, 17 Law J. Rep. (N.S.) Q.B. 7; 11 Q.B. Rep. 19.

The following document held not to be a promissory note:—"August 5, 1844.—Borrowed of Mr. J. White the sum of 200*l.* to account for on

behalf of the Alliance Club, at — months' notice if required."

So also where the blank was filled up by the word "two." *White v. North*, 18 Law J. Rep. (N.S.) Exch. 316; 3 Exch. Rep. 689.

In 1842 Wilson & Sons, type-founders, were indebted to W G the plaintiffs' testator in 6,000*l.*, previously to and after which time they supplied the defendant with type, being paid by him quarterly. Wilson & Sons being applied to by W G for payment, delivered to him the following order signed by them and directed to the defendant:—"24th Sept. 1842.—Dear Sir,—We hereby authorize you to pay on our account to the order of W G, 6,000*l.* at the following periods, deducting the amount from the quarterly accounts for type furnished to you and to Messrs. Eyre & Spottiswoode, viz., 11th Nov. 1843, 1,000*l.*, 11th Nov. 1844, 1,000*l.*, 11th Nov. 1845, 1,000*l.*, 11th Nov. 1846, 1,500*l.*, 11th Nov. 1847, 1,500*l.*=6,000*l.* Yours, A. Wilson & Sons." The defendant returned the following answer:—"To W. G.—Dear Sir, having received the foregoing authority from Messrs. A. Wilson & Sons, I undertake to make you the payments as above stated. A. Spottiswoode, Sept. 24, 1842." The first two instalments up to November 1844 were duly paid to W. G. Type continued to be furnished by Messrs. Wilson to the defendant up to December 1845, quarterly payments for which were duly made by the defendant to Messrs. Wilson. The quarterly account for type up to the 31st of December 1845, amounting to 651*l.* 0*s.* 9*d.*, was also paid by the defendant to Messrs. Wilson; but the 1,000*l.* instalment due on the 11th of November 1845 was not paid to W. G. In December 1845 the defendant stated that he considered himself bound to see all the amounts due from himself to Messrs. Wilsons applied to the discharge of their debt due to W G:—Held, first, that the documents of the 24th of September 1842, required an agreement and not a promissory note or bill of exchange stamp. Secondly, that the documents amounted to an agreement that if any of the specified portions of the debt mentioned therein were at any time unpaid by Messrs. Wilson to W G, the defendant on having notice thereof would, as far as those amounts extended, pay the debt due from Messrs. Wilson to W G, and that the plaintiffs were entitled to recover the sum of 651*l.* 0*s.* 9*d.* *Hamilton v. Spottiswoode*, 18 Law J. Rep. (N.S.) Exch. 393; 4 Exch. Rep. 200.

Assumpsit by the indorsee of a bill of exchange against the drawer: plea, a traverse of the drawing. The plaintiff gave in evidence an instrument in the following form:—

"Port of London Sea, Fire and Life Assurance Company.

"To the Cashier,

"10th of Sept. 1849.

"500*l.*—Fifty-three days after date, credit Messrs. P & Co. or order with the sum of five hundred pounds, claimed per *Cleopatra*, in cash on account of this corporation. A C, Managing Director."

Held, that "credit in cash" was equivalent to "pay;" and that the affirmative of the issue was proved. *Eddison v. Collingridge*, 19 Law J. Rep. (N.S.) C.P. 268.

[See (B) Stamp—(G) Transfer, (b) Notes pay-

able to Maker's own Order—(Q) Cheques. And see COMPANY.]

(B) STAMP.

An instrument stamped as a promissory note and containing, besides the ordinary promise to pay, the following words, viz.:—"I have lodged with A B (the payee) the counterpart leases, &c., as a collateral security for the said sum of 500*l.*,"—Held, not to require an additional agreement stamp. *Fancourt v. Thorne*, 15 Law J. Rep. (N.S.) Q.B. 344; 9 Q.B. Rep. 312.

A party paying an accommodation bill, after maturity, on behalf of the acceptor, may bring an action against the drawer without having the bill re-stamped. *Thomas v. Fenton*, 16 Law J. Rep. (N.S.) Q.B. 362; 5 Dowl. & L. P.C. 28.

The following document was held not to require a stamp, either as a promissory note, a receipt, or as an agreement:—

"£170*l.* Received from Mrs. B T the sum of 170*l.* for value received, for which I promise to pay at the rate of 5*l.* per cent. from the above date.—A A S." *Taylor v. Steele*, 16 Law J. Rep. (N.S.) Exch. 177; 16 Mee. & W. 665.

[See (E) Alteration—(Q) Cheques, (a) Date and Place of Drawing.]

(C) CONSIDERATION [FAILURE OF].

The defendant having sold to T through the agency of the plaintiffs, who were factors, some bark, which he agreed should be equal to the sample, drew a bill on the plaintiffs for the price of the bark, which they accepted. The bark not being equal to the sample, and being rejected by T, the buyer,—Held, that the consideration of the bill having failed, the plaintiffs were entitled to recover the amount of it from the defendant. *Hooper v. Treffry*, 16 Law J. Rep. (N.S.) Exch. 233; 1 Exch. Rep. 17.

In an action by A, the payee of a promissory note, against B, the maker, it is no defence that the note was given as security for a loan made to B out of the funds of a co-partnership, of which A and B are members, and A the treasurer and trustee, and that A sues on behalf of the co-partnership. *Lomas v. Bradshaw*, 19 Law J. Rep. (N.S.) C.P. 273.

[See (O) Pleading, (u) Want of Consideration and Fraud.]

(D) ACCOMMODATION BILL.

To an action on a bill of exchange for 100*l.* the defendant pleaded that the bill was an accommodation bill, and that the defendant never had and the plaintiff had never given any value for it. The evidence was, that the bill was given as an accommodation bill, and that during the currency of it it was agreed that the plaintiff and defendant should each give to the other cross-acceptances for 100*l.* That which the defendant gave the plaintiff was destroyed, but the plaintiff was compelled to pay that which he gave the defendant:—Held, that the plea was not supported. *Burton v. Penton*, 16 Law J. Rep. (N.S.) Q.B. 353; s. c. *nom. Burdon v. Benton*, 9 Q.B. Rep. 843.

Plaintiff, having accepted a bill for defendant's accommodation, defended an action brought by the indorsee, and finally paid the amount, with the

costs of the action. Plaintiff brought assumpsit for money paid: the jury were directed that, if defendant requested plaintiff to undertake the defence (as to which there was some evidence, but no express request proved), the costs were recoverable as money paid to the plaintiff's use. Verdict for plaintiff:—Held, that the direction was right, and the costs recoverable under the count for money paid. *Garrard v. Cottrell*, 10 Q.B. Rep. 679.

The acceptor of an accommodation bill is not entitled, in an action against the drawer upon his implied contract of indemnity, to recover costs incurred in defending an action brought against himself upon the bill. *Beech v. Jones*, 5 Com. B. Rep. 696.

The contract of the drawer of an accommodation bill with the acceptor is to indemnify him against the bill, and if the drawer provides the acceptor with funds to meet the bill this is, in law, a performance of that contract, and confers on the acceptor a right to retain the money, not merely against any revocation by the drawer, but also against his assignees in the event of his becoming bankrupt before the bill is paid. *Yates v. Hoppe*, 19 Law J. Rep. (N.S.) C.P. 180.

A accepted a bill of exchange for 150*l.* drawn by and for the accommodation of B. B indorsed the bill, and in order to get it discounted procured C also to indorse it. B then delivered the bill to a person who advanced 100*l.* on it. When the bill became due the holder demanded payment of the 100*l.* from C, who took up the bill by giving the holder a new bill for 160*l.*, the holder paying him 50*l.* besides the 100*l.* already paid to B. C then brought his action against A on the bill, and B filed his bill to restrain the action and have the bill delivered up. The common injunction was obtained, but dissolved on the merits, and C recovered judgment in the action. At the hearing the bill was dismissed for want of equity, with costs. *Hammon v. Sedgwick*, 6 Hare, 256.

(E) ALTERATION.

A bill of exchange, drawn for one sum in Paris, and accepted for a smaller sum in England, was altered to correspond with the acceptance; it was not shewn where the alteration was made:—Held, that no stamp was necessary. *Hamelin v. Bruck*, 15 Law J. Rep. (N.S.) Q.B. 343; 9 Q.B. Rep. 306.

Where a bill was altered by the drawer from three to two months without the knowledge of the acceptor, but who subsequently assented to it,—Held, that he was bound by the alteration. *Tarleton v. Shingler*, 7 Com. B. Rep. 812.

[See MONEY HAD AND RECEIVED.]

(F) ACCEPTANCE.

(a) Varying from Tenour of Bill.

A bill drawn by T T upon the defendant, dated the 28th of November 1836, required him to pay to the order of T T 500*l.*, forty-two months after date. The defendant accepted it in the following terms:—"Accepted on condition of its being renewed until the 28th of November 1844, without interest, payable by me, at W & Co. bankers, London." In an action by the plaintiff as indorsee of the bill against the defendant, the declaration stated that T T made his bill of exchange on the

28th of November 1836, directed to the defendant, and thereby required the defendant forty-two months after date to pay, &c., and that the defendant accepted the said bill payable on the 28th of November 1844, &c.:—Held, that as against the defendant it was competent to the plaintiff, if he pleased, to treat the acceptance as an extension of the time of payment specified in the bill, and to declare upon it accordingly; but that he might have disagreed to the acceptance, and have treated the bill as dishonoured by non-acceptance.

Whether, if the plaintiff agreed to the acceptance at all, he was bound to treat it as an acceptance to pay on the 28th of November 1844—*quære*.

Whether the indorsee might have been at liberty to treat the acceptance, as between himself and the acceptor, as a general acceptance to pay at the end of forty-two months, and to treat the condition as binding only on the drawer—*quære*.

Semble—That an acceptance must be for payment in money, and that an acceptance to pay a bill at maturity by then giving another acceptance would be void. *Russell v. Phillips*, 19 Law J. Rep. (N.S.) Q.B. 297.

(b) *Estoppel by*.

To an action by indorsee of a bill of exchange against acceptor, a plea, that before the making and accepting the bill, the drawer committed an act of bankruptcy, upon which a fiat issued, and that the assignees appointed under the fiat, after the commencement of the suit, required defendant to pay them the amount of the said bill of exchange,—Held, ill. *Braithwaite v. Gardiner*, 15 Law J. Rep. (N.S.) Q.B. 187; 8 Q.B. Rep. 473.

The acceptor of a bill payable to the order of the drawer cannot deny the authority of the drawer to draw and to indorse.

Declaration alleging that the Governor and Company of Copper Miners drew a bill upon the defendant, payable to their order; that the defendant accepted the same, and that the drawers indorsed the same to the plaintiffs. Plea, that the Governor and Company of Copper Miners were a body corporate; that the bill was made by them and accepted by the defendant as a bill so made by the said body corporate; and that the said body corporate had no authority to indorse any bill of exchange:—Held, bad on special demurrer. *Halifax v. Lyle*, 18 Law J. Rep. (N.S.) Exch. 197; 3 Exch. Rep. 446.

(c) *By Partner or Agent*.

Indorsee against the three defendants as acceptors of a bill of exchange drawn on "E M and others, trustees of Clarence Temperance Hall, Liverpool," and accepted thus:—"Accepted E M." The three defendants, with E M and another, were the five trustees of a body of persons associated together for the purpose of building the Temperance Hall. E M had authority from all the trustees to accept the bill on their behalf:—Held, that the defendants were bound by the acceptance, though it did not shew on the face of it that E M intended to accept, not individually, but for himself and four others. *Jenkins v. Morris*, 16 Mee. & W. 877.

A bill of exchange was drawn upon the plaintiff, and accepted by his wife in her name, she having

authority to accept for him:—Held, that the plaintiff was liable on the bill as acceptor.

If a principal authorizes an agent to accept a bill, such principal is liable as acceptor, though wrongly described by his agent in the acceptance. *Lindus v. Bradwell*, 17 Law J. Rep. (N.S.) C.P. 121; 5 Com. B. Rep. 583.

(G) TRANSFER AND INDORSEMENT.

(a) *In general*.

[*Soares v. Glyn*, 5 Law J. Dig. 141; 8 Q.B. Rep. 24.]

The declaration stated that the defendants made their promissory note, and promised to pay one H, since deceased, or order, 300*l*. on demand; that H indorsed the note without making any delivery thereof; that H died, having appointed his wife sole executrix, who afterwards transferred the note to the plaintiff, *to wit*, by delivery thereof to him:—Held, on general demurrer, that the word "transferred" meant a delivery only, and not an indorsement and delivery; and that the declaration was bad. *Bromage v. Lloyd*, 16 Law J. Rep. (N.S.) Exch. 257; 1 Exch. Rep. 32; 5 Dowl. & L. P.C. 123.

L & Co., the indorsees of a bill of exchange (and agents of A), indorsed the bill, placed it among the papers of A in their possession, and made no communication to A on the subject of the bill:—Held, a good indorsement to A. *Lysaght v. Bryant*, 19 Law J. Rep. (N.S.) C.P. 160; 9 Com. B. Rep. 46.

(b) *Note payable to Maker's own Order*.

The statute 3 & 4 Ann. c. 9, s. 1. extends to, and renders assignable and indorsable over, promissory notes payable to the order of the maker. *Wood v. Mytton*, 16 Law J. Rep. (N.S.) Q.B. 446; 10 Q.B. Rep. 805.

A declaration on a promissory note stated, that the defendant made his promissory note, and thereby promised to pay to the order of the defendant, 500*l*. two months after date, and indorsed the same to the plaintiff. The second count stated, that the defendant made his other promissory note, and thereby promised to pay to the bearer 500*l*. two months after date; that the defendant delivered the said last-mentioned note to the plaintiff, who was and still is the bearer thereof. The defendant demurred to the first count, on the ground that a note payable to the maker's order was not a legal instrument, and could not be negotiated; and he pleaded to the second count, that he made a certain instrument, whereby he promised to pay to the order of him, the defendant, 500*l*., as in the first count is alleged; without this, that he made any other promissory note, whereby he promised to pay to the bearer the sum of money in the second count mentioned, as in the same count is alleged:—Held, that the first count was bad, as the instrument in question, being payable to the order of the maker, was not a promissory note within the statute 3 & 4 Anne, c. 9.

Held also, that the second plea was bad, as amounting to an argumentative denial of the defendant's having made the note. *Flight v. Maclean*, 16 Law J. Rep. (N.S.) Exch. 23; 16 Mee. & W. 51.

A note payable to the maker's own order is not a promissory note negotiable under the stat. 3 & 4

Anne, c. 9. s. 1. But the maker of such a note may, by indorsing it, give the holder a right of action on it against him.

A declaration describing such a note as a "promissory note" might be bad on demurrer, but is good after being pleaded over to. So, though an allegation that the defendant *indorsed* such a note might be bad on demurrer, it is sufficient after plea. *Brown v. De Winton*, 17 Law J. Rep. (N.S.) C.P. 281; 6 Com. B. Rep. 336.

A declaration stated that defendant made a promissory note payable to his own order, and indorsed it to Smith & Co., who indorsed it to plaintiff:—Held, that as against the maker and indorser this was a valid promissory note payable to Smith & Co. or order; that the note before indorsement was in the nature of a promise to pay to the person to whom the maker should afterwards indorse it; and that the declaration would have been bad on special demurrer for not setting out correctly the legal effect of the instrument. *Gay v. Lander*, 17 Law J. Rep. (N.S.) C.P. 286; 6 Com. B. Rep. 336.

An instrument whereby the maker promises to pay a sum of money to his own order is not a promissory note at all, and, therefore, not transferable as such within the 3 & 4 Anne, c. 9; by which statute the legislature only meant to make those instruments assignable which gave a right to sue. The effect of indorsement is to perfect the incomplete instrument, making it a binding contract between the maker and indorsee, and it then becomes an assignable note: if the indorsement be in blank it is a note payable to bearer, and properly declared upon as such.

The indorsement, in such a case, is not a new drawing, so as to make a fresh stamp necessary. *Hooper v. Williams*, 17 Law J. Rep. (N.S.) Exch. 315; 2 Exch. Rep. 13.

(c) *Where Bill fraudulently drawn by one Partner.*

To an action by indorsee, against A and B as drawers of a bill of exchange, indorsed to C, and by him to the plaintiff, A pleaded, that he and B were in co-partnership as brewers; that B made and indorsed the bill, using the name of the firm, in fraud of A, and not for the purposes of the co-partnership, but for his own private purposes, viz., for a private debt due from him to C, and without the knowledge or consent of A; that there was no consideration or value to him, A, for the drawing or indorsement of the bill; of all which premises C, at the time of the indorsement to him, had knowledge and notice; and that at the time when the bill was indorsed and delivered to the plaintiff, he had full knowledge and notice of all the premises in the plea aforesaid. Replication, that at the time when the bill was indorsed and delivered to the plaintiff, he had not any such knowledge or notice as in the plea mentioned; and issue thereon. At the trial, the jury found that C had no knowledge of the original fraud in the drawing of the bill, but that the plaintiff, at the time of the indorsement to him, had knowledge of that fraud:—Held, that the plea was not proved. *May v. Chapman*, 16 Mee. & W. 355.

(d) *Notice of Non-acceptance to Indorser.*

In an action by indorsee against indorser of a bill of exchange, the declaration stated that T drew his

bill of exchange in favour of the defendant; that defendant indorsed the bill to the plaintiff, and that the acceptor did not pay it, although it was presented for payment, of which the defendant had notice. The defendant pleaded, that after the indorsement to the plaintiff, and before it became due, the plaintiff, being the holder, indorsed it to some person unknown, who presented it to G for acceptance; that G refused to accept it, and that the defendant had no notice of the dishonour for non-acceptance. The plaintiff replied *de injuriâ*:—Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that the plea was not bad in omitting to state that the plaintiff was not a *bond fide* indorsee for value, or before the bill became due, or without knowledge of the dishonour for non-acceptance; the defendant not being bound to make these averments.

Semble—That it would have been a bad replication, that the *unknown person* indorsed the bill to the plaintiff for value before it became due, and that the plaintiff had no knowledge of the dishonour for non-acceptance, &c. *Bartlett v. Benson*, 15 Law J. Rep. (N.S.) Exch. 23; 14 Mee. & W. 733; 3 Dowl. & L. P.C. 274.

(e) *Special Indorsement after Indorsement in Blank.*

A bill of exchange, bearing several indorsements in blank, was subsequently indorsed by the defendant to the plaintiffs specially in these terms:—"Pay Messrs. B and W & Co. or order, W. Macdonald." Then followed an indorsement, "Per proc. of the Eastwood Company,—Thos. Goodwill." The Eastwood Company and the firm of Messrs. B and W & Co. consisted of the same persons. The bill afterwards came into the hands of other parties, and being presented by the holder to the acceptor, was refused payment on the ground of its not having been indorsed in terms by B and W & Co. The defendant, on the bill being returned to him and payment demanded, suggested that the words "B and W & Co." should be inserted on the bill under his indorsement; but ultimately, after his suggestion had been complied with, refused to pay the bill. B and W & Co. accordingly brought an action against him, to which he pleaded non-presentment of the bill,—Held, that the defendant had no right to restrain the negotiability of the bill by a special indorsement; that the presentment was sufficient; and that the plaintiffs were entitled to recover. *Walker v. Macdonald*, 17 Law J. Rep. (N.S.) Exch. 377; 2 Exch. Rep. 527.

(f) *After Maturity.*

To a declaration on a bill of exchange, drawn by A on, and accepted by defendant, payable to A's order, and by A indorsed to B, and by B to plaintiff, defendant pleaded that he accepted the bill for the accommodation of A and B, and without consideration, &c., and on the terms that it should not be negotiated after it was due, and that it was indorsed to plaintiff after it was due, without defendant's privity:—Held, that the plea was bad. *Carruthers v. West*, 17 Law J. Rep. (N.S.) Q.B. 4; 11 Q.B. Rep. 143.

(g) *By Agent.*

H B, the manager of a banking company, had a

limited authority to indorse, &c. bills of exchange for the business of the bank. The bank stopped payment, and H B afterwards indorsed a bill for the accommodation of the drawer in the same form as all bills of exchange were usually indorsed, &c. by the bank, thus, "P. p. N. and T. Joint-Stock Banking Company. H. B. Manager":—Held, that the indorsement "per procuration" was notice to a party receiving the bill that H B professed to act under an authority from the bank; and that a party taking the bill should ascertain that H B was acting within the terms of his authority. *Alexander v. M'Kenzie*, 18 Law J. Rep. (N.S.) C.P. 94; 6 Com. B. Rep. 766.

Where an agent is authorized to indorse the name of his principal, he may do so by the instrumentality of a third party. *Lord v. Hall*, 2 Car. & K. 698.

(h) Re-indorsement [Effect of].

Declaration by indorsee against indorser stated that W & Co. made their bill of exchange, and directed the same to one H, and then indorsed it to the defendant, who indorsed it to the plaintiffs. Plea, that W & Co. were the plaintiffs; that they were the makers of the bill and the persons who indorsed it to the defendant, and who were liable to him as such indorsers in the event of his paying the same. Replication, that before and at the time of the drawing of the bill by the plaintiffs and the indorsement by the defendant, H was indebted to the plaintiffs in 40*l.* 12*s.*; that it was agreed between the plaintiffs and H that, in consideration that H should procure the defendant to indorse and become surety as indorser to the plaintiffs of such bill, the plaintiffs should give time to H for payment of the said 40*l.* 12*s.*; that the plaintiffs drew and indorsed the bill, and that the defendant for the accommodation of H indorsed the bill, with the intent of becoming security as indorser to the plaintiffs of the said bill, and that the plaintiffs gave time to H:—Held, first, that the plaintiffs were entitled to recover against the defendant, there being no circuity of action in this case, as the defendant was unable to maintain an action against the plaintiffs. Secondly, that the plaintiffs' agreement not to sue H was a sufficient consideration for the defendant's guarantee.

Quare—Whether the replication was a departure from the declaration. At all events, the objection ought to have been pointed out on special demurrer. *Wilders v. Stevens*, 15 Law J. Rep. (N.S.) Exch. 108; 15 Mee. & W. 208.

[See (P) Evidence, *Indorsement*. And see ACTION, Defence.]

(H) PRESENTMENT.

In an action by an indorsee against the drawer of a bill of exchange, a letter of the defendant, saying, "You know I meant to call upon you immediately after the 24th with the money. E G (the acceptor) is an old and intimate friend of mine,"—Held, sufficient evidence of a waiver of presentment and notice of dishonour. *Mills v. Gibson*, 16 Law J. Rep. (N.S.) C.P. 249.

Declaration, alleging that the defendant made his promissory note, and thereby promised to pay to the plaintiff, by name and addition of Miss Jessie

Hope, at 10, Duncan Street, Edinburgh, the sum of, &c. Averment, that the plaintiff, when and since the said sum became due and payable, was always ready and willing to receive the said sum according to the tenour and effect of the said note, of which the defendant had notice, yet, &c. On general demurrer, held, that this was a note payable at a particular place, and that the declaration was bad for want of an averment of presentment for payment there. *Spindler v. Grellett*, 17 Law J. Rep. (N.S.) Exch. 6; 1 Exch. Rep. 384; 5 Dowl. & L. P.C. 191.

To a declaration for goods sold, the defendants pleaded, that after, &c., they delivered to the plaintiff, for and on account of the debt, promissory notes of the bank of L & Co., and that the plaintiff did not present the notes at the bank. They also pleaded that no notice of dishonour was given to the defendants. Replication, that before the note was delivered to the plaintiff, the said L & Co. became bankrupts, and could not have paid the notes; and that the plaintiff had no knowledge of the bankruptcy before or at the time of the delivering the notes to him; and that within a reasonable time from such delivery for presentment, the plaintiff having had notice of the bankruptcy of Messrs. L & Co., gave notice to the defendants, and being holder of the notes, he tendered and offered to deliver them up to the defendants, and requested them to pay the amount mentioned in them, but that the defendants refused to take back the notes or to pay the money, and that the notes would not have been paid if they had been presented. Rejoinder to the replication to the fourth plea, that the defendants were the holders of the notes, and delivered them to the plaintiff in the *bona fide* belief and expectation that they would be paid, and that they had not any knowledge or suspicion that Messrs. L & Co. had become bankrupts, and that he the plaintiff did not give notice:—Held, first, that the pleas were good; secondly, that the replication was also good, as shewing a good excuse for non-presentment; and, lastly, that the rejoinder was ill. *Robson v. Oliver*, 16 Law J. Rep. (N.S.) Q.B. 437; 10 Q.B. Rep. 704.

[See (G) Transfer—(I) (b) Payment.]

(I) PAYMENT.

(a) By Appropriation of Monies received by Holder on account of Drawer.

To an action against acceptors of a bill of exchange for 419*l.* 2*s.*, damages being laid at 500*l.*, the defendants pleaded, first, as to 4*l.* 18*s.* parcel, &c., payment of 5*l.* into court; and, secondly, "as to the residue of the sum mentioned in the declaration," that the plaintiffs were the brokers of C I H, and sold certain property for him for 415*l.* 12*s.* 6*d.*, payable on a day which would arrive before the bill would become due, and that he applied to the plaintiffs to advance him the amount, which they agreed to do, if C I H would procure the defendants to accept a bill for 419*l.* 2*s.*, and that the plaintiffs agreed to appropriate the purchase-money, when received by them, towards the payment of the bill; and that thereupon, the defendants for the accommodation of C I H, and without any consideration, accepted the bill, and the plaintiffs advanced C I H 415*l.* 12*s.* 6*d.*, and afterwards and before the bill

became due they received the purchase-money, viz., the 415*l.* 12*s.* 6*d.*, which was sufficient to satisfy the residue of the sum in the declaration mentioned, and all damages, &c. :—Held, that the facts stated in the plea being proved were a good answer to the action.

Held, secondly, that they were evidence of a payment to the plaintiffs by the defendants, through the agency of C I H, of 415*l.* 12*s.* 6*d.*

Held, thirdly, that the defendants were as between the plaintiffs and themselves entitled to credit for the full sum of 415*l.* 12*s.* *Hills v. Mesnard*, 16 Law J. Rep. (N.S.) Q.B. 306; 10 Q.B. Rep. 266.

(b) *Notes payable at particular Place.*

A promissory note which, in the body of it, is made "payable on, &c. At &c.," must, by the law of England, be presented at the place mentioned, although there is a full stop between the date and the place of payment; the statement of the place cannot be taken as a mere memorandum. *Vanderdonckt v. Thellusson*, 19 Law J. Rep. (N.S.) C.P. 12; 8 Com. B. Rep. 812.

The words "payable at," &c. written beneath the body of a promissory note, constitute a memorandum only, and do not form part of the contract. *Masters v. Barretto*, 19 Law J. Rep. (N.S.) C.P. 50; 8 Com. B. Rep. 433.

Debt, by payee against the maker of a promissory note, payable at No. 11, Old Slip. The declaration stated "that when the said note became due the plaintiffs were ready and willing to present the said note to the defendant, at the said No. 11, Old Slip, for payment, and they would have duly presented the same to the defendant and demanded payment, but the defendant was then absent from the said No. 11, Old Slip, and had then clandestinely absconded from thence without having left any effects or means for the payment of the said note, nor were there any means there for the payment of the said note, and the defendant did pay the said note when it became due." Demurrer and joinder therein :—Held, that the declaration failed to shew a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shewn for the omission. *Sands v. Clarke*, 19 Law J. Rep. (N.S.) C.P. 84; 8 Com. B. Rep. 751.

(c) *Protest for Non-payment.*

In an action by a joint-stock banking society, as indorsees of a promissory note against the indorser, the declaration stated that one L made his promissory note in Scotland to the defendants' order and delivered the same to them; that they indorsed and delivered the same to the plaintiff; that the note was not paid although presented, and that it was protested for non-payment, whereof the defendant had notice. Fifth plea, that the defendants had not notice of the note being protested. Seventh plea, that the society, between the 25th of May and the 25th of July 1847, did not deliver at the Stamp Office an account or return pursuant to the 7 Geo. 4. c. 67 :—Held, on motion in arrest of judgment, that the declaration was good, the word "whereof" not being confined to the averment of protest only.

Held, also, on motion for judgment *non obstante veredicto*, first, that the fifth plea was bad, as pro-

testation of the note was not necessary; secondly, that the seventh plea was bad, the delivery of the account to the Stamp Office not being a condition precedent to the right of the plaintiff to recover on a promissory note. *Bonar v. Mitchell*, 19 Law J. Rep. (N.S.) Exch. 302; 5 Exch. Rep. 415.

(K) DISCHARGE OF LIABILITY ON.

(a) *By giving Time.*

To a declaration in assumpsit, by indorsee against drawer of a bill of exchange, the defendant pleaded that after the bill became due it was agreed between the plaintiff and the acceptor, without the defendant's consent, that the plaintiff should, in consideration of 30*s.* then paid him by the acceptor, give the acceptor time, and forbear to sue him for one month; that, in pursuance of the agreement, the plaintiff did give the acceptor time, and forbore to sue him for one month. Replication, that it was not agreed between the plaintiff and the acceptor, *modo et formâ* :—Held, after verdict for the defendant on this issue, that the plaintiff was not entitled to judgment *non obstante veredicto*, for that the plea was good, though it did not shew that the plaintiff could have proceeded to take any step against the acceptor within the month.

Held, also, that the drawer supported the issue on his part by merely proving the agreement, and that the plaintiff was not entitled to shew in answer that judgment could not have been obtained earlier than the time to which he had agreed to forbear. *Isaac v. Daniel*, 15 Law J. Rep. (N.S.) Q.B. 149; 8 Q.B. Rep. 500.

In assumpsit by the indorsee of a bill of exchange against the executrix of the drawer, it was pleaded that the plaintiff being holder of the bill when overdue, without the authority of the drawer, agreed with the acceptor, that, in consideration that he, the acceptor, would for a reasonable time, to wit, for one month, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by him, the plaintiff, if satisfactory to him, in lieu and substitution and for and on account of the overdue bill, he, the plaintiff, would for and during that period forbear enforcing payment from the acceptor :—Held, sufficient on general demurrer, as shewing a binding agreement to give time to the acceptor, and that the drawer was therefore discharged. *Moss v. Hall*, 19 Law J. Rep. (N.S.) Exch. 205; 5 Exch. Rep. 46.

(b) *By giving Security.*

If one of two makers of a joint and several promissory note, give the holder a deed of mortgage to secure the amount, with a covenant to pay it, the other maker is not thereby discharged; for the remedy on the specialty is not co-extensive with the remedy on the note. *Ansell v. Baker*, 15 Q.B. Rep. 20.

(c) *Of Acceptor by Payment of Drawer.*

In an action by indorsee against the acceptor of a bill of exchange, it appeared that when the bill became due the drawer (who was also payee) paid the plaintiff the amount of the bill and left it in his hands, that he might sue the acceptor upon it :—Held, that it was competent to the drawer to make the plaintiff his agent for the purpose of

suing on the bill, and that the liability of the acceptor was not discharged. *Williams v. James*, 19 Law J. Rep. (n.s.) Q.B. 445; 15 Q.B. Rep. 498.

(d) *Proof by Indorsee on Fiat in Bankruptcy against Acceptor.*

The drawer of a bill of exchange, who has paid the amount for an indorsee after a fiat in bankruptcy issued against the acceptor, may sue the latter upon the bill before he has obtained his certificate, notwithstanding the indorsee has proved under the fiat. *Walker v. Pilbeam*, 4 Com. B. Rep. 229.

(L) NOTICE OF DISHONOUR.

(a) *Form and Requisites.*

What is a sufficient notice of dishonour to an indorsee of a promissory note. *Chapman v. the British Guiana Bank*, 6 Moore, P.C. 23.

A notice of dishonour of a bill of exchange should shew, directly or by necessary implication, first, that the bill has been presented; secondly, that it has not been paid; and, thirdly, that the party to whom the notice is given is looked to for payment.

The defendant drew his bill on Maclean, who accepted it; the defendant indorsed to Day and Day to the plaintiff. The bill falling due on a Sunday, the plaintiff's son presented it on the Saturday to the acceptor, and he refused to pay. The plaintiff's son went and told Day and his foreman; on the same day the foreman told the defendant of the dishonour; on the Sunday, Day also told him of it:—Held, that there was no sufficient notice, there being no sufficient intimation from an authorized person that the defendant would be looked to for payment.

Semble—That a tradesman's foreman is not to be presumed to have authority to give a notice of dishonour for his master.

Semble, also, that a simple statement of dishonour, made by the holder of the bill, might be good notice, although it would not be sufficient if made by another party. *East v. Smith*, 16 Law J. Rep. (n.s.) Q.B. 292; 4 Dowl. & L. P.C. 744.

The plaintiff gave the defendant this notice of dishonour:—"I am the holder of a bill drawn by you on L M M for 98*l.* 15*s.*, which became due yesterday, and is unpaid; and I have to state, that unless the same is paid to me immediately, I shall proceed against you without delay for the amount. Amount of bill 98*l.* 15*s.*, noting 5*s.*, total 99*l.*":—Held, that the word "noting" must be taken as part of the notice; that it implied presentment and non-payment; and that the notice was therefore sufficient. *Armstrong v. Christiansi*, 17 Law J. Rep. (n.s.) C.P. 181; 5 Com. B. Rep. 687.

(b) *By wrong Party.*

Assumpsit on a bill of exchange, drawn by the defendant, indorsed by him to one Vaughan, and by Vaughan to the plaintiff. Plea, no notice of dishonour. The plaintiff's attorney, who was authorized by him to give the defendant notice of the dishonour, stated by mistake in his letter to the defendant, that he was authorized by Vaughan to demand payment of the dishonoured bill. The notice, if actually given by Vaughan, would have been sufficient:—Held, that the misrepresentation

of the name did not avoid the notice of dishonour, but merely gave the defendant every defence against the plaintiff that he would have had if the notice had been really given by Vaughan; and as the notice, if given by Vaughan, would have been good, and the defendant could have had no defence to an action by Vaughan, and had not been injured by the mistake, the plaintiff was entitled to recover. *Harrison v. Ruscoe*, 15 Law J. Rep. (n.s.) Exch. 110; 15 Mee. & W. 231.

(c) *Misdescription of Bill.*

Notice of dishonour is not vitiated by a misdescription of the bill of exchange, which could not mislead the party receiving the notice, in respect of the bill intended.

Where, therefore, notice of dishonour to drawer described the bill correctly as to date, amount, and parties, but stated it to be payable at the London and Westminster Bank, whereas it was made payable at the London Joint-Stock Bank, and there was no evidence that the drawer had been, in fact, misled thereby,—Held, that the notice of dishonour was sufficient. *Bromage v. Vaughan*, 16 Law J. Rep. (n.s.) Q.B. 10; 9 Q.B. Rep. 608.

(d) *By Post.*

A notice of dishonour of a bill of exchange posted by the holder on the day on which he is bound to give such notice, is good, although by the mistake of the post-office it is not delivered to the party entitled to such notice until some time afterwards; and, *semble*, the post-mark if given in evidence ought to be proved, either by persons from the post-office, or by those who are in the habit of receiving letters by the post. *Woodcock v. Houldsworth*, 16 Law J. Rep. (n.s.) Exch. 49; 16 Mee. & W. 124.

(e) *Enures to the Benefit of antecedent Parties.*

A notice of dishonour given by a party to the bill liable to be sued or who may be entitled to sue enures to the benefit of antecedent parties. *Lysaght v. Bryant*, 19 Law J. Rep. (n.s.) C.P. 160; 2 Car. & K. 1016.

(f) *Excuse for and Dispensation of.*

Where want of notice of dishonour of a bill, in an action against the drawer, was excused in the declaration by an allegation that the bill was accepted for the accommodation of the drawer, that he had no assets in the hands of the drawee, and that he sustained no damage by the want of notice,—Held, that the excuse was sufficient, and that it was not necessary to state that the defendant had no reasonable expectation of assets in the hands of the drawer at the maturity of the bill. *Thomas v. Fenton*, 16 Law J. Rep. (n.s.) Q.B. 362; 5 Dowl. & L. P.C. 28.

In an action on a promissory note by the indorsee against the indorser, to whom it had been indorsed by the payee, the declaration alleged, that neither at the time when the note was made nor afterwards and before it became due, nor when it became due, and on presentment for payment, had the maker or the payee any effects of the defendant in his hands, nor was there any consideration or value for the making of the note, of the payment thereof, or its indorsement by the payee to the

defendant, and that the defendant had not sustained any damage by reason of his not having had notice of the non-payment of the note:—Held, that as against an indorser the declaration did not state a sufficient excuse of want of notice of dishonour, as it was consistent with the averments in the declaration that the note might have been indorsed by the defendant for the accommodation of a prior party, in which case the defendant would be entitled to notice of dishonour. *Carter v. Flower*, 16 Law J. Rep. (N.S.) Exch. 199; 16 Mee. & W. 743; 4 Dowl. & L. P.C. 529.

The holder of a dishonoured bill is entitled to recover against an indorser, if he has sent the bill in due time to the place of business of the indorser, for the purpose of giving notice of dishonour, and found it closed and no one there, although no written notice of dishonour was left by him. Such facts do not, however, prove an issue that notice of dishonour was given, for their legal effect is not to give notice, but to dispense with the necessity for giving it, and the pleading must be according to the legal effect.

Semble—That the holder may, if he pleases, elect to treat the absence of the indorser from his place of business as extending the time for giving notice; and that a notice of dishonour given at the place of business, is in time, if given at the first reasonable opportunity afterwards, and that proof of its having been so given will support an averment of due notice having been given. *Allen v. Edmundson*, 17 Law J. Rep. (N.S.) Exch. 291; 2 Exch. Rep. 719; 2 Car. & K. 547.

(g) Proof of.

In an action against the drawer of a foreign bill of exchange, a promise made by defendant to pay the bill after the drawer had refused to accept it, is sufficient evidence to prove issues joined on pleas denying the protest and notice of protest, though such promise be subject to a condition which has not been complied with. *Campbell v. Webster*, 15 Law J. Rep. (N.S.) C.P. 4; 2 Com. B. Rep. 258.

A drew a bill for 10*l.* on B, who owed him 20*l.* The bill was payable on Saturday, the 10th of August. On the following Wednesday A was told by the bankers of C, the holder, that they understood that he, A, had received the money to take up the bill. He said he should keep the money, as B still owed him 10*l.*, and that he wished the bankers would sue B on the bill:—Held, evidence to go to the jury that A had received due notice of dishonour. *Jackson v. Collins*, 17 Law J. Rep. (N.S.) Q.B. 142.

In an action by the indorsee against the drawer of a bill of exchange the defendant pleaded that he had received no notice of dishonour. It was proved that the bill was taken to the defendant when it became due; that he then said that the acceptor was dead, and he was his executor; and he asked for time, and said that he would see the bill paid:—Held, that this was sufficient evidence of notice of dishonour to the defendant. *Caut v. Thompson*, 18 Law J. Rep. (N.S.) C.P. 125; 7 Com. B. Rep. 400.

Where the declaration alleged notice by defendant of the dishonour of the cheque which was denied by the plea,—Held, that the allegation was not supported by proof of the drawer having no effects in the hands of the banker, but leave was

given to amend. *Jackson v. Carrington*, 2 Car. & K. 750.

(M) REMITTING BILLS [CUSTOM AS TO].

If the remitter of a foreign bill receives credit from the drawer till foreign post day, and the payee gives the remitter full consideration, but the remitter does not pay the drawer, the payee may maintain his action against the drawer, although the drawer has never received any consideration.

A declaration stated that the defendants made their bill directed to Messrs. A in France, and payable to the plaintiffs' order, and delivered it to C & Co., who delivered it to the plaintiff. Plea, that the defendants made and delivered the bill to C & Co. for the plaintiffs' use on the terms of being paid the amount, according to the custom of merchants, on next foreign post day, and that the defendants were never paid. Replication, that after the bill was delivered to C & Co., they appeared, and the plaintiffs believed them to be the lawful holders, and that it was delivered by C & Co. to the plaintiffs for full value. On demurrer, held that the plea was bad, and that even if it had been sufficient to call on the plaintiffs to shew *bona fides*, they sufficiently did so by the replication. *Munroe v. Bordier*, 19 Law J. Rep. (N.S.) C.P. 133; 8 Com. B. Rep. 862.

(N) ACTIONS.

(a) Against Maker and Indorser jointly.

By the Dutch Roman law, in force in British Guiana, a joint action by the holder of a promissory note will lie against the maker and indorser of such note. *Chapman v. the British Guiana Bank*, 6 Moore, P.C. 23.

(b) By Payee of Lost Bill.

The payee of a negotiable bill of exchange having lost it, cannot, on its arriving at maturity, maintain an action upon it against the acceptor without producing it.

In an action by the drawer against the acceptor of a bill of exchange, the defendant pleaded that after the acceptance and before action the plaintiff lost the bill; that it still remained lost; and that the plaintiff was not at the commencement of the suit nor then the holder of or possessed of the bill. Replication, that the bill had not been, either at the time it was lost or at any other time, indorsed by the plaintiff or transferable by delivery, or capable of being enforced or put in suit against the defendant by any other person but the plaintiff; that up to and at the time of the loss the plaintiff was always the holder of the bill, and still is alone entitled to be the holder; that at the time of action brought, the defendant had notice that the plaintiff was not the holder of the bill for the reason aforesaid:—Held, that the defendant was entitled to judgment. *Ramuz v. Crowe*, 16 Law J. Rep. (N.S.) Exch. 280; 1 Exch. Rep. 167.

(c) Recovery of Interest where Bill not produced at Trial.

A declaration by indorsee against acceptor stated, that J C, on the 1st of September 1845, made his bill of exchange and required defendant to pay 20*l.* four months after date, which defendant accepted,

&c. There was no plea traversing the acceptance, and at the trial the bill was not produced, and none of defendant's pleas were proved:—Held, that plaintiff could not recover interest from the time when the bill became due, without producing the bill, and that the verdict should in such a case be limited to the principal and interest since the writ sued out. *Hutton v. Ward*, 19 Law J. Rep. (N.S.) Q.B. 293; 15 Q.B. Rep. 26.

(d) *Effect of collateral Agreements and conditional Delivery.*

To an action on a promissory note for 150*l.*, the defendant pleaded that A B being indebted to the plaintiff in 3,612*l.* 10*s.*, it was agreed that the plaintiff should accept 1,500*l.* in satisfaction, and that in consideration of the premises the defendant should make the note, and deliver it to the plaintiff in part payment, and that the plaintiff should not enforce payment of the original debt;—and that A B after the making of the note became bankrupt, and that the plaintiff in violation of the agreement proved for the original debt:—Held, that the plea was not proved by evidence of an agreement, that upon giving 350*l.* down, and a bond of other parties for 1,000*l.*, and the note, A B should be released from the original debt.

Held, also, that the plea was good after verdict. *Gillett v. Whitmarsh*, 15 Law J. Rep. (N.S.) Q.B. 291; 8 Q.B. Rep. 966.

To a declaration by the payee against the maker of a promissory note, the defendant pleaded that after the note had become due it was agreed between the plaintiff, the defendant, and one A B, that the said A B should, at the request of the plaintiff, pay to the plaintiff in trust for E B, 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid, and that the rights and causes of action of the plaintiff upon and in respect of the said note should be suspended, so long as the said A B should continue to pay the said sum of 25*l.*; averment, that the said A B had paid the said sum, &c. Upon issue joined to a replication traversing such payment by A B, a verdict was found, and judgment afterwards given for the defendant. On error brought to reverse such judgment,—Held, that the above plea was bad in substance, the legal effect of the agreement therein set out being not to suspend the plaintiff's right of action upon the note, but only to subject him to an action if he sued contrary to the terms of the agreement. *Ford v. Beech*, 17 Law J. Rep. (N.S.) Q.B. 114; 5 Dowl. & L. P.C. 610; 11 Q.B. Rep. 852.

H, being joint owner with the defendant of estates in Berbice, advanced to the latter large sums on account of the defendant's share of the liabilities in respect of those estates, and received on account thereof the defendant's acceptance for 3,000*l.* on the following terms, contained in a letter written by the defendant to him:—"Should the crops (of the estates) not come forward in time to provide for these notes, I shall expect to have them renewed for such period as may be found necessary from the condition of the properties." The crops being and still continuing unproductive, the bills were renewed on three several occasions; but ultimately H refused to renew further, and the plaintiffs, who were indorsees of H, with notice of the agreement, brought

the present action:—Held, that they were entitled to recover, as the agreement stipulated for one red newal only. *Innes v. Munroe*, 17 Law J. Rep. (N.S.) Exch. 71; 1 Exch. Rep. 478.

Defendant made a promissory note payable on demand to plaintiffs, as executors of A B, and at the time the note was given a deed was executed, reciting that the plaintiffs had agreed, with the consent of the residuary legatees, who were parties to the deed, to invest the residue of A B's estate in certain securities, of which the note was one, until the said residue should be divisible under the trusts of A B's will. To an action on the note brought before the residue was divisible, the defendant pleaded that by a contemporaneous agreement in writing it was agreed that the note should not be payable until the residue was divisible. The replication traversed the making of the agreement:—Held, that the allegation of the contemporaneous agreement was proved by the deed.

The deed in question was not executed by the plaintiffs, but they had acted under it, and it was in their custody, and produced by them at the trial:—Held, that they were bound by it, and that it was an answer to the action. *Webb v. Spicer*, 18 Law J. Rep. (N.S.) Q.B. 142.

In an action by indorsee against acceptor of a bill of exchange, defendant, under a traverse of the indorsement, may prove that the drawer wrote his name on the bill, and delivered it to the plaintiff, upon condition of certain other bills being given up to the drawer, and that the condition had not been complied with. *Bell v. Ingestre*, 19 Law J. Rep. (N.S.) Q.B. 71; 12 Q.B. Rep. 317.

(O) PLEADING.

(a) *In general.*

[*James v. Williams*, 5 Law J. Dig. 147; affirmed *Williams v. James*, 2 Exch. Rep. 798.]

Assumpsit by C W, as indorsee of a bill, against the indorser. The declaration averred that one C W drew the bill on J D, that the defendant indorsed it to the plaintiff, and that the drawee did not pay it when due. Plea, that the defendant had not due notice of the non-payment. The plaintiff was proved to be the drawer, and to have given notice of the dishonour to the defendant:—Held, that, on these pleadings, the defendant could not object that the plaintiff was not competent to give notice of dishonour, on the ground that the C W suing as indorsee and the C W stated in the declaration to be the drawer were the same person. *Williams v. Clarke*, 16 Mee. & W. 834.

To an action upon a bill for 25*l.*, drawn by the defendant, indorsed by him to K, and by K to the plaintiff, the defendant pleaded that K's indorsement was in blank, and that after the bill was indorsed and became payable, K paid the plaintiff 25*l.* in satisfaction; that the plaintiff delivered the bill to K, who then and until and at the time of the commencement of the action hath been and still is the holder thereof. Replication, that at the commencement of the suit the plaintiff was the holder of the bill; without this, that at the time of the commencement of the suit K was the holder. The defendant having demurred to the replication, a Judge set aside the demurrer as frivolous:—Held, on motion to set aside the Judge's order, that the replication was good, as it put in answer so much

of the plea as was necessary to make K. the holder of the bill. *Rogers v. Chilton*, 17 Law J. Rep. (N.S.) Exch. 8.

Assumpsit by the indorsee of a bill of exchange for 25*l.*, drawn by the defendant, indorsed by him to T R K, and by him to the plaintiffs. Plea, that the indorsement by T R K, to the plaintiffs, was in blank; that after such indorsement, and on the day of the bill becoming due, T R K paid the plaintiffs the sum of 25*l.* in the said bill specified, in full satisfaction of the said sum of 25*l.*, and the plaintiffs then delivered the bill to T R K, who, at and after the time of the commencement of the action, was and still is the holder of the bill. Replication, that at the commencement of the suit the plaintiffs were the holders of the bill; without this, that at the commencement of the suit T R K was the holder thereof. The jury found a verdict for the plaintiffs:—Held, on an application for a repleader, that the issue raised was a material issue. *Rogers v. Chilton*, 17 Law J. Rep. (N.S.) Exch. 345; 1 Exch. Rep. 862.

To a declaration by indorsee against acceptor of a bill of exchange, defendant pleaded that the bill was accepted for the accommodation of the drawer, and that at the time of acceptance it was agreed between the drawer and defendant that the drawer should hold the bill on the terms that he should pay it when due, and that if he should negotiate it, the holder should deliver it to the drawer before or when it fell due to enable him to pay it, and that the bill should not be retained by any holder after it fell due; that the drawer received and held the bill on the said terms, and afterwards indorsed the same to the plaintiff, who then had notice of the premises, and received and held the bill on the terms aforesaid, and retained it contrary to the said terms:—Held, that *de injuriâ* was a good replication. *Robinson v. Little*, 18 Law J. Rep. (N.S.) Q.B. 29; 9 Q.B. Rep. 602.

In assumpsit by indorsee against acceptor; plea of indorsement by plaintiff to a third party; replication, that plaintiff at commencement of suit was the indorsee and holder, without this, that the person mentioned in plea was holder as alleged:—Held, on special demurrer, that the replication was good. *Arthur v. Beales*, 1 Exch. Rep. 608.

In assumpsit by indorsee against indorser; plea, indorsement of bill to a third party for a special purpose, who, in violation thereof, delivered it to plaintiff, who was the holder, without consideration; replication, good consideration, to wit, the sum, &c.:—Held, on special demurrer, that the replication was good. *May v. Seyler*, 2 Exch. Rep. 563.

To an action upon certain bills of exchange, drawn by M & Sons, upon and accepted by the defendant, and payable to the plaintiff at certain periods after date, the defendant pleaded that, after the bills became due, M & Sons made an agreement with the acceptor to discharge him on receiving 2*s. 9d.* in the pound upon, *inter alia*, the said acceptance, in consideration of the payment of a certain specified sum in settlement of their differences of account, and that the plaintiff took the bills after the agreement. The plea contained averments that M & Sons were the holders of the bills at the time the agreement was made, and that they afterwards delivered them to the plaintiff. The replication traversed the former of these allegations:—Held, that although the repli-

cation admitted a delivery of the bills by M & Sons to the plaintiff after the making of the agreement, that it did not admit such a delivery as to give the plaintiff a new title to the bills, and, consequently, that the replication was good as putting in issue a substantial averment in the plea. *Corlett v. Booker*, 5 Exch. Rep. 197.

To a declaration on a bill of exchange by the drawer against the acceptor, the defendant pleaded that the bill declared on was given in discharge of another bill, which was given in discharge of a previous bill, which was drawn for partnership purposes, and the proceeds of which were so applied; and that the partnership accounts had not yet been settled. *Semble*, that *de injuriâ* is a good replication to such a plea. *Tibaldi v. Ellerman*, 6 Dowl. & L. P.C. 71.

(b) Names and Matters of Description.

A declaration on a bill of exchange against the acceptor, which averred that one J. C. Pawle made his bill of exchange, which the defendant accepted, and that J. C. Pawle indorsed it to the plaintiff:—Held ill, on special demurrer. *Levy v. Webb*, 15 Law J. Rep. (N.S.) Q.B. 407; 9 Q.B. Rep. 427.

Where the declaration alleged that certain persons, under the name, style, and firm of James Chandler & Son, made their bill, &c. and the defendant accepted it, and that "the said James Chandler & Son" indorsed it to the plaintiff:—Held, good on special demurrer. *Smith v. Ball*, 15 Law J. Rep. (N.S.) Q.B. 413; 9 Q.B. Rep. 361.

A bill having been accepted for the purpose of taking up other bills accepted by the same party, for the accommodation of the drawer, was held to be properly described as having been accepted for the "accommodation" of the drawer. *Thomas v. Fenton*, 16 Law J. Rep. (N.S.) Q.B. 362; 5 Dowl. & L. P.C. 28.

A count on a bill of exchange, by indorsee against acceptor, alleged that "one T. B. Doe," on &c., made his bill of exchange, &c. The Court refused to set aside as frivolous a demurrer, assigning for cause that the drawer was described in the count by the initials of his christian name only, without alleging any excuse for the omission of his christian name, or shewing that he was so designated in the bill.

Semble—That the omission is fatal on special demurrer. *Turner v. Fitt*, 3 Com. B. Rep. 701.

In an action by L, indorsee of a bill of exchange, against the acceptor, the defendant pleaded that H (the drawer) indorsed the said bill in blank, and that when the said bill became payable, and thence, &c., the said bill was lawfully held by I. Williams for value, and whilst the said I. Williams was the lawful holder thereof it was agreed between the defendant and I. Williams that the defendant should pay I. Williams 10*l.*, and give him a promissory note at three months for 15*l. 15s.* for the residue of the said bill, interest and all claims in respect thereof; that whilst I. Williams was the lawful holder of the bill the defendant paid the 10*l.*, and gave the promissory note, which he also paid to I. Williams when due, and that the plaintiff took the bill when it was overdue. Averment, that the defendant had no knowledge of the christian name of the said I. Williams to a greater extent than as set forth by the said initial letter, although due

inquiries have been made in that behalf. On special demurrer,—Held, that the lawful title of I. Williams to the bill when due was sufficiently alleged; that a payment of the bill when due to the lawful holder was sufficiently alleged; and that "I." was a sufficient description of the christian name of the party. *Lomax v. Landells*, 18 Law J. Rep. (N.S.) C.P. 88; 6 Com. B. Rep. 577.

Debt against the maker of a promissory note. Plea, that it was made by the defendant as the treasurer of a certain society which consisted of divers persons, to wit, fifty persons, and was called the Silurian Lodge of Odd Fellows, &c., and as security for any balance due to the society from the defendant as such treasurer, &c.:—Held ill, on special demurrer, for not stating the names of the persons composing the society nor any reason for not giving them. *Williams v. Miles*, 18 Law J. Rep. (N.S.) Exch. 295; 6 Dowl. & L. P.C. 433.

(c) *Non assumpsit.*

To a declaration on a bill of exchange, and on an account stated, the defendant pleaded non assumpsit, whereupon the plaintiff signed judgment as for want of a plea:—Held, that he was not justified in signing judgment, the proper course being to demur; and the Court refused to amend such judgment by confining it to the issue raised on the first count of the declaration. *Edison v. Pigram or Peagram*, 16 Law J. Rep. (N.S.) Exch. 33; 16 Mee. & W. 137; 4 Dowl. & L.P.C. 277.

Non assumpsit, by statute (5 & 6 Vict. c. 122), may be pleaded to an action on a bill of exchange or a promissory note. *Weeks v. Argent*, 16 Law J. Rep. (N.S.) Exch. 209; 16 Mee. & W. 817.

To an action of assumpsit containing one count on a bill of exchange and another on an account stated, the defendant pleaded generally non assumpsit:—Held, that the plaintiff was not bound to demur, but might apply to the Judge to set the plea aside. *Robeson v. Ellis*, 5 Dowl. & L.P.C. 403.

The Court cannot try an action on a bill by indorsee against acceptor on the plea of non assumpsit; and the plaintiff took a verdict without putting in the bill or offering any evidence. *Neale v. Proctor*, 2 Car. & K. 456.

(d) *Non-issuable Plea.*

To an action by the indorsee against the acceptor of a bill of exchange, the defendant being under terms of pleading issuably, pleaded that the bill was drawn by M for the defendant's accommodation, and without value, and that it was indorsed by M without any consideration or value given by the plaintiff for such indorsement to the defendant, or to M, or to any other person:—Held, not to be an issuable plea. *Hunter v. Wilson*, 19 Law J. Rep. (N.S.) Exch. 8; 4 Exch. Rep. 489.

(e) *Duplicity.*

Assumpsit against acceptor of a bill of exchange, indorsed by drawer to plaintiff. Plea, that defendant accepted for the accommodation of the drawer, and that there never was any value or consideration for defendant's acceptance, or for the payment of the bill by him. That, after the bill became due, and before action, the drawer paid plaintiff the amount; and that plaintiff always held and still holds the bill

without value or consideration. Replication, that the bill was not accepted for the drawer's accommodation, and that the drawer did not pay the amount of the bill *modo et formd.* A demurrer to the replication for duplicity was set aside as frivolous by a Judge's order:—Held, on motion to rescind the order, that the plea was itself double, and the replication not objectionable for duplicity.

Held, also, that the jurisdiction of a Judge at chambers in setting aside demurrers as frivolous is of so beneficial a tendency that the Court will not encourage applications calling on them to interfere with it. *Lane v. Ridley*, 10 Q.B. Rep. 479.

(f) *Argumentative Denial and Averments.*

Plea by E, one of three persons sued as acceptors of a bill of exchange, that before and at the time, &c., the defendants were partners, upon the terms that neither of them should, without the consent of the others, accept any bill of exchange in the name of the firm, otherwise than for the *bond fide* debts or liabilities of the firm; and that the said bill was accepted by the other defendants in the name of the firm without the consent of the defendant E, and in fraud of him, and in violation of the said terms of partnership, and was delivered by the other defendants to the plaintiff for money owing to the plaintiff from one of them, and not for any debt or liability of the firm, of all which the plaintiff had notice at the time of the delivery of the bill to him; and that there never was any value or consideration, except as aforesaid, for the acceptance of the bill, or for the payment thereof by the defendant E; and that he held and now holds the same without value or consideration, concluding with a verification:—Held, on special demurrer, a bad plea, as being an argumentative denial of the acceptance. *Grout v. Enthoven*, 17 Law J. Rep. (N.S.) Exch. 70; 1 Exch. Rep. 382.

Assumpsit by the executors of the alleged payee of a promissory note against the maker. Plea, that the promissory note in the declaration mentioned was, in the lifetime of the deceased and with his consent, made payable to E M his wife, and that during his lifetime he did no act reducing the said note into possession. Verification:—Held, on special demurrer, to be a bad plea, upon the ground that it amounted to an argumentative denial of the making of the note. *Howard v. Oakes*, 18 Law J. Rep. (N.S.) Exch. 485; 3 Exch. Rep. 136.

In an action by indorsee against indorser of a bill of exchange, drawn payable in London, the declaration averred a presentment generally, not stating in London, but the venue in the declaration was London:—Held, under Reg. Gen. Hilary term, 4 Will. 4. r. 8, that this was a sufficient averment of a presentment in London.

Quære—Whether if the rule had not applied, the defect in the declaration would have been cured by pleading over. *Boydell v. Harkness*, 15 Law J. Rep. (N.S.) C.P. 233; 4 Dowl. & L.P.C. 178; 3 Com. B. Rep. 168.

[See *Flight v. Maclean*, (G) Transfer.]

(g) *Plea of Stamp Law.*

To a declaration by the payee against the makers of a promissory note for the payment of 145*l.* 4*s.* on or before the 15th of April 1845, the defendants

pleaded that by the said note at the time of the making, the defendants promised to pay the sum therein mentioned, without specifying any time for the payment; that after the note was made and issued, and was complete and delivered to the plaintiff, the note was, by the defendants' consent, but *without the same being re-stamped*, altered by the plaintiff in a material part by making the same to be payable on or before the 15th of April 1845, and by the insertion of the words "and to be paid on or before the 15th of April 1845." Replication, that before and at the time of making, issuing, completing and delivering the note to the plaintiff, and before the said alteration was made, it was meant and intended by the plaintiff and the defendants that the note should be payable on or before the 15th of April 1845, and that the words so inserted in the note should be inserted therein, but by the mistake of the plaintiff and the defendants the note was made and issued, and was complete and delivered to the plaintiff, without specifying any time of payment; that the alteration was made, with the intent and purpose of correcting the mistake and making the note payable according to the intention of the plaintiff and the defendants, within a reasonable time and before negotiation. Rejoinder, that *before* and at the time of the making, issuing and completing of the note, and *before* the alteration, it was not intended by the plaintiff and the defendants that the note should be made payable on or before the 15th of April 1845:—Held, on special demurrer, first, that the rejoinder was bad, as taking too large a traverse by putting in issue the meaning of the parties "*before*" as well as "*at*" the time of making the note. Secondly, that the plea afforded no answer to the declaration, as the stamp laws authorized the stamping of certain notes *before* the trial, and the plea did not negative all possibility of this being one of those cases.

Semble—that the replication was bad, in not shewing that the promissory note was not an instrument binding upon the parties before the alteration.

Quere—Whether the stamp laws can be pleaded in bar of an action on a promissory note or bill of exchange; but that, at all events, they can only be so pleaded in cases where the instrument cannot be made good by being stamped before the trial. *Bradley v. Bardsley*, 15 Law J. Rep. (N.S.) Exch. 115; 14 Mee. & W. 873; 3 Dowl. & L. P.C. 476.

(h) Waiver of Acceptance.

Assumpsit on a bill of exchange, drawn by W upon and accepted by three defendants, payable to the order of W, and by him indorsed to the plaintiff. Fourth plea, that after the defendants had accepted the bill, and before it became due, and before it was indorsed to the plaintiff, W waived the acceptance of the bill, and exonerated and discharged the defendants from the payment thereof, and that no person ever gave or received any consideration for the said indorsement. The fifth plea was in the same terms, except that it concluded with an averment that the bill was indorsed to the plaintiff after it became due:—Held, (affirming the decision of the Court of Exchequer, *Steele v. Harmer* or *Benham*, 15 Law J. Rep. (N.S.) Exch. 217; 14 Mee. & W. 831; 3 Dowl. & L. P.C. 506), that

these pleas were bad, for not shewing that W was the holder of the bill at the time of the alleged waiver by him. *Harmer v. Steele*, 19 Law J. Rep. (N.S.) Exch. 34; 4 Exch. Rep. 1.

(i) Traverse of Indorsement.

To declaration in debt by drawer against acceptor of a bill of exchange, and on an account stated, defendant pleaded that the bill was indorsed by plaintiff to M D, who then became, and thence hitherto remained the holder thereof. Replication, that plaintiff was the holder of the bill at the commencement of the suit, *absque hoc* that M D, from the time of the indorsement *hitherto* remained the holder thereof:—Held, (on special demurrer) that the replication was not too large, and also that the plaintiff was at liberty to traverse the material allegation in the plea, and was not bound to state specially how he re-acquired the bill from M D. *Barber v. Lemon*, 17 Law J. Rep. (N.S.) Q.B. 69; 11 Q. B. Rep. 302.

Tenth plea, that after the making and accepting of the said bill by the defendants, and before it became due, it was delivered on the day and year when it was accepted to W, and that after it was so accepted and delivered, and while W was the holder and payee thereof, and before the bill became due, W indorsed the said bill to H, one of the defendants (acceptors), with the intention of divesting himself, and whereby he did divest himself of all right, &c. in and to the said bill, and of the right of suing thereon, and of indorsing the same again; that the bill was so indorsed to the defendant H for valuable consideration; that H continued to be the holder of the bill from the time when it was so indorsed to him until it was delivered by H to the plaintiff; that the indorsement in the declaration mentioned consisted merely of the last-mentioned delivery of the bill by H to the plaintiff, and that it was never indorsed by W otherwise than as in this plea mentioned; and that at the time of the delivery of the bill by H to the plaintiff, the plaintiff had notice of the premises. The eleventh plea was in like terms, except that it alleged that there was no consideration for the delivery of the bill by H to the plaintiff. These pleas concluded with a verification:—Held, (affirming the decision of the Court of Exchequer, *Steele v. Harmer* or *Benham*, 15 Law J. Rep. (N.S.) Exch. 217; 14 Mee. & W. 831; 3 Dowl. & L. P.C. 506), that they were bad in substance; as it is no objection to the negotiability of a bill, that during its currency it has become the property of one of its acceptors. Held, also, that if they contained a traverse of the indorsement, these pleas were bad in form, for not concluding to the country.

The twelfth plea was in similar terms to the tenth, except that it concluded with an averment that the bill was delivered by the defendant H to the plaintiff after it became due:—Held, that the plea contained a substantial answer to the action, as the liability to sue on it and the right to receive payment concurring in one of the acceptors at the time when the bill became due, operated as a payment and performance of the contract of acceptance, as to all the acceptors, so as to prevent any action afterwards being brought on that contract.

Semble—that the acceptor, who had paid the bill, might have an action for contribution against his

co-acceptors, if the terms upon which they joined admitted of such an action being brought.

Held, also, (reversing the decision of the Court of Exchequer,) that the tenth, eleventh and twelfth pleas did not amount to an argumentative traverse of the indorsement to the plaintiff, as the allegation that H delivered the bill to the plaintiff was consistent with the fact of the indorsement mentioned in the declaration being in blank.

Semble—that if some of these pleas were ambiguous, in not shewing whether the indorsement to the plaintiff was special or in blank, the substantial answer relied on in them would not be vitiated by their introducing another answer defectively pleaded, but which is not relied on by the defendant. *Harmer v. Steele*, 19 Law J. Rep. (N.S.) Exch. 34; 4 Exch. Rep. 1.

(k) *Allegation of Lapse of Time so as to include Days of Grace.*

A declaration by indorsee against acceptor of a bill of exchange, payable three months after date, "which period has elapsed," alleged a promise by the defendant to pay according to the tenour and effect of the bill. Breach, that the defendant has disregarded his said promise, and has not paid the said sum, &c. A demurrer, that the declaration did not sufficiently shew that the three days of grace had elapsed before action was set aside as frivolous. *Padwick v. Turner*, 17 Law J. Rep. (N.S.) Q.B. 7; 11 Q.B. Rep. 124.

(l) *Agreement to accept Composition.*

To an action by the payee against the acceptors of two bills of exchange, the defendants pleaded a plea alleging that the bills were accepted by them and one A B, not by them alone, and that before the bills were due, and before the delivery to the plaintiff, it was agreed between the drawers and the defendants and A B, that, in consideration of the defendants and A B paying the drawers 500*l.* in settlement of accounts, the drawers would accept a dividend of 2*s.* 9*d.* in the pound on these and other bills accepted by the defendants and A B, and within one month would deliver up the bills, receiving the dividend on each acceptance; that a place for the tender of the composition was agreed upon, and a penalty of 500*l.* agreed to be paid on default on either side; that the 500*l.* in settlement of accounts were paid to the drawers, and the composition duly tendered within the month; and alleging a refusal by the drawers to accept the sum tendered, or to deliver up the acceptances, and delivery of the bills to the plaintiff in fraud of the agreement, and that the plaintiff took and holds the bills with notice of the premises. Replication *de injuria*, and special demurrer:—*Semble*—that the plea contained no defence to the action; but, assuming that it did,—Held, that the replication *de injuria* was good on special demurrer, the defence being one which, before the New Rules, might have been raised under non assumpsit.

The defendants also pleaded that after acceptance by the defendants and A B, it was agreed between the plaintiff, through the drawers as his agents, and the defendants and A B [as in the former plea, except that the plaintiff bound himself to accept the dividend of 2*s.* 9*d.*, and deliver up the acceptances instead of the drawers]; that the defendants

and A B paid to the drawers and they accepted the 500*l.* in settlement, and the defendants and A B tendered the dividend, of all which the plaintiff had notice; that the plaintiff refused to accept the dividend, and failed to deliver up the acceptances. The replication denied the agreement between the plaintiff by the drawers as his agents, and the defendants and A B, *modo et forma*:—Held, that the plea was bad in substance, as it contained no allegation that the agreement to accept the dividend was accepted by the plaintiff in satisfaction or substitution of the agreement on the bill, and that it was consistent with the plea that the plaintiff may have elected to pay the penalty of 500*l.* for default in performance of the agreement.

Quære—Whether the replication was not bad as putting in issue, not only the agreement, but the agreement by the drawers as the plaintiff's agents. *Buttigieg v. Booker*, 19 Law J. Rep. (N.S.) C.P. 330; 1 L.M. & P. 444.

(m) *Giving Bill for and on account of a Debt.*

Assumpsit on a bill of exchange for 50*l.* by drawer against acceptor, with counts for money lent, and on an account stated. Plea to the first count, that before the bill became due, G had agreed to pay defendant certain sums by monthly instalments of 40*l.*; that defendant was unable to pay the bill, and thereupon, while plaintiff was holder, and before it became due, in consideration that defendant, with assent of G, and at request of plaintiff, would permit plaintiff to receive from G so much of the instalments of 40*l.* as should amount to the sum in the bill, plaintiff agreed to accept payment of the bill throughout, and to discharge defendant from performing the promise in the first count. Averment, that plaintiff received the first instalment, but neglected of his own wrong to procure payment of the residue from G out of the next instalment. Replication, that, in consideration that defendant would, with assent of G, at request of plaintiff, permit plaintiff to receive from G so much of the instalments of 40*l.* as should amount to the sum in the bill, plaintiff did not agree to accept, &c., traversing the pleas in terms:—Held, bad, on special demurrer, for not expressly traversing the agreement, and for leaving it uncertain whether it meant to put in issue simply the agreement or the consideration, or both, or that G, by plaintiff's consent, agreed to pay him the bill out of the instalments, so as to substitute themselves as debtors to plaintiff on the defendant's acceptance.

Eighth plea, as to 50*l.* parcel of the monies in the second and last, that before breach of the promises in those counts, plaintiff drew his bill for 50*l.*, which defendant accepted and delivered to plaintiff, who then accepted and received the same in discharge of the said sum of 50*l.*, parcel &c., and then indorsed and delivered the same to S, who from thence hitherto hath been and still is the holder thereof, and entitled to sue defendant on the same. Replication, that the bill became due before the commencement of the suit, and defendant did not pay it, and that S, before the commencement of the suit, returned the bill to plaintiff, who then became the holder, and continued so to the commencement, &c., and still is the holder:—Held, bad, on special demurrer, for setting up fresh

matter, without confessing and avoiding, or expressly traversing the averment of S being holder at the commencement of the action.

The word "discharge" in the plea imported not payment or satisfaction of the debt, but only that the bill was given "for and on account of" it.

The ninth plea resembled the eighth, except in averring that whilst S was holder, defendant and K at his request and on his account, respectively paid him its amount. Replication, traversing the payment, &c. of the bill in the terms of the plea, and generally, and averring the return of the bill by S to plaintiff, and the holding of it by plaintiff, as in the replication to the eighth plea:—Held, bad on special demurrer, for like reasons as the eighth.

Where plaintiff, instead of demurring to a double plea, replies double, he must not reply argumentatively, or by setting up fresh matter without confessing and avoiding the plea. *Kemp v. Watt*, 15 Mee. & W. 672; 4 Dowl. & L. P.C. 21.

Debt by the payee against the maker of a promissory note, payable at six months, for money lent, interest, and on an account stated. Plea, as to the sum of 100*l.*, parcel of the monies in the second, third, and last counts, that the defendant before the commencement of the suit, made his promissory note for the payment to the plaintiff's order of 100*l.*, six months after date: and the defendant then delivered the note to the plaintiff, who then took and received the same for and on account of the sum of 100*l.* Replication, that the period of six months, specified in the said note, expired before the commencement of this suit, and the promissory note became, before the commencement of the suit, due and payable, yet the defendant had not paid the sum of money in the note specified:—Held, on demurrer, that the plea afforded no answer to the declaration, as it did not aver that the note was still running, or that it had been indorsed over by the plaintiff.

Semble—that the plea was not bad, on the ground of its omitting to state that the note was given as well as received, on account of the debt. *Price v. Price*, 16 Law J. Rep. (n.s.) Exch. 99; 16 Mee. & W. 232; 4 Dowl. & L. P.C. 537.

(n) Want of Consideration and Fraud.

To a count on a promissory note made by the defendant, payable to the order of M J, and indorsed by M J to V, and by V to the plaintiff, the defendant pleaded a set of pleas, alleging that the note was obtained by the fraud of G B and others, and another set of pleas, alleging that the consideration was the forbearing to prosecute C J, a son of the defendant, for a felony; but it was not alleged in any of the pleas that M J was a party to the fraud or the illegal agreement, or had notice of them:—Held, that M J's title being undisputed, the pleas were bad. *Masters v. Ibberson*, 18 Law J. Rep. (n.s.) C.P. 348; 8 Com. B. Rep. 100.

(P) EVIDENCE.

[*Wilkes v. Hopkins*, 5 Law J. Dig. 152; 1 Com. B. Rep. 737.]

(a) Production of Bill without Notice.

In an action on a bill of exchange, where the only issue was that the acceptance was obtained by

fraud and covin, the defendant cannot compel the plaintiff to produce the bill in support of the plea, unless he has given a notice to produce. *Lawrence v. Clark*, 15 Law J. Rep. (n.s.) Exch. 40; 14 Mee. & W. 250; 3 Dowl. & L. P.C. 87.

(b) Secondary Evidence of destroyed Bill.

Upon a plea of *non acceptavit* in an action by indorsee against the acceptor of a bill of exchange, the plaintiff having proved that the bill was destroyed, —Held, that secondary evidence of its contents was admissible.

Quære—Whether, to be available as an answer to an action at law, the non-production of the bill when payment was demanded, should not be pleaded specially. *Blackie v. Pidding*, 6 Com. B. Rep. 196.

(c) On Plea of Infancy.

A declaration by an indorser against the acceptor of a bill of exchange stated, that the bill was drawn on the 20th of September 1847, payable four months after date, and that the defendant then accepted the said bill. Plea, infancy of the defendant. It was proved that the defendant became of full age on the 24th of December 1847:—Held, that this was no evidence of the defendant's being an infant at the time of his accepting the bill. *Harrison v. Clifton*, 17 Law J. Rep. (n.s.) Exch. 233.

(d) Indorsement.

(1) Identity of Payee.

A note made payable to J H was indorsed by J H. It appeared that there were two J H's, father and son; and that the indorsement was in the son's handwriting:—Held, that though the presumption was that J H the father was the payee, it was rebutted by the fact of the note having been in the son's possession, and indorsed in his handwriting. *Stebbing v. Spicer*, 19 Law J. Rep. (n.s.) C.P. 24; 8 Com. B. Rep. 827.

(2) Evidence in Reply on Traverse of.

In an action by the indorsee of a bill of exchange and an issue raised on a plea denying the indorsement, the plaintiff rested his case, in the first instance, on proof of the handwriting of the indorser. The defendant then gave evidence that the plaintiff was too poor to have discounted the bill, or to have had it indorsed to him, and that he had disclaimed having done so, or having anything to do with the bill:—Held, that the plaintiff ought not to be allowed to give evidence in reply, for the purpose of shewing the plaintiff's ability to discount the bill, and that, in fact, he had discounted it, as such evidence was merely confirmatory of the plaintiff's *prima facie* case, and not in contradiction of the defendant's witnesses. *Jacobs v. Tarleton*, 17 Law J. Rep. (n.s.) Q.B. 194; 11 Q.B. Rep. 421.

(Q) CHEQUES.

(a) Date and Place of Drawing.

Where a cheque was headed "Dorchester Old Bank, established in 1786," without any other mention of place,—Held, that it must be taken *prima facie* that it was issued at Dorchester, and that it was therefore exempted from stamp, under 9 Geo. 4. c. 49. *Strickland or Stickland v. Mansfield*, 15 Law J. Rep. (n.s.) Q.B. Rep. 226; 8 Q.B. Rep. 675.

A cheque was drawn in the following form:—

"October 12, 1847.—Messrs. Knapp & Co., Bankers, Abingdon. Pay to Mr. Hicks, or bearer, 117*l*. 17*s*. Thomas Sharps."—Held, that its place of issue did not sufficiently appear so as to satisfy the exemption clause in the Stamp Act, 9 Geo. 4. c. 49. s. 15. *Bopart v. Hicks*, 18 Law J. Rep. (N.S.) Exch. 33; 3 Exch. Rep. 1.

(b) *Delivery of.*

B employed C to raise money, and C procured 160*l*. from A, which he handed to B, from whom he took a cheque for that sum payable to him (C) or bearer. C subsequently applied to B for payment of the cheque. In debt by A against B on the cheque,—Held, that C was clearly the defendant's agent, and that the delivery to him supported the averment in the declaration of a delivery to A. *Samuel v. Green*, 16 Law J. Rep. (N.S.) Q.B. 239; 10 Q.B. Rep. 262.

(c) *Payment [Presentment for and Evidence on Plea of].*

Where the drawees of a cheque continue solvent, and have effects of the drawer in their hands, the holder does not lose his right of action against the drawer, by any delay in presenting the cheque for payment. *Robinson v. Hawksford*, 15 Law J. Rep. (N.S.) Q.B. 377; 9 Q.B. Rep. 52.

Where the defendant, having money of the plaintiff's in his hands, drew a cheque upon his banker, in favour of the plaintiff, the proceeds of which the latter received at the bank,—Held, in an action for money had and received, that this was evidence in support of a plea of payment, without proof that the plaintiff had received the cheque from the defendant. *Mountford v. Harper*, 16 Law J. Rep. (N.S.) Exch. 184; 16 Mee. & W. 825.

(d) *Debt by Payee against Maker.*

Debt lies against the maker of a banker's cheque by the payee to whom he has delivered it.

A declaration upon a banker's cheque, payable to the plaintiff or bearer, after stating that the defendant was summoned in an action of debt, averred that the defendant made the cheque, and delivered it to the plaintiff, who still was the bearer of it; that it was presented and not paid, and "that in consideration of the premises, the defendant promised the plaintiff" to pay him the amount, &c., upon request. It then contained counts for goods sold and delivered, and upon an account stated, and concluded that, "by reason of the non-payment of the said several monies, an action hath accrued," &c.—Held, on motion in arrest of judgment, that the first count was a good count in debt, as the allegation of the promise might be rejected as surplusage. *Simpkins v. Potheary*, 19 Law J. Rep. (N.S.) Exch. 242; 5 Exch. Rep. 253.

(e) *Evidence.*

A written acknowledgment of a loan, accompanied by an undertaking to repay it, cannot be read in evidence, unless stamped as a promissory note.

In an action by assignees, proof that a cheque for a certain sum in defendant's favour was drawn by the bankrupts upon their bankers, and that the amount thereof was placed by their bankers to the defendant's credit, is no evidence to go to the jury of

a loan of money to the defendants by the bankrupts. *Graham v. Cox*, 2 Car. & K. 702.
[See VENUE, Changing.]

BILL OF LADING.

[See SHIP AND SHIPPING.]

BILL OF SALE.

[See COSTS—EVIDENCE—SALE.]

BOND.

[By Servants. See BANKERS; and see BANKRUPT, Proof of Debt, and Acts of Bankruptcy (b)—INTEREST—MUNICIPAL CORPORATION—PLEADING—PRINCIPAL AND SURETY—STAMP.]

(A) VALIDITY, CONSTRUCTION AND OPERATION OF.

- (a) *Bond void in Law not enforced in Equity.*
- (b) *Appropriation of Taxes to Arrears due from Collector.*
- (c) *Merger of Simple Contract Debt.*
- (d) *Of Condition not to practise as a Surgeon.*
- (e) *Of Condition to try in Interpleader Bond.*
- (f) *Of Condition impossible of Performance.*
- (g) *Bond for due performance of Duties by Clerk.*

(B) PARTIES TO SUE [ON OVERSEERS AND COLLECTOR'S BONDS].

(C) STAYING PROCEEDINGS ON.

(D) STATUTE OF LIMITATIONS [POST OBIT BOND].

(E) SET-OFF [UNDER 8 GEO. 2. c. 24. s. 5.]

(F) PLEADING.

- (a) *How shewn that Action brought post Diem.*
- (b) *Inferential Allegation of French Law.*

(G) AMENDMENT.

(A) VALIDITY, CONSTRUCTION AND OPERATION OF.

(a) *Bond void in Law not enforced in Equity.*

A bond, void in law, may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made.

An instrument, purporting to be a bond, executed by the obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party.

A party joining as surety in a bond ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor.

M induced W to join him as surety in a bond for repayment of a loan, saying he only wanted time to realize securities, and he would hold her harmless. M and S, being trustees of a fund, sold it, with consent of B, the *cestui que trust*, and thereby raised the loan for M, who informed W that B was the lender, but did not inform her how the loan was raised:—Held, that B not being in fact the lender, his personal representatives had no

privity of contract with, nor equities against, W, and that, in consequence of the concealment from her of the real nature of the transaction, she was, in equity, altogether released from the bond. *Squire v. Whittton*, 1 H. L. Cas. 333.

(b) *Appropriation of Taxes to Arrears due from Collector.*

M was surety in a bond given by G, the collector of taxes in Jamaica, for payment of the collections for the year 1842. G, at the date of the bond, was in arrear for taxes collected by him in 1841. G appointed one S his deputy, to collect the taxes for the year 1842, which he partly did, and G collected the remainder. Shortly after the collection of the taxes, the receiver-general pressed G for the payment of the arrears of 1841. G went to S and obtained from him 3,000*l.* to remit to the receiver-general, S taking that amount out of a chest, in which were placed the monies collected for 1842. G converted that sum, and also 2,000*l.* which he had collected for taxes in 1842, into paper money, and transmitted 5,000*l.* to the receiver-general, who appropriated the whole amount in liquidation of the arrears for 1841. In an action brought by the Crown against M upon the bond, the Judge charged the jury, that if they were satisfied that the sum of 5,000*l.* had been remitted out of the taxes of 1842, and that G had not expressly assented to the appropriation of that amount towards payment of the arrears of 1841, they ought to find for the defendant:—Held, by the Judicial Committee, sustaining a bill of exceptions to the Judge's charge and awarding a *venire de novo*, that the receiver-general had a right to appropriate the remittance by G to the liquidation of the arrears of 1841, and that it was not necessary that G should assent to that appropriation; and that M was bound by the appropriation, and liable on the bond for the deficiency of the taxes for the year 1842. *Attorney General of Jamaica v. Manderson*, 6 Moore, P.C. 239.

(c) *Merger of Simple Contract Debt.*

A simple contract debt, held not to be merged by a bond of the debtor, with sureties conditioned to be void on payment of the amount then or thereafter to become due, or on payment by sureties on default of debtor after notice; or if no notice should be given. *Norfolk Rail. Co. v. M'Namara*, 3 Exch. Rep. 628.

(d) *Of Condition not to practise as a Surgeon.*

To debt on a bond, the condition of which was that if obligor should practise as a surgeon at S at any time, without the consent of the obligee, then, &c.; plea, that the defendant did not practise as a surgeon at S without the consent, &c.:—Held, bad for not shewing the performance of the condition; and held, that the period of restraint was not confined to the lifetime of the obligee. *Hastings v. Whitley*, 2 Exch. Rep. 611.

(e) *Of Condition to try in Interpleader Bond.*

A bond given to plaintiffs under an interpleader order, by two defendants, as security for a claimant of goods seized at the suit of plaintiffs, contained a condition, that if at the trial of the issue the goods should be found to have been the property of the

claimant, or, if he should "proceed to try" according to the order or any further order, or, should pay the value of the goods, the bond should be void. The declaration, after setting out the condition, stated, that when the issue came on to be tried the parties agreed to withdraw a juror; that afterwards a Judge's order was made, directing the claimant to proceed to trial at a certain sittings, and that he did not proceed to trial, or try:—Held, that the declaration was good; that the condition meant that the claimant should try, and was not satisfied by the first proceeding to trial; and that there was a sufficient breach. And a plea which stated that the claimant did proceed to trial, and that a juror was withdrawn, was held bad, as raising an immaterial issue. *Williams v. Gray*, 19 Law J. Rep. (n.s.) C.P. 382.

(f) *Of Condition impossible of Performance.*

In an action against a surety upon a bond under the 1 & 2 Vict. c. 110. s. 8. for the payment of a debt by H, or his rendering himself in any action to be brought, the defendant pleaded that the plaintiff had brought an action against H in the Court of Queen's Bench, and had issued a *ca. sa.* on a judgment recovered therein, on which H was taken and detained in custody, according to the practice of the said court, and that from the recovery of the judgment until the arrest, H was ready and willing to surrender himself according to the practice of the court and the condition of the bond, and that by reason of his having been so taken and detained, "he was, by the practice of the said court, exonerated and discharged from rendering himself according to the said condition." On special demurrer, the defendant was allowed to amend; and

Seemle—that the plea should either have shewn the practice of the court, and that H did surrender, if the facts alleged amounted to a surrender by such practice, or that it became impossible for H to surrender, on account of the act of the plaintiff, and the practice of the Court. *Hayward v. Bennett*, 17 Law J. Rep. (n.s.) C.P. 182; 5 Dowl. & L. P.C. 480; 5 Com. B. Rep. 593.

(g) *Bond for due performance of Duties by Clerk.*

Debt on bond, given by E G and the defendant and another, as his sureties, to the London and Croydon Railway Company, for the due performance by E G of the duties of chief clerk to the booking office at the railway station. The condition was, that if E G should render to the London and Croydon Railway Company, or to the committee for managing the London terminus of the London and Croydon, London and Brighton, and South-Eastern Railways, a true account of all receipts and payments of him, and should pay to the London and Croydon Company, or to the said committee, all sums received by him on account of the company or committee, and also such sums as he should receive from the booking clerks, or on account of the said company or committee, the bond was void.

Second plea, performance by E G by rendering an account to and payment to the London and Croydon Company and the committee.

Third plea, that the bond was made to the London and Croydon Company before the passing of an act of parliament consolidating the London and Brighton

and the London and Croydon Companies; that the action was commenced afterwards, and that immediately after the passing of the act of parliament the London and Croydon Company was thereby dissolved.

Fourth plea, that the bond was made before the passing of the act, and the action commenced afterwards; that from the time of making the bond to the passing of the act, the defendant rendered to the London and Croydon Company a true account, and paid them all sums received by him on account of the said company.

The replication to the second plea traversed the rendering a true account, alleging that E G, on the 9th of April 1846, and on divers other days between that day and the 20th of December 1846, received divers large sums of money, amounting to 100,000*l.*, and did not render a true account to the company or the committee. The second breach stated, that E G received 150,000*l.* on account of the said company, and other sums amounting to 300,000*l.* from the booking clerks on account of the company, but did not pay the same to the company or to the committee. The third breach stated a receipt by E G of 350,000*l.* on account of the said committee, and of 360,000*l.* from the said booking clerks on account of the said committee, and non-payment of the same to the committee or the company.

Held, on special demurrer, first, that the third plea afforded no answer to the action; secondly, that the fourth plea was bad, as it was consistent with the statements in it that E G did not render to the committee a full account of his receipts and payments, and that he might not have paid to the committee the monies received by him on account of the committee; thirdly, that the breaches in the replication were good. *London, Brighton, and South Coast Rail. Co. v. Goodwin*, 18 Law J. Rep. (N.S.) Exch. 174; 3 Exch. Rep. 320.

Debt on bond given by E G, and the defendant and another, as his sureties, to the London and Croydon Railway Company, for the due performance by E G of the duties of chief clerk to the booking-office at a railway station. The condition was, that if E G should render to the London and Croydon Railway Company, or to the committee for managing the London terminus of the London and Croydon, London and Brighton, and South-Eastern Railways, a true account of all receipts and payments, and should pay to the Croydon Company, or to the said committee, all sums received by him on account of the company or committee, and also such sums as he should receive from the booking clerks, or on account of the said company or committee, the bond was to be void. Breaches were assigned in the replication. Upon the assessment of damages after judgment for the plaintiff upon demurrer, the breach relied upon was that E G did not pay over to the company what he had received from the booking clerks. It appeared that instead of making up his accounts in the evening of each day, E G had allowed the clerks to be in arrear, and had balanced the accounts on the following day by appropriating a portion of that day's receipts to the deficiency of the previous day, but had in fact paid over all that he had received:—Held, that this was a breach of the condition, for he had not paid it over duly.

Held, also, that the opening an additional line, whereby the duties of the clerk were increased, did not affect the liability of his sureties in respect of the duties as to the original lines specified in the bond and condition. *London and Brighton Rail. Co. v. Goodwin*, 18 Law J. Rep. (N.S.) Exch. 337; 3 Exch. Rep. 736.

(B) PARTIES TO SUE [ON OVERSEERS AND COLLECTOR'S BONDS].

The churchwardens and overseers for the time being may still sue upon bonds given under 59 Geo. 3. c. 12. s. 7. for the due performance of the duties of assistant overseer in a parish within an union, the effect of 7 & 8 Vict. c. 101. s. 61. being only to substitute, in such cases, the board of guardians for the vestry as the body who are to direct the bond to be sued upon. *Skelton v. Rushby*, 19 Law J. Rep. (N.S.) M.C. 29; 4 Exch. Rep. 545.

An act of parliament directed that seven guardians should form a quorum, and that they should sue in name of treasurer:—Held, that an action on a bond, for the due performance of a collector's duties executed by seven of the guardians, was well brought in the name of the treasurer. *Kingsford v. Dutton*, 1 L. M. & P. 479.

(C) STAYING PROCEEDINGS ON.

In an action against sureties on a bond, particulars of several breaches of the condition were given, of which only one was contested by the defendants:—Held, that the Court had no power to order a stay of proceedings as to the admitted breaches upon payment into court by the defendants of the damage sustained on those breaches. *Kepp v. Wiggett*, 16 Law J. Rep. (N.S.) C.P. 235; 5 Dowl. & L. P.C. 164; 4 Com. B. Rep. 678.

(D) STATUTE OF LIMITATIONS [POST OBIT BOND].

To a declaration upon a bond, not setting out any condition, plea, that the debt and cause of action did not accrue within twenty years. Replication, taking issue thereupon. At the trial the bond and condition were produced, when it appeared that the bond had been executed more than twenty years; but that the condition was for the payment of the money after the death of a party who was proved to have died within twenty years:—Held, that the plea was disproved.

Semble—That the plaintiff might have replied, shewing when the condition was broken. *Tuckey v. Hawkins*, 16 Law J. Rep. (N.S.) C.P. 201; 4 Com. B. Rep. 655.

(E) SET-OFF [UNDER 8 GEO. 2. c. 24. s. 5.]

In an action of debt on a bond, where the interest of the sum secured has not been paid on the appointed day, a set-off equivalent to the interest which existed before the commencement of the action, though not at the time of the interest falling due, may be pleaded under the 8 Geo. 2. c. 24. s. 5. *Lee v. Lester*, 18 Law J. Rep. (N.S.) C.P. 312; 7 Com. B. Rep. 1008.

(F) PLEADING.

(a) *How shewn that Action brought post Diem.*

Debt on bond for 300*l.*, dated 29th of September 1827. Plea (after setting out on over the condition,

which was for payment of 300*l.* and interest on the 29th of March next ensuing the date of the bond), general performance. Replication, that the defendant did not pay the 300*l.* and interest, according to the condition of the bond; concluding with a verification:—Held, that the replication was good, and the plea bad, and that a demurrer to the replication was properly set aside as frivolous. *Trix v. Thorne*, 16 Law J. Rep. (N.S.) Q.B. 15; 9 Q.B. Rep. 282.

(b) *Inferential Allegation of French Law.*

Debt upon a bond. Plea, that the bond was made in France, and was not passed by an officer of France, or written throughout by defendant, nor did defendant write the acknowledgment or "*ap-prouvé*," bearing in words at length the debt secured, nor was defendant at the time a merchant, &c.; and that, by reason of the premises, the bond by the laws of France never was nor is binding on the defendant, and was and is of no force or validity:—Held, on special demurrer, that the plea was inferential only in not stating in direct terms what the law of France is, and was therefore bad.

Quære—Whether *de injuriâ* would have been a good replication to such a plea. *Benham v. Mornington*, 15 Law J. Rep. (N.S.) C.P. 221; 4 Dowl. & L. P.C. 213; 3 Com. B. Rep. 133.

(G) AMENDMENT.

Bond reformed being erroneously prepared so as to be void for usury. *Hodgkinson v. Wyatt*, 9 Beav. 566.

BOOKS AND ENGRAVINGS.

Duties on reduced by 9 & 10 Vict. c. 58; 24 Law J. Stat. 159.

BOROUGH.

[See MUNICIPAL CORPORATION—RATE.]

BOTTOMRY BOND.

[See INSURANCE.]

BOUNDARY.

[See BRIDGE—MANOR—SETTLEMENT.]

BREACH OF PROMISE.

[See MARRIAGE.]

BRICKS AND BRICKFIELD.

[See EXCISE—RATE.]

BRIDGE.

[See RAILWAY—RATE.]

(A) LIABILITY TO REPAIR.

(a) *Construction of Boundary Act.*

(b) *Bridge erected for private Purposes.*

(c) *Bridge not transferred from County to Borough.*

(B) PRESENTMENT FOR NON-REPAIR.

An Act to provide more effectually for maintaining, &c. bridges in cities and boroughs, 13 & 14 Vict. c. 64; 28 Law J. Stat. 126.

(A) LIABILITY TO REPAIR.

(a) *Construction of Boundary Act.*

In the schedule to Boundary Act, 2 & 3 Will. 4. c. 64, part of Glasbury parish was stated to belong to Brecknockshire, to be isolated and to be locally situated in Brecknockshire or Radnorshire, and was annexed, in future, to Brecknockshire. By 7 & 8 Vict. c. 61, every part of a county detached from the main body of such county is to be considered for all purposes as forming part of that county of which it is considered a part for election purposes, under 2 & 3 Will. 4. c. 64. In fact, no part of Glasbury was "isolated" or "detached," unless 470 acres of land therein, which were separated from Brecknockshire by the river Wye, could be so considered:—Held, that notwithstanding the misapprehension in the schedule as to the fact of Glasbury parish being isolated and locally situated in Brecknockshire or Radnorshire, the 470 acres of the parish of Glasbury, though not strictly speaking either "isolated" or "detached" from the main body of the county of Radnor, must upon the facts found be taken to be the part of the parish described in the schedule, and that it therefore became, under the Boundary Act, a part of the county of Brecon, and (under 7 & 8 Vict. c. 61.) for all purposes, including liability to repair a bridge.

Where boundary line between two counties necessarily runs along some part of a public river, the middle of the river is the boundary, there being nothing in the Boundary Act, 2 & 3 Will. 4. c. 64, to prevent the general rule in such cases applying. *Regina v. the Inhabitants of Brecknockshire*, 19 Law J. Rep. (N.S.) M.C. 203.

(b) *Bridge erected for private Purposes.*

The word "riding" in the Statute of Bridges (22 Hen. 8. c. 5. s. 3.) is not confined to districts called by that name, but includes any division of a county which corresponds in its definition to a riding.

By 6 & 7 Will. 4. c. 87. the Isle of Ely has a separate commission and clerk of the peace and a separate county rate and *custos rotulorum* from the county of Cambridge, and by 7 Will. 4. & 1 Vict. c. 53. s. 7, it is enacted that, in statutes theretofore passed or thereafter to be passed respecting counties, ridings or divisions, the Isle of Ely should be deemed and taken to be a division of a county.

Held, that the Isle of Ely is included in the Statute of Bridges, and therefore its inhabitants are *prima facie* liable at common law to repair the

bridges situate within it; and may be indicted in the same form as ordinary counties.

The general rule as to bridges built prior to 43 Geo. 3. c. 59. is, that if a private person erects a bridge, and it becomes useful to the county in general, the county shall repair it.

But where an act rendering a bridge necessary, though authorized to be done, is done primarily for private purposes, and interferes with the public right, and the public user, from which public benefit is inferred, is referable only to that act, because made necessary by it, the authority to do the act in question is conditional only on the party maintaining the public right in the same state as before it was interfered with.

Plea to indictment for non-repair not double by reason of its alleging that drain and bridge were vested in corporation. *Regina v. the Inhabitants of the Isle of Ely*, 19 Law J. Rep. (N.S.) M.C. 223.

(c) *Bridge not transferred from County to Borough.*

By statute 2 & 3 Will. 4. c. 64, a certain part of the parish of F, in the county of Wilts, was included within the city of New Sarum, which is not a county of itself, but which, after the passing of the 5 & 6 Will. 4. c. 76, had a separate court of quarter sessions:—Held, that after the passing of the last-mentioned statute the city of New Sarum was not liable to the repair of a public bridge, locally situate within the part of the parish of F so included within the city. *Regina v. the Inhabitants of New Sarum*, 15 Law J. Rep. (N.S.) M.C. 15; 7 Q.B. Rep. 941.

(B) PRESENTMENT FOR NON-REPAIR.

By 13 Geo. 3. c. 78. s. 24. power is given to a single Justice to present any highway or bridge out of repair. The 43 Geo. 3. c. 59. enacts that all matters and things in 13 Geo. 3. c. 78. contained relating to highways shall be extended to county bridges as fully as if they were repeated and re-enacted therein. Statute 5 & 6 Will. 4. c. 50. expressly repeals 13 Geo. 3. c. 78, leaving untouched the 43 Geo. 3. c. 59, and by section 99. abolished all presentments for non-repair of highways. By the interpretation clause (section 5) "highway" is not to include county bridges:—Held, that the power conferred by 43 Geo. 3. c. 59. on a single Justice of presenting a county bridge is not repealed by the 5 & 6 Will. 4. c. 50. *Regina v. the Justices of Breconshire*, 18 Law J. Rep. (N.S.) M.C. 123.

BROKER.

[See COMPANY—PRACTICE, Adding Pleas—PRINCIPAL AND AGENT—PRODUCTION AND INSPECTION OF DOCUMENTS—STOCK EXCHANGE.]

A party who does work for another in and about the procuring and hiring of persons to be employed by that other, in surveying a line of railway, is not a broker, within the stat. 6 Ann. c. 16, which requires persons acting as brokers within the City of London to be admitted by the mayor and aldermen; and per *Rolfe, B.*, the employment of a broker relates to goods and money, and not to personal contracts

for work and labour. *Milford v. Hughes*, 16 Law J. Rep. (N.S.) Exch. 40; 16 Mee. & W. 174.

BUILDING.

[See FRIENDLY AND BENEFIT SOCIETIES—METROPOLIS.]

BURGLARY.

On the trial of an indictment for a burglary, it appeared that adjoining the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house; and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roofs of the dwelling-house, kiln, and dairy were of different heights:—Held, that the dairy was not a part of the dwelling-house, and that a burglary could not be committed by breaking into it. *Regina v. Higgs*, 2 Car. & K. 322.

BURIAL FEES.

[See CLERGY.]

CANAL COMPANY.

[As to what is a judicial act by Commissioners, see CERTIORARI. And see CARRIER.]

Construction of Act as to Tolls.

A canal company was empowered, by act of parliament, to take for tonnage upon all coals, &c., and other commodities whatsoever conveyed upon the canal, duties not exceeding 2½d. per ton, on entering or passing out of the canal, and also not exceeding 1½d. a mile for every ton of coal, &c., except all dung, soil, marl, ashes and other manure (other than lime, which was to pay half tolls), and except stone, &c., and other materials for mending roads, which was to pass toll-free. By another section it was enacted "that no boat should pass through any of the locks, unless such boat should pay a duty equal to what would be paid by a vessel loaded with a burden of thirty tons, or unless it should be returning, after having passed on the canal with a greater burden than thirty tons":—Held, affirming the judgment of the Court below (13 Law J. Rep. (N.S.) Exch. 283; 13 Mee. & W. 114), that a boat laden with more than thirty tons of manure, which had entered the canal, and passed along it, without paying toll, was not liable to pay any toll on returning through the lock empty, after discharging her cargo. *Graham Canal Company v. Hall*, 15 Law J. Rep. (N.S.) Exch. 63; 14 Mee. & W. 880.

Effect of Interested Persons acting as Commissioners.

Upon the general rule of law and the construction of a canal act, proceedings of Commissioners held to be invalid by reason of interest.

Quare, as to interest of the owner of land in which colliery situate.

Semble, that where a large body of Commissioners are appointed by statute, the accidental intrusion of one interested person will not necessarily vitiate the proceedings. *Regina v. the Aberdare Canal Co.*, 19 Law J. Rep. (N.S.) Q.B. 251.

Notice of Meeting of Commissioners.

By a Canal Act, no meeting of Commissioners was to be held unless previous notice should be given in some newspaper, published or circulated in the county of G at least sixteen days before such meeting. Notice of the meeting of the Commissioners, to be held on the 12th of February, was inserted in a newspaper, dated the 27th of January, on which day the notice itself also bore date; but it was proved that the newspaper was printed and partly circulated on the 26th of January:—Held, that the notice was insufficient, as not being given "at least sixteen days before such meeting." *Regina v. Aberdare Canal Co.*, 19 Law J. Rep. (N.S.) Q.B. 251.

CARRIER.

[See RAILWAY.]

(A) DUTIES AND LIABILITIES OF CARRIERS.

- (a) *Cases of special Contract.*
- (b) *Servants.*
- (c) *Loss of Luggage.*
- (d) *Gratuitous Bailment.*
- (e) *Delivery to.*
- (f) *Damages.*

(B) CARRIERS TO FOREIGN PARTS.

Canal companies enabled to become carriers by 10 & 11 Vict. c. 94; 25 Law J. Stat. 266.

(A) DUTIES AND LIABILITIES OF CARRIERS.

(a) *Cases of special Contract.*

In an action on the case, the declaration alleged that the defendants were proprietors of a railway and carriages for the conveyance of passengers, cattle, &c. for hire; that they received nine horses of the plaintiff to be safely and securely carried in the carriages of the defendants for hire, and that it thereupon became their duty safely and securely to carry and deliver the said horses, and averred the loss of one of the horses by reason of the insufficiency of the carriage. It appeared that the injury to the horse was occasioned by a defect in the horse-box in which it was placed, and which defect had been pointed out to the servants of the defendants. The plaintiff received a ticket from the defendants' clerk, stating the amount paid for the carriage of the horses, and having the following memorandum annexed: "This ticket is issued subject to the owner's undertaking all risks of conveyance whatever, as the company will not be responsible for any injury or damage (however caused) occurring to horses or carriages while travelling, or in loading or unloading;" — Held, that the terms contained in the ticket formed part of the contract for the carriage of the horses, upon which the defendants' duty arose, and that

the allegation that the defendants received the horses "to be safely and securely carried" by them, was disproved.

Semble—that notwithstanding the contract, the plaintiff might have charged the defendants with a breach of duty in not providing a sufficient carriage. *Shaw v. York and North Midland Rail. Co.*, 18 Law J. Rep. (N.S.) Q.B. 181; 13 Q.B. Rep. 347.

(b) *Servants.*

If a carrier who contracts to deliver goods from A to B enters into a sub-contract with another party to convey those goods over a certain portion of the journey, such sub-contractor and every person employed by him in the performance of the contract, is "a servant in the employ" of the carrier within the meaning of the 8th section of the 11 Geo. 4. & 1 Will. 4. c. 68.

A delivery ticket issued by a railway company, as common carriers, in respect of goods they had undertaken to carry, described several persons, amongst others J, as porters in their employ. In an action brought by the bailor of the goods for their non-delivery, they having been stolen on their journey by J,—*semble*, that the company were not estopped from giving evidence that J was not their servant. *Machin or Machu v. London and South-Western Rail. Co.*, 17 Law J. Rep. (N.S.) Exch. 271; 2 Exch. Rep. 415.

(c) *Loss of Luggage.*

The declaration stated that the defendants were common carriers on a railway from Woodgate to the Southwark terminus in London; that C S R, wife of the plaintiff, became a passenger, and was received with a dressing-case, which was part of her luggage, and which was to be safely and securely carried to and delivered at the station at Southwark; that the defendants did not take due or proper care about the conveyance, but by their negligence and improper conduct the dressing-case was wholly lost. It was proved that Mrs. R came to the Woodgate station of the Brighton Railway, and her dressing-case was put under the seat of the carriage; that on arriving at the Southwark terminus, Mrs. R was carried to a hackney coach, and the defendants' servants removed her luggage from the railway carriage to the hackney coach, and the dressing-case was lost, never having been seen in the hackney coach:—Held, that the evidence was sufficient to support the declaration, there being an allegation of the duty to deliver, and no delivery having taken place.

Held, also, that negligence, though alleged, did not require to be proved. *Richards v. London and South Coast Rail. Co.*, 18 Law J. Rep. (N.S.) C.P. 251; 7 Com. B. Rep. 839.

To a declaration in case against common carriers for the loss of a trunk containing certain articles of jewellery and female apparel, the defendants pleaded as to part of the goods in the declaration mentioned, to wit, the said articles of jewellery, one of the said dresses, &c. &c., that at the time of the delivery to them they were contained in the trunk in the declaration mentioned; that they were so delivered to the defendants after the passing of the statute 11 Geo. 4. & 1 Will. 4. c. 68. (the Carriers' Act); that the said goods consisted of

articles and property of the descriptions following, or of some or one of such descriptions, that is to say, gold or silver in a manufactured or unmanufactured state, &c. (enumerating the several articles mentioned in the 1st section of the act), and that their value exceeded 10*l.*; that at the time of the receipt of the goods by them, the defendants had duly affixed the notice required by section 2. of the act; and that the plaintiff gave them no notice of the nature or value of the goods, nor did she pay or tender the increased rate of charge demandable under the act:—Held, that the plea was bad for not alleging with certainty that the articles in question were articles of some or one of the descriptions mentioned in the act. *Smith v. London, Brighton, and South Coast Rail. Co.*, 7 Com. B. Rep. 782.

(d) *Gratuitous Bailment.*

Defendant, a carrier and wharfinger, received into his warehouse certain goods of the plaintiff, on the terms that they should be conveyed by defendant's barges to London, when the plaintiff should direct, at the usual freight, and that, in the mean time, they should be kept by defendant without charge for warehousing:—Held, in an action for not keeping the goods safely, that defendant was not a gratuitous bailee. *White v. Humphery*, 11 Q.B. Rep. 43.

(e) *Delivery to.*

If, in an action against a carrier for the loss of a parcel, the defendant plead that it was not delivered to him to be carried, it is sufficient for the plaintiff to shew that it was delivered to a person and at a house where parcels were in the habit of being left for this carrier, and it is immaterial whether this person was paid any money or not; and in such an action the person who so left the parcel may be asked, on cross-examination, what direction was on the parcel. *Burrell v. North*, 2 Car. & K. 680.

(f) *Damages.*

The plaintiff sent goods to the London warehouse of the defendants, who were carriers, to be forwarded to Bedford. The goods, which ought to have reached Bedford in time for Saturday's market, did not arrive there until Monday. The plaintiff's clerk, who had been sent to Bedford on the Saturday to receive and sell the goods, waited there until the Monday, when he removed them to St. Neots, in order to sell them:—Held, that it was a question for the jury, whether the expenses of the clerk's stay at Bedford were a reasonable consequence of the defendants' breach of contract, and that the Judge was not bound as a matter of law to direct the jury that the defendants were not liable for such expenses, unless they had notice that it would be the consequence of a delay in the delivery of the goods. *Black v. Baxendale*, 17 Law J. Rep. (N.S.) Exch. 50; 1 Exch. Rep. 410.

Where a parcel containing several small ones was sent through the railway company to the plaintiff's agent at B, and one of them, directed to C D, was lost,—Held, not necessary to shew, in an action against the company, that they had not delivered it to C D, and that the amount of damages was the value of the parcel, as the plaintiff would be liable for that amount. *Crouch v. the*

London and North-Western Rail. Co., 2 Car. & K. 789.

(B) CARRIERS TO FOREIGN PARTS.

A declaration in case stated that the defendants were common carriers of passengers for hire from Southampton to Gibraltar, which was stated to be a place beyond the seas. The defendants pleaded that they were not common carriers as in the declaration alleged:—Held, that this plea put in issue only the fact of their being common carriers, undertaking to carry for any one who chose to employ them, and not their liability as common carriers according to the custom of England, *Benett v. Peninsular and Oriental Steam Boat Co.*, 18 Law J. Rep. (N.S.) C.P. 85; 6 Com. B. Rep. 775.

CASE.

[See ACTION—CARRIER—DISTRESS—HACKNEY CARRIAGE—JUSTICE OF THE PEACE—MASTER AND SERVANT—MINE—NEGLIGENCE—NUISANCE—SEDUCTION—WAY.]

Fraudulent Imitation of Trade Mark.

A declaration in case stated that the plaintiffs, manufacturers of cutlery, were accustomed to mark their knives with certain marks denoting their manufacture, and that the defendants, intending to injure the plaintiffs, did fraudulently impose similar marks on knives made by the defendants, to induce the public to believe that the knives made by the defendants were manufactured by the plaintiffs, &c.:—Held, that it was properly left to the jury to consider, whether there was such a resemblance between the defendants' marks and those used by the plaintiffs, as was calculated to deceive the public; and whether the defendants used the marks with an intention to deceive.

No person has a right to sell his own goods as and for goods manufactured by another person. *Rodgers v. Nowill*, 17 Law J. Rep. (N.S.) C.P. 52; 5 Com. B. Rep. 109.

Obligation on Owner of House to repair as regards his Neighbour.

A declaration in case stated, that a certain messuage was in the occupation of T S as tenant to the plaintiff, the reversion belonging to the plaintiff; and that the defendant was owner and proprietor of another messuage, and by reason thereof as such owner and proprietor of such messuage ought to have repaired and kept repaired in a substantial manner the said messuage secondly mentioned. Breach, non-repair by the defendant. Plea, that the said messuages were contiguous and abutting on each other, and were divided by a party wall, whereof the plaintiff was seised of an undivided moiety; that the wall was in a ruinous state, and being parcel of the messuage in the declaration secondly mentioned, had fallen on the first-mentioned messuage. Replication, traversing that the wall was a party wall, and that the plaintiff was seised thereof:—Held, first, that the replication was good. Secondly, that the declaration was bad, there being no obligation towards a neighbour on the owner of a house, merely

as owner, to repair or keep it in repair in a substantial manner, the whole of his obligation being to prevent it from becoming a nuisance.

The term "owner," as well as that of "proprietor," of premises may mean one who has the whole legal interest in the premises, so that no one else has any estate in possession or reversion, or it may mean one who has a subsisting estate at the time of the wrong complained of, or one who is the owner of the whole or of some interest as distinguishable from that of tenant in possession. *Chauntler v. Robinson*, 19 Law J. Rep. (N.S.) Exch. 170; 4 Exch. Rep. 163.

CASTE.

Suit by certain *Comaties* of the *Vaisyas*, or third caste of the Hindoos, against the *Mantri-maha-nad* (secret assembly, for avenging encroachments upon rules or rights of caste), to establish their right to have performed for them and their tribe, certain religious ceremonies, call *soobha* and *asoobha* (auspicious and inauspicious), by *Brahmins*, in the language of the *Vedas*, in the enjoyment of which they had been disturbed by the *Brahmins* refusing to perform such ceremonies. In the answer to the plaint, the defendants denied the right of the *Comaties*, and set forth certain acts, whereby they had forfeited their right to have the ceremonies performed for them, by the *Brahmins*. The *Zilla* Court, taking that part of the defendants' answer which set forth the acts by which the forfeiture of the rights in question was occasioned, framed it into a statement of facts and law, for the opinion of the *Pundit* of the Court; and upon his opinion, declared the plaintiffs' tribe entitled to have the ceremonies performed for them by *Brahmins*. Upon appeal, the provincial court remitted the suit to the *Zilla* Court, to take evidence, and upon such evidence, and the opinions of the *Pundits*, which the provincial court took upon the same statement as the *Zilla*, they affirmed the decree. The *Sudder Dewanny Adawlet*, upon the whole case, reversed these decisions:—Held, by the Judicial Committee of the Privy Council, reversing the decisions of the three Courts, that the whole proceedings were irregular and contrary to the express provisions of the *Madras Regulation XV. of 1816*, sect. x. cl. 3 and 4, which required the Judge to record the points necessary to be established, before the evidence could be taken; the opinion of the *Pundits* being also taken upon an assumed statement of facts, not admitted or recorded. But in consideration of the circumstances, such reversal was without prejudice to bringing a fresh suit. *Namboory Setapaty v. Kanoo-Colanoo Pullia*, 3 Moore, In. App. 359.

CATTLE.

Provisions for preventing the introduction and spreading of contagious or infectious disorders among cattle. 11 & 12 Vict. c. 105. and 107; 26 Law J. Stat. App. xvi., xvii.

CEMETERY.

Provisions usually inserted in cemetery acts consolidated by 10 & 11 Vict. c. 65; 25 Law J. Stat. 208.

CENTRAL CRIMINAL COURT.

[See INDICTMENT, Venue.]

Provisions as to preferring and removing indictments. 9 & 10 Vict. c. 24; 24 Law J. Stat. 70.

CERTIORARI.

[See CONVICTION—POOR—REVENUE—TITHE.]

(A) WHEN IT LIES.

- (a) *Although restrained by Statute.*
- (b) *Judicial Acts and Orders.*
- (c) *Order of Removal unappealed against.*
- (d) *Indictment for keeping disorderly House.*
- (e) *Certificate of Admission to Lunatic Asylum.*
- (f) *Resolution of Vestry.*

(B) NOTICE OF.

(C) MATTERS OF PROCEDURE.

- (a) *Within what Time to issue.*
- (b) *Ex parte Application.*
- (c) *Rule absolute in first instance.*
- (d) *Motion in open Court.*
- (e) *What Points may be gone into.*
- (f) *Motion to quash.*
- (g) *Other Matters.*

(D) COSTS TO PROSECUTOR AND PARTY GRIEVED.

(A) WHEN IT LIES.

[*Regina v. Lancaster and Preston Junction Rail. Co.* 5 Law J. Dig. 161; 6 Q.B. Rep. 759.]

(a) *Although restrained by Statute.*

Though the Excise Act, 7 & 8 Geo. 4. c. 53. takes away a *certiorari* from the Queen's Bench, it may still issue where a conviction has been obtained by fraud. *Regina v. Gillyard*, 17 Law J. Rep. (N.S.) M.C. 153; 12 Q.B. Rep. 527.

The 10th section of the statute 25 Geo. 2. c. 36. taking away the writ of *certiorari* for the removal of indictments against any person for keeping a bawdy-house, gaming-house, or other disorderly house, does not apply where the indictment has once been removed, at the instance of the prosecutor, into the Central Criminal Court, under the 4 & 5 Will. 4. c. 36.—Held, therefore, that after an indictment for keeping a disorderly house had been so removed from the Middlesex Sessions, a second writ of *certiorari* for the removal of the same indictment from the Central Criminal Court into the Court of Queen's Bench, might be granted at the instance of the party indicted. *Regina v. Brier*, 19 Law J. Rep. (N.S.) M.C. 121.

It is no ground for a *certiorari* to remove several convictions before Justices under the Factory Act, 7 & 8 Vict. c. 15. s. 41. (the *certiorari* being expressly taken away), that the summons to appear and answer the charges was served only the day

before the hearing, and that the Justices made the convictions upon no other appearance than that of an attorney who professed to represent the parties charged, without requiring proof of the service of the summons, and upon the evidence offered in support of one of the charges only. *Ex parte Hopwood*, 19 Law J. Rep. (N.S.) M.C. 197; 15 Q.B. Rep. 121.

(b) *Judicial Acts and Orders.*

The Court of Quarter Sessions made an order, October 1844, that no officer of the court should thereafter take any fee from any defendant in misdemeanor:—Held, a judicial order properly removable by *certiorari*. *Regina v. Coles*, 15 Law J. Rep. (N.S.) M.C. 10; 8 Q.B. Rep. 75.

B, an owner of lands adjoining a canal, made a request to the committee of the company for their consent to erect a bridge over the canal, and after twenty-one days' refusal, applied to Commissioners under the act for their consent and approbation, who, after hearing evidence and arguments on both sides, gave their consent and approbation, and entered a minute of the proceedings in their books:—Held, that this was such a judicial act as could be removed by *certiorari*. *Regina v. Aberdare Canal Co.*, 19 Law J. Rep. (N.S.) Q.B. 251.

(c) *Order of Removal unappealed against.*

An order of removal, against which there has been no appeal to the Quarter Sessions, may be brought up by *certiorari* for defects appearing on the face of it. *Regina v. Blathwayt*, 15 Law J. Rep. (N.S.) M.C. 48; 3 Dowl. & L. P.C. 542.

(d) *Indictment for keeping disorderly House.*

No indictment for keeping a disorderly house can be removed by *certiorari*, whether the indictment be at the prosecution of the constable, under the statute 25 Geo. 2. c. 36, or at the instance of a private individual. *Regina v. Sanders*, 15 Law J. Rep. (N.S.) M.C. 158; 9 Q.B. Rep. 235.

(e) *Certificate of Admission to Lunatic Asylum.*

A certificate for the admission of a lunatic into an asylum, signed by a clergyman and overseer, under 8 & 9 Vict. c. 100. s. 48, is not removable by *certiorari*.

The objection that such a certificate is not properly the subject of a *certiorari*, may be taken on shewing cause against a rule to quash the certificate after it has been removed. *Regina v. Inhabitants of Hatfield Peverel*, 18 Law J. Rep. (N.S.) M.C. 225.

(f) *Resolution of Vestry.*

A *certiorari* will not lie to bring up a resolution of vestry for the appointment of paid constables under the 5 & 6 Vict. c. 109. s. 18. Nor the copy of such resolution forwarded to the Justices in petty sessions, on which they made the appointment. But it will lie to bring up the appointment itself made by the Justices in petty sessions, where the proceedings in vestry have not been conducted in conformity to the 58 Geo. 3. c. 69, amended by the 59 Geo. 3. c. 85, a poll having been demanded and refused, and the resolution having been carried by a shew of hands. A *certiorari* being granted for that purpose, it is competent to the parties moving to shew upon affidavit that the irregularity in the pro-

ceedings of the vestry was of such a nature as to take away the jurisdiction of the Justices. *In re the Constables of Hipperholme-cum-Brighouse*, 5 Dowl. & L. P.C. 79.

(B) NOTICE OF.

A notice given to Justices of an intention to move for a *certiorari* in six days from the giving of the notice, or as soon after as counsel can be heard, is sufficient. *Regina v. Rose*, 15 Law J. Rep. (N.S.) M.C. 6; 3 Dowl. & L. P.C. 359.

(C) MATTERS OF PRACTICE.

(a) *Within what Time to issue.*

The Court refused to grant a *certiorari* to bring up an order of Sessions, made, subject to a case, more than six months after the making of the order, where application had been made at chambers within the time, but had failed in consequence of non-attendance of a Judge there until after the six months had expired. *In re the Parishes of Llanbeblig and Llandyfrydog*, 15 Law J. Rep. (N.S.) M.C. 92.

(b) *Ex parte Application.*

A writ of *certiorari* to remove a plaintiff from the county court may issue, under the 9 & 10 Vict. c. 95. s. 20, upon an *ex parte* application, if the Judge, in the exercise of his discretion, thinks it proper to grant leave without notice to the other party. *Symonds v. Dimsdale*, 17 Law J. Rep. (N.S.) Exch. 247; 2 Exch. Rep. 533.

(c) *Rule absolute in first instance.*

Where the preliminary steps have been duly taken, a rule under stat. 8 & 9 Vict. c. 118. s. 44, for a *certiorari* to remove an award of an Assistant Inclosure Commissioner will be absolute in the first instance. *Ex parte Kelsey or Kelcey*, 19 Law J. Rep. (N.S.) Q.B. 145; 1 L. M. & P. 55.

(d) *Motion in open Court.*

Where the Sessions have granted a case for the opinion of the Court, the Court will not, on the argument on such case, entertain any question not raised by the Sessions for their decision. If it be intended to object to the order of Sessions as bad on the face thereof, upon any grounds not raised by the special case, the *certiorari* must be moved for in open court, and such additional grounds of objection stated. *Regina v. Inhabitants of Heyop*, 15 Law J. Rep. (N.S.) M.C. 70; 8 Q.B. Rep. 547.

(e) *What Points may be gone into.*

Where a case has been sent from the Sessions, the Court will not, upon the *certiorari*, go into any objections arising on the face of the order itself, not raised by the case. *Regina v. Inhabitants of Hartpury*, 16 Law J. Rep. (N.S.) M.C. 105; 8 Q.B. Rep. 566.

[And see *ante*, (d).]

(f) *Motion to quash.*

When a whole term has elapsed after a case, granted by an order of Quarter Sessions, has been brought up by *certiorari*, it is too late to quash the *certiorari*, on the ground that although the affidavits on which the *certiorari* was obtained alleged service of notice on two Justices present at the time of the

making of the order, one of those Justices was, in fact, not then present. *Regina v. Inhabitants of Basingstoke*, 19 Law J. Rep. (N.S.) M.C. 28; 6 Dowl. & L. P.C. 303.

(e) *Other Matters.*

The proper practice upon the return of a *certiorari* to remove a conviction is, that the case should be put into the Crown paper. *Regina v. Lord or Ex parte Lord*, 16 Law J. Rep. (N.S.) M.C. 15; 4 Dowl. & L. P.C. 405.

Where, by act of parliament, the original jurisdiction as to the merits of a case is given to magistrates, from whose decision no appeal as to the merits is given to the Court of Queen's Bench, that Court, when the decision of the magistrates is complained of, and their proceedings brought up by writ of *certiorari* to be quashed, has only power to see whether the case was one in which the magistrates had jurisdiction, and whether their proceedings are regular upon the face of them.

That Court will not receive affidavits, for the purpose of impeaching the decision upon the facts, of which the magistrates are the sole judges; as, if they have jurisdiction over the case, their jurisdiction cannot be affected by, or made to depend upon, the truth or falsehood of the facts, or the sufficiency or insufficiency of the evidence brought to support the case.

In a proceeding, therefore, before magistrates, under the 59 Geo. 3. c. 12. s. 24, against the defendant, for not giving up possession of a parish house, after a proper demand, where they had made an order in pursuance of the statute, which was brought up by *certiorari* to be quashed, the Court refused to receive affidavits as to the facts proved before the magistrates, and others attacking the credit of the witnesses; and as it appeared that the case was one in which the magistrates had jurisdiction, and that their proceedings were good in form, the rule was discharged. *Regina v. Bolton*, 10 Law J. Rep. (N.S.) M.C. 49; 1 Q.B. Rep. 66.

(D) COSTS TO PROSECUTOR AND PARTY GRIEVED.

Where a side-bar rule has been obtained for costs to prosecutors and parties grieved, under the statute 5 & 6 Will. & M. c. 11. s. 2, the Court will not discharge the side-bar rule on affidavits, which shew that sums of money have been raised by subscription towards defraying the expenses of the prosecution; or on the ground that all the prosecutors do not appear to have been aggrieved; or on the ground of its appearing that the *certiorari* was obtained at the instance of one of the defendants alone. *Regina v. Dobson*, 15 Law J. Rep. (N.S.) Q.B. 97; 9 Q.B. Rep. 302, n.

Where an indictment has been removed by *certiorari* under 5 Will. & M. c. 11, if the party grieved or injured be in point of fact the prosecutor, he will be entitled to costs under that statute, although not bound over to prosecute, and although another person, not a party grieved or injured, was bound over to prosecute, and was at the trial in pursuance of his recognizance. *Regina v. Bishop*, 18 Law J. Rep. (N.S.) M.C. 63; 6 Dowl. & L. P.C. 499.

CHAMPERTY.

[See CONTRACT, Rescission of.]

CHANCERY.

Certain offices in the Petty Bag and the practice on the common law side of the Court of Chancery and the inrolment office regulated by the 11 & 12 Vict. c. 94; 26 Law J. Stat. App. ix.

Orders in pursuance of that act, made December 29, 1848; 18 Law J. Rep. (N.S.) Chanc. 503.

The 11 & 12 Vict. c. 94. amended by 12 & 13 Vict. c. 119; 27 Law J. Stat. 250.

An Act to diminish the delay and expense of the proceedings in the Court of Chancery, 13 & 14 Vict. c. 35; 28 Law J. Stat. 52.

The Attorney General (after the passing of the statute 5 Vict. c. 5.) filed an information in Chancery against the mayor and commonalty of London, alleging that the Crown was seized of the bed and soil of the river Thames; that the defendants were conservators thereof, and in breach of their duty as such conservators had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were nuisances, and demurred to the rest of the bill for want of equity.

Held, affirming an order of the Master of the Rolls, that, upon these pleadings, the information was maintainable.

If a bill or information discloses, upon the facts stated in any part of it, ground for a decree in equity, it is maintainable. *Per the Lord Chancellor*, pp. 464, 6, 7.

A bill, which raises a legal question, may be so framed as not to be open to demurrer on that account, but, on the real nature of the question appearing at the hearing, the court of equity will refuse to interfere. *Per the Lord Chancellor*, p. 468.

As the Crown would not be liable to costs in this case, the judgment of the Court below was affirmed, without costs.

Quære—Whether, when an act of parliament transfers jurisdiction from one Court to another, or grants an extension of the jurisdiction of an existing Court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein. *The Corporation of London v. the Attorney General*, 1 H. L. Cas. 440.

A Scotchman, by a testamentary instrument in the Scotch form, gave all his personal estate to trustees in trust to pay legacies and annuities, and the income of the surplus to A for life, and on A's death to invest the capital in the purchase of lands in Scotland. The trustees named in the will having disclaimed, the Court of Session appointed new trustees, who, as well as A and several of the legatees and annuitants, were resident in Scotland. A administered to the testator's estate in England; and filed a bill in Chancery against the trustees for

the usual accounts of the testator's estate possessed by them, and to have the residue ascertained and secured. The trustees filed a cross-bill for an account of the testator's estate in England possessed by A, and to have the residue ascertained and paid over to them upon the trusts of the will. The Court refused to relinquish its jurisdiction over the fund in A's hands, and directed it to be paid into court, and to be invested in consols, and the dividends to be paid to A for life. *Preston v. Melville*, 15 Sim. 35.

CHAPEL.

[See CHURCH—RATE.]

CHARGE.

[See JUDGMENT.]

A held shares as trustee and executed a declaration of trust, but gave no notice at the office of the company. He afterwards mortgaged the shares for his private debt, and gave notice to the company, who entered the mortgage in their books:—Held, that the mortgagee had priority over the *cestui que trust*.

Notice to one proprietor is not for this purpose notice to the company. *Martin v. Sedgwick*, 9 Beav. 333.

A, who was entitled to a residuary fund in the hands of his father's army agents, charged it, first to the agents and afterwards to M without notice. The agents voluntarily paid the whole fund into court in an administration suit. M obtained the first stop-order thereon:—Held, that M had priority over the agents. *Swayne v. Swayne*, 11 Beav. 463.

The owner of a vessel, then on a voyage, mortgaged it and the cargo to A, subject to two prior mortgages thereof; and the third mortgagee forthwith gave notice of his mortgage to the two prior incumbrancers. The master of the vessel afterwards at Sydney transhipped the cargo and consigned it to London to consignees, who honoured his bill on having a lien on the consignment. The mortgagor induced B to advance 1,000*l.* on a mortgage of the cargo so consigned without notice of any charge thereon, except the lien of the consignee. B gave notice of his mortgage to the consignee. A as soon as he knew of the consignment (but after B's notice) gave notice to the consignee of the mortgage to him; and after such notice the consignee after satisfying his lien paid over the balance of the proceeds to B:—Held, that A, having done all he could towards possession, was entitled to priority over B. *Feltham v. Clark*, 1 De Gex & S. 307.

CHARITY.

[See CHURCHWARDENS AND OVERSEERS—COSTS—HEIR-AT-LAW.]

- (A) CONSTRUCTION OF INSTRUMENT CREATING IT.
- (B) DEVISE AND BEQUEST TO.
 - (a) *Validity of.*
 - (b) *What passes by.*

(C) ADMINISTRATION.

- (a) *Scheme.*
- (b) *Trustees.*
 - (1) *Control over in general.*
 - (2) *Appointment of new Trustees.*
- (c) *Estates.*

(D) JURISDICTION OVER.

- (a) *Of the Court of Chancery.*
 - (1) *In general.*
 - (2) *On Petition.*
 - (3) *By Information.*
- (b) *Of the Visitor.*
- (c) *Of Supreme Court at Madras.*
- (d) *Of Commissioners for Ireland.*

(E) INFORMATION BY THE ATTORNEY GENERAL.

(F) PLEADING AND PRACTICE.

(G) COSTS.

(A) CONSTRUCTION OF INSTRUMENT CREATING IT.

In the year 1584 an act was passed, the objects of which were of a public nature, viz. to supply the ships in the harbour and the inhabitants of Plymouth with water, &c. An hospital, founded in the year 1617, was endowed with certain lands, emanating from the corporation of Plymouth, and a very close connexion was otherwise established between the two bodies. In 1653, in consideration of a sum of 1,400*l.*, part of a larger sum due from the corporation to the hospital, an estate in fee simple was granted by the corporation to the hospital of one-fourth part of certain mills, *together with one-fourth of the leat or water-course (constructed under the act), running, coming, and going to all the said mills*:—Held, that the corporation had no right to apply to the use of the mills situate on the leat any water brought by it other than that which remained after the public purposes had been satisfied, and that one-fourth only of the surplus water of the leat passed by the grant of 1653.

Held, also, notwithstanding probable adequacy of consideration paid, that a deed, dated in the year 1805, by which that interest of the hospital in the mills, leat, &c. was conveyed to the corporation by the hospital, was invalid, the hospital having been always treated and considered as dependent on the corporation. *Attorney General v. Plymouth (Mayor, &c.)*, 15 Law J. Rep. (N.S.) Chanc. 109; 9 Beav. 67.

A party being desirous of establishing some schools, entered into an agreement with a corporation, who accepted a conveyance of certain lands and fee-farm rents, and covenanted therewith to keep up the charity, whether the income arising from the property so conveyed should or should not be sufficient to pay all the expenses of the charity:—Held, notwithstanding, that under the circumstances, the corporation were not entitled to the surplus of the income, but that the charity ought to be extended. *Attorney General v. Merchant Venturers' Company of Bristol*, 17 Law J. Rep. (N.S.) Chanc. 137.

By a charter of Phil. & Mary (1553) reciting that eighteen presbyters, fifteen clerks and twelve poor men had been lately maintained at B out of the issues of certain guilds since dissolved and seized to the Crown, it was witnessed that, con-

sidering a provision for divine worship and the maintenance of the poor, and the education of youth belonged to the regal office, and at the humble petition of the mayor and burgesses, and in consideration of the charges which they sustained in and about the reparation of the bridge and port, and that they might be better able to sustain these charges, the King and Queen granted certain lands to the corporation to the intent that they should find and maintain a grammar school in B, and a schoolmaster, two priests to celebrate divine service in the parish church, and four poor persons to pray for the souls of the King and Queen and their ancestors, with a direction to apply all the rents and profits "ad sustentationem pædagogii et suppædagogii scholæ prædictæ, ac capellanos et pauperes prædictos et alia necessaria, prædictum burgum scholam capellanos et pauperes prædictos, et sustentationem et manutentionem eorundem tantum modo tangentia et concernentia:"—Held, that the trusts were for religious purposes, education, and the relief of the poor exclusively.

Effect of usage in the construction of charters. *Attorney General v. Boston*, 1 De Gex & S. 519.

A chapel or meeting-house in England was vested in trustees, upon trust, for a congregation of Protestant Presbyterian dissenters, proved to be in as strict connexion with the Established Church of Scotland as practicable:—Held, that this was not a trust for dissenters generally, and that no person was eligible to, or entitled to hold, the office of minister of the chapel whose opinions and acts constituted a disqualification for the ministry of the Established Church of Scotland; and that the congregation were entitled to a declaration as prayed, that their minister must be a minister of that church, although the foundation deeds contained no declaration to that effect.

It being proved that the officiating minister of the chapel had adhered to the Free Church of Scotland, and had become disqualified for the ministry of the Established Church of Scotland, he and those of the trustees, defendants, who concurred and co-operated with him in opposing the relators and plaintiffs, were ordered to pay the costs of the suit, and the adverse defendants to be removed from the office of trustees. *Attorney General v. Murdoch*, 19 Law J. Rep. (N.S.) Chanc. 3; 7 Hare, 445.

Testator, by his will, dated in 1624, gave certain funds to the corporation of R, upon trust for the poor of the town of R, with a proviso that in case of neglect to perform the trusts or of misemployment of the funds, the same should be paid or transferred to the corporation of L, for the benefit of Christ's Hospital. In 1639, on an information by the Attorney General against the corporations of R and L, a decree was made for the application of the funds, varying the trusts declared by the will, with a declaration that if the corporation of R should misapply the funds contrary to the decree, the same should be made over to the corporation of L for the benefit of Christ's Hospital. The corporation of R misapplied the funds for a series of years; on bill by the corporation of L against the corporation of R and the Attorney General for a transfer of the fund, held, affirming the decree below, that the limitation over took effect.

Held, also, that such a limitation over is not

within the rules of law against perpetuities, being a substitution merely of one charity trust for another.

Held, also, that as the property had continued in possession of the corporation of R, who, after the acts of forfeiture, became trustees for Christ's Hospital, there was no adverse possession, and the Statute of Limitations did not apply.

Semble—A party who, on the original hearing, does not oppose the decree, will not generally be allowed to re-open the discussion by an appeal or rehearing. *Christ's Hospital v. Grainger*, 19 Law J. Rep. (N.S.) Chanc. 33; 1 Mac. & G. 460; 1 Hall & Tw. 533.

On an information filed, praying that the president and scholars of a college might be decreed to provide for the master and usher of a school rooms and commons equal to the fellows of the college, and a declaration that they were entitled to participate in the increased revenues of the college, and an order that the president and scholars should erect convenient buildings for a grammar school on the original site thereof, it was held, on the true construction of the statutes made by the founder, under a royal licence, that there was no trust imposed on the college in favour of the school which could be executed by this Court; that the master and usher of the school were only college officers appointed to discharge certain duties assigned them by the statutes in consideration of certain fixed stipends, and as such subject to the jurisdiction of the visitor of the college for the time being, and that they were not entitled to participate in the increased revenues of the college. *Attorney General v. Magdalen College, Oxford*, 16 Law J. Rep. (N.S.) Chanc. 391; 10 Beav. 402.

[See (C) Administration, (a) Scheme.]

(B) DEVISE AND BEQUEST TO.

[See CONVERSION AND RE-CONVERSION.]

(a) Validity of.

A testator devised his real estate to trustees, upon trust to sell and to invest the money to arise therefrom upon trust for his wife for life, and after her death, then as to one-third to certain charitable uses:—Held, that the devise to the trustees was valid during the wife's life, notwithstanding the subsequent devise to charitable uses. *Young v. Grove*, 16 Law J. Rep. (N.S.) C.P. 216; 4 Com. B. Rep. 668.

A bequest for the assistance of Unitarian congregations held valid and the trust directed to be carried into execution. *Shrewsbury v. Hornby*, 5 Hare, 406.

A testator gave the money to arise from the conversion of all the residue of his personal estate to the Queen's Chancellor of the Exchequer for the time being, "to be by him appropriated to the benefit and advantage of my beloved country Great Britain."—Held, that this was a good charitable bequest. *Nightingale v. Goulburn*, 16 Law J. Rep. (N.S.) Chanc. 270; 5 Hare, 484; affirmed 17 Law J. Rep. (N.S.) Chanc. 296.

Bequest to the governors of a society instituted for the "increase and encouragement of good servants," &c. &c. No such institution could be found:—Held, that the gift was charitable, and

did not fail. *Loscombe v. Wintringham*, 18 Beav. 87.

The will of a testatrix directed her executors to pay 100*l.* a year to her bankers, for the sole use and benefit of any of the ministers and members of the churches then forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who might be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines; or half the sum might be appropriated for the benefit of the church founded by the late Edward Irving in Newman Street:—Held, that the above was a valid charitable bequest to the class ascertained by the Master. *Attorney General v. Lawes*, 19 Law J. Rep. (N.S.) Chanc. 300; 8 Hare, 32.

(b) *What passes by.*

A testator directed payment of his debts, and then bequeathed certain sums of money to his executors in trust, for the benefit of certain poor persons. The testator at his death was possessed, amongst other things, of divers shares in certain gas-light, dock, and railway companies, which, by deeds or acts of parliament, were agreed or declared to be personal estate. The pure personal estate of the testator being insufficient to fully satisfy all the legacies given by his will,—Held, that the shares in the several companies were applicable to the payment of the charity legacies. *Sparling v. Parker*, 16 Law J. Rep. (N.S.) Chanc. 57; 9 Beav. 450.

The parish of W H was formerly divided into three divisions, called S, P, and C; and charitable gifts had been made to the parish of W H for these divisions separately. A district parish was formed out of the S division, and another district parish was made up of the P division:—Held, that under the two acts, the gifts given for the S division might be apportioned between the district parish forming part of the S division, and the remaining part of the S division, and that the gifts given for the P division might be given to the new district parish made up of the P division. *In re West Ham Charities*, 17 Law J. Rep. (N.S.) Chanc. 441; 2 De Gex & S. 218.

A testatrix gave all her property, consisting of leaseholds and personalty, to her brother, who died nine days after her, and by his will bequeathed the whole of his property to charities:—Held, that as it was the duty of the representatives of the testatrix to sell the leaseholds for payment of debts, &c., the brother, who had made no election, took the leaseholds as personalty, and the charities were, therefore, entitled to them under his will. *Shadbolt v. Thornton*, 18 Law J. Rep. (N.S.) Chanc. 392; 17 Sim. 49.

A testator directed his executors to purchase a piece of land called "the Mount," and to build thereon a mausoleum for the interment of himself and certain members of his family. The residue of his estate the testator bequeathed to the Government of Bengal for charitable purposes. On a reference being directed, the Master found that the owner of "the Mount" had refused to sell the property:—Held, that as the first direction had not been carried into execution, the subsequent charitable bequest took effect in the same manner as if the first clause had not been introduced into the will, and that the whole of the residue belonged to the Government

of Bengal. *Mitford v. Reynolds*, 17 Law J. Rep. (N.S.) Chanc. 238; 16 Sim. 105.

(C) ADMINISTRATION.

(a) *Scheme.*

[See ECCLESIASTICAL COMMISSIONERS.]

A testator, born in Scotland, and educated at Glasgow College, by his will, dated in 1677, when he was resident in England, where he died in 1679, gave the residue of his estate to trustees for the maintenance and education, at the University of Oxford, of scholars born and educated in Scotland, who should have spent a certain time as students at Glasgow College; and he declared it to be his will that every such scholar should, upon his admission at Oxford, execute a bond conditioned for payment of 500*l.* to the college if he should not enter into holy orders, and if he should accept any spiritual promotion, benefice, or other preferment in England or Wales, it being the testator's will that every such scholar should return to Scotland, there to be preferred and advanced as his capacity should deserve, but in no case to come back into England, nor to go into any other place, but only into Scotland, for his preferment.

Glasgow College was Presbyterian while the testator was a student there; but Episcopalian at the dates of his will and of his death; soon after which, Presbyterianism became by law the established form of church government in Scotland, and has so continued, the Protestant Episcopal Church being always tolerated, and recently recognized by law, but not endowed.

In 1693, a decree was made establishing this charity, and thereby it was declared that Baliol College should receive the testator's exhibitors, according to the condition of his will; and directions were given as to the number of students, and their stipends, &c., but no scheme was directed. This decree was adopted by Lord Hardwicke in 1744, and a decree was then made directing a scheme for the administration of the charity, *cy pres*, it being impossible to carry the testator's intentions strictly into effect. The scheme was confirmed by a decree of Lord Henley, in 1759, with certain variations as to increasing the number of exhibitors, and their stipends. Under these decrees students had been admitted for many years at Baliol College from Glasgow College, without regard to their destination for holy orders or their return to Scotland.

Upon an information, filed in 1845, at the relation of members of the Protestant Episcopal Church in Scotland, a decree was made directing the Master to inquire whether the scheme sanctioned by the former decrees, and according to which the charity had been administered, could be varied so as to make it more effectually conducive to the supply of the Protestant Episcopal Church in Scotland with competent clergymen, being natives of Scotland, and educated at Glasgow and Oxford; and in making such inquiry, the Master was to have regard to the said will, and to the circumstance that at its date the established Church of Scotland was Episcopal, and is now Presbyterian:—Held, that the proposed inquiry contemplated a new scheme, inconsistent with that under which the charity had been administered for more than a century, as near to the testator's

intentions as was practicable, and that the proposed alteration of it was not warranted by any alteration in the state of the law and Church in Scotland. *Glasgow College v. the Attorney General*, 1 H. L. Cas. 800., reversing 2 Coll. C.C. 665.

Peter Blundell, by his will, dated in June 1599, directed his executors to lay out 2,400*l.* in building a school at Tiverton; that in the said school should not be taught above 150 scholars at any one time, and these to be of children born, or for the most part before their age of six years brought up, in the town of Tiverton, and if the said number be not filled up, that the want should be supplied with the children of foreigners, to be admitted with the assent of such ten householders as for the time being should be most in the subsidy books of the Queen, and no boy should continue in the school above the age of eighteen, or be admitted under the age of six years, and none under a grammar scholar. The testator then gave directions as to the payment of a schoolmaster and usher, and desired that they would hold themselves satisfied and content with the recompense he had provided for their travail, without seeking or exacting any more, either of parents or children, his meaning being that it should be for ever a free school, and not a school of exaction. The testator gave other sums for the establishment of scholarships at the universities.

Upon an information filed against the trustees of this charity for a scheme for the general regulation and management of the funds, and for an alteration in the system of education,—it was referred to the Master to inquire into and state the annual income of the charity; and it was declared that the schoolmasters ought not to receive payments for the scholars or take boarders; that none but boys educated as free scholars were eligible to the scholarships and exhibitions; and that the testator, by the term “foreigners” meant any children not born or brought up in the parish. The Master was to inquire what salaries ought, under such circumstances, to be paid to the schoolmasters, and if their number ought to be increased; and whether it would be desirable to apply part of the funds in providing instruction in matters of science and literature, and in modern languages, and to declare what new qualification should be prescribed for the ten householders in lieu of subsidy books as directed by the will. *Attorney General v. Devon (Earl)*, 16 Law J. Rep. (N.S.) Chanc. 34; 15 Sim. 193.

The statutes of Manchester Free Grammar School declared that the master and usher (who had stipends) should teach freely and indifferently every scholar coming to the school, without money or reward taken therefore; that no scholar of what county or shire soever should be refused; that no scholar should bring meat or drink into nor should any one lodge in the school; that vacancies in the trusteeship should be supplied by honest gentlemen and honest persons within the parish of Manchester; and that the trustees should have full power to augment, increase, expound, and reform the provisions of the statutes only concerning the schoolmaster, usher, and scholars. The master and usher had for several years taken boarders who had participated in the benefits of the charity; and the trustees had been generally noblemen and gentlemen residing not in Manchester, but in Lan-

cashire, and the adjoining counties:—Held, that the master and usher should not be allowed to take boarders, and that the trustees should be appointed from honest persons residing in the parish of Manchester, including those who occupied or carried on business in manufactories in the parish, and had dwelling-houses within six miles of the school-house. *Attorney General v. Stamford*, 16 Sim. 453.

The exhibitions of a free grammar school confined to the poor boys on the foundation, and the boarders allowed to be taken by the head master excluded from participating in them. *Solicitor General v. Bath, Attorney General v. Blair*, 18 Law J. Rep. (N.S.) Chanc. 275.

In 1832 a Presbyterian church and school in England were settled upon trust “for the worship and service of God, according to the rites and usages of the Established Church of Scotland,” the services “to be conducted by a minister belonging to and in full communion with the same church.” A minister eligible in these respects, and licensed by the presbytery of Edinburgh, was appointed and continued minister. In 1843 the Free Church seceded from the Established Church of Scotland upon points of discipline, but not of doctrine. The appointed minister adhered to the Free Church. He was cited before the Presbytery of Edinburgh, but declined to attend, and was by it declared no longer a licentiate or minister of the Church of Scotland. Shortly afterwards the General Assembly of the Church of Scotland in due form declared that all adherents of the Free Church ceased to be members of the Church of Scotland:—Held, that according to the provisions of the deed the minister was no longer qualified to fill the office, and a decree was made for his removal, and directions given for the future administration of the charity. *Attorney General v. Munro*, 2 De Gex & S. 122.

A schoolmaster retained all the rents of a charity estate after making small fixed payments to almspeople. At the hearing, the Court held that he was not entitled to do so, and made a decree referring it to the Master to inquire of what the charity estate and property consisted, and to settle a proper scheme for the management of the estates and property, and for the application of the future rents and profits of the school. No account was directed against the schoolmaster:—Held, that “future rents” meant all subsequent to the decree, and the schoolmaster having died before the scheme had been settled, the Court, on a supplemental information, directed an account against his personal representatives of the rents received subsequent to the decree. *Attorney General v. Tufnell*, 12 Beav. 35.

A testatrix gave 1,000*l.* consols to trustees, upon trust to apply the dividends to the providing each poor inmate of the D Union Workhouse above sixty years with a pint of porter. By the Poor Law Amendment Act, the introduction of fermented liquors into a workhouse was forbidden. The trustees submitted to act as the Court should direct. An order was made that the dividends should be paid to the vicar of the parish of D, to be applied by him pursuant to the provisions of the will, so far as the same might be consistent with the Poor Law Amendment Act. *Attorney General v. Vint*, 19 Law J. Rep. (N.S.) Chanc. 150.

A charity was established in the reign of

Hen. 8. for two chaplains and twelve poor. In 1572, Queen Elizabeth, by letters patent, gave power to A, B and C to make ordinances for the regulation and management of the charity. In 1574, A, B and C made ordinances giving to the master the whole management of the charity property, and authorizing him to let on fines, and to appropriate the fines to his own use. In 1576, an act of parliament confirmed the charter of 1572 and the ordinances made or to be made by A, B and C. By letting on fines the property, which was worth 7,000*l.* a-year, produced on an average only 1,200*l.*; nearly half of which consisted of fines, and was received by the Master:—Held, that this ordinance was not authorized by the charter or confirmed by the act of parliament; and that even if it were, the mode of proceeding being prejudicial to the objects of the charity, the Court would direct a new mode of management to be adopted. *Attorney General v. Wyggeston Hospital*, 12 Beav. 113.

(b) Trustees.

(1) Controul over in general.

Though a trustee for a public charity is not called on for twenty years by the body to whom he is accountable to account, yet it is his duty to tender his accounts without requisition; and if he do not, he is liable to the costs of an information filed to compel an account, even though in the result the charity prove to be indebted to such trustee. *Attorney General v. Gibbs*, 1 De Gex & S. 156.

A testator gave the rents of real estate to trustees, in trust, to pay the same to such sufficient, able, and orthodox minister as should be from time to time settled in the cure of S, by and with the consent and approbation of the trustees; and declared that, if any such should be placed there without the consent or approbation of the trustees, they should apply the rents in another way. On the occasion of a vacancy in the cure, the patron announced to the trustees his intention of nominating C to the cure. In reply to this, the trustees stated their wish that a residence should be built in the parish for the incumbent, and that arrangements should be made for charging the rents with it. Some negotiations were entered into respecting this matter, but the scheme failed. The trustees having declined to make any payment to C, an information was filed against them at the relation of C for payment of the rents to C, or for a new scheme. The information was dismissed. *Attorney General v. Mosley*, 17 Law J. Rep. (N.S.) Chanc. 446; 2 De Gex & S. 398.

Certain copyhold lands having been devised to trustees for the benefit of a charity, and the copyholds having been enfranchised, the Court directed the trustees to convey the legal estate to the company. *Attorney General v. Clothworkers' Co.*, 17 Law J. Rep. (N.S.) Chanc. 456.

(2) Appointment of new Trustees.

Under what circumstances the Court will make an order for filling up vacancies in charity trustees under the Municipal Corporations Act. *In re Shrewsbury Charities*, 1 Mac. & G. 84.

The Court will not make an order for filling up the vacancies in charity trustees by the appointment

of particular individuals without a reference to the Master.

Where an unnecessary party had been served with a petition solely in consequence of a claim set up by him, he was left to bear his own costs. *In re Shrewsbury School*, 1 Mac. & G. 85; 1 Hall & Tw. 204.

The Court will not fill up vacancies in charity trustees under the Municipal Corporations Act, unless the existing number is practically insufficient. *In re Worcester Charities*, 2 Ph. 284.

(c) Estates.

In 1699, a lease of charity land was granted for 999 years at a rent very little more than had for some time been received for it. The lessee covenanted to build upon the land. That lease was in 1849 set aside as to a part of the land comprised in it, on an information filed against the assignee of that part only, and he was held not to be entitled to any allowance in respect of the building which had been erected upon the land. *Attorney General v. Pilgrim*, 2 Hall & Tw. 186.

Lease of charity lands for 999 years, subject to a fixed rent of 10*l.*, and a covenant to lay out 300*l.* in building, set aside after 150 years, and an allowance for the building refused.

An alienation of charity property may be valid, but the onus of proof lies on the alienee. *Attorney General v. Pilgrim*, 12 Beav. 57.

In letting charity lands the Court will look only to the benefit of the charity, and will accept the offer of a stranger to become tenant over that of an old tenant, if the excess of the rent offered by the stranger exceeds the compensation to which the old tenant is equitably entitled on being turned out; and a reference will be directed to ascertain whether any and what compensation should be paid to the outgoing tenant for his outlay of capital on the lands. *Attorney General v. Gains*, 10 Beav. 63.

(D) JURISDICTION OVER.

(a) Of the Court of Chancery.

(1) In general.

A large fund was raised by small contributions for the purpose of purchasing land as a site for a Presbyterian church and school. With a part of these monies, one of the subscribers, in December 1848, purchased a piece of freehold land for that purpose, and took the conveyance to such uses as he should appoint. In May 1839, he appointed it to the use of trustees upon trust for the establishment of a church and school accordingly. There was doubt whether as to either of these deeds the provisions of the Mortmain Act had been complied with. In a suit by information and bill, instituted by some of the trustees of the deed of May 1839, against the remaining trustees, and the minister of the church and a mortgagee (also one of the original subscribers to the fund) complaining that the minister of the church had ceased to be qualified according to the trusts of the deed, and seeking to enforce the performance of those trusts:—Held, first, that if the deeds were invalid for non-compliance with the Mortmain Acts, the trusts could not be enforced in equity.

Secondly, that the plaintiffs declining to try the validity at law, the equities existing between the parties did not enable the Court to interfere.

Thirdly, that the suit was defective for want of parties on the ground that the original subscribers were not distinctly represented. *Attorney General v. Gardner*, 2 De Gex & S. 102.

(2) *On Petition.*

Where an act of parliament has provided for the application of the surplus funds of a charity, but the mode of application thereby pointed out has become inexpedient or useless, the Court has jurisdiction upon the petition of the trustees under Sir S. Romilly's Act, to direct an inquiry before the Master as to the expediency of applying for another act of parliament to authorize an application of the surplus in a different mode. *In re Shrewsbury Grammar School*, 19 Law J. Rep. (N.S.) Chanc. 287; 1 Mac. & G. 324; 1 Hall & Tw. 401.

[*Attorney General v. Bristol*, 5 Law J. Dig. 171; 14 Sim. 648.]

(3) *By Information.*

An information was filed in the year 1821, against the trustees of a grammar school founded in the reign of Edw. 6, praying that a new scheme might be approved of for the management of the school. Pending these proceedings, the trustees, in the year 1838, themselves made new regulations for the school, to which the usher, who was appointed previously to the filing of the information, was ordered to conform. The usher refused to be bound by such new regulations, and was consequently dismissed, and now presented a petition, under Sir S. Romilly's Act, alleging that the trustees of the school had no power to alter the rules, and praying that he might be reinstated:—Held, that the Court had no power, except under an information, to decide whether the trustees had power to alter the regulations of the school. Petition dismissed, with costs. *Attorney General v. East Retford Grammar School*, 17 Law J. Rep. (N.S.) Chanc. 450.

(b) *Of the Visitor.*

If on the true construction of the statutes of a college, the college are trustees for the maintenance of a free grammar school for the public, the Court having authority to enforce the execution of the trust, any breach of trust will be redressed by it in the exercise of its ordinary jurisdiction; but if the master and usher of the school are only officers appointed to perform certain duties of the college, and the duty of appointing them is not otherwise annexed to the mere property of the college than by the necessity of paying certain fixed stipends, and not in the nature of a trust the execution of which is within the jurisdiction of the Court to enforce, but the observance of which is to be enforced by the visitor of the college, the breach of duty, whatever it may be, must be redressed by the authority of the visitor, and not in this court. *Attorney General v. Magdalen College, Oxford*, 16 Law J. Rep. (N.S.) Chanc. 391; 10 Beav. 402.

An almshouse, called Brown's Hospital, was founded at Stamford by letters patent, in the

reign of Ric. 3, and statutes and ordinances for its regulation were made by the founder. These statutes and ordinances were revised in the reign of Jac. 1, when it was directed by letters patent that the Bishop of Lincoln for the time being should from time to time examine and inquire into the ancient statutes, laws, and ordinances of the charity, and should abolish such as were repugnant to the laws of the kingdom, and should make such other good and salutary laws and ordinances, as well concerning the divine services as concerning the government and direction of the warden, confrater, and poor to be supported in the hospital, as should appear to the said bishop good, useful, fit, and salutary, so long as they should not be inconsistent with the laws of the realm or the statutes of the founder:—Held, upon an information filed to effect an alteration in the management of the charity, that the Bishop of Lincoln was not entitled to general visitatorial powers, and could exercise no controul over the revenues of the hospital, which were subject to the jurisdiction of this Court. *Attorney General v. Brown's Hospital*, 19 Law J. Rep. (N.S.) Chanc. 73; 17 Sim. 137.

(c) *Of Supreme Court at Madras.*

The Supreme Court at Madras (established by the Madras Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England, over charities.

By the 53 Geo. 3. c. 155. s. 111, the Advocate-General is entitled to appear and represent the Crown in informations for the administration of charitable funds. *Attorney General v. Brodie*, 6 Moore, P.C. 12; 4 Moore, In. App. 190.

(d) *Of Commissioners for Ireland.*

By the Act 7 & 8 Vict. c. 97, the power of the Commissioners of Charitable Donations and Bequests for Ireland to sue for the recovery of such donations and bequests, is expressly limited to cases where they are withheld, concealed or misapplied; and the same, when recovered by the Commissioners, are to be, by themselves, applied to charitable uses, according to the donor's intention. And although they obtain the sanction of the Attorney General to their suit, as required by the said act, they must maintain it according to the power of suing thereby given to them, and are not entitled to the general jurisdiction which the Court exercises in suits instituted by the Attorney General.

A decree, therefore, made at the suit of the Commissioners, first, removing a testamentary trustee of a charity, on the grounds of his bankruptcy and residence abroad, but without proof of any *improper* withholding, or concealment, or misapplication of the trust property; and, secondly, directing the appointment of another trustee in his place, is wholly wrong.

Seemle—that neither bankruptcy, nor occasional residence abroad, disqualifies a testamentary trustee, to whom the testator has, unconditionally, confided a large personal discretion in the administration of the trusts, together with power to appoint a receiver of the rents of the trust estates.

Where the fact of bankruptcy is not put in issue

by the bill, evidence of it is not admissible at the hearing of the cause.

If a bill alleges fraud, which is not proved, and also alleges other matters, which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is not proved, and to give so much relief, under the circumstances, as the plaintiff may be entitled to. *Archbold v. Commissioners of Charitable Donations and Bequests for Ireland*, 2 H.L. Cas. 440.

(E) INFORMATION BY THE ATTORNEY GENERAL.

Under a will, dated 1624, real and personal property was vested in the corporation of R upon trust, for the poor of the town, and if they neglected to perform the trusts or misemployed the property for one year, the will gave it to the corporation of London in trust for Christ's Hospital. In 1639 a decree was made on information in the Exchequer against both corporations, directing the corporation of R to apply the income for the benefit of the poor of the town, but in a manner different from that prescribed by the will, and that on neglect to do so or misemployment of the property for one year, they should convey it to the corporation of London in trust for Christ's Hospital. The corporation of R neglected to perform the directions of the decree for several years. In 1837 certain trustees of the property were appointed under the Municipal Corporations Act. The decree of 1639 held to be binding, and the legal estate in the property to be still in the corporation of R, and they were ordered to convey it according to the decree. *Christ's Hospital v. Grainger*, 16 Sim. 83.

An information was filed by the Attorney General in 1710 to recover certain lands, formerly chantry lands, which had been granted by King Edw. 6. for the benefit of the Morpeth School, against the defendants, who represented the Thornton family, to whom a lease of the lands for 500 years had been granted in 1685. A commission was issued to ascertain the identity of the lands. The commissioners reported that they were unable to ascertain which were the chantry lands. No final decree was made in consequence of a compromise having been entered into between the parties, by which it was agreed that 100*l.* per annum should be paid to the charity, and that an act of parliament should be obtained to carry the compromise into effect, but that if the act should not be obtained within two years, then that the agreement should not be binding. No such act was ever passed, but the owners of property continued to pay the 100*l.* per annum up to the present time, being a period of 130 years. Another information was filed in 1833, to have the benefit of the proceedings commenced in 1710, and prayed that the lease for 500 years might be set aside, and that the chantry lands might be ascertained:—Held, that the stipulation as to obtaining an act of parliament not having been performed, the parties were in the same situation as at first, and the relators were entitled to the benefit of the proceedings under the original information; and that an inquiry ought to take place to ascertain what portion of the lands would be of equal value to those granted by King Edw. 6. *Attorney General v. Trevelyan*, 16 Law J. Rep. (N.S.) Chanc. 521.

(F) PLEADING AND PRACTICE.

Charity trustees allowed to file a bill against the Attorney General to have the accounts of the charity taken, and to be personally discharged from liability in respect thereof, on their submitting to such account as the Attorney General would be entitled to ask against them in an information filed by him; and in the same suit, if the Attorney General desires it, the Court will direct a reference for a scheme. *Governors of Christ's Hospital v. the Attorney General*, 5 Hare, 257.

Applications under the 8 & 9 Vict. c. 70. s. 22. for the apportionment of charitable gifts given to a parish between a district parish formed out of it and the remainder of the parish, ought to be headed both in the matter of the 8 & 9 Vict. c. 70. and in the matter of the 52 Geo. 3. c. 101.

In such applications it is not necessary to allege or prove any abuses in the past or existing management of the charities. *In re West Ham Charities*, 17 Law J. Rep. (N.S.) Chanc. 441; 2 De Gex & S. 218.

After some disputes between a corporation and trustees of charity estates, a compromise was agreed on and confirmed by act of parliament, under which the corporation were to sell certain estates, and out of the proceeds pay to the trustees a gross sum of money by a fixed day. The money was not paid by the time appointed; but there being no case of wilful default made against the corporation, it was held that they were not liable to pay interest on the gross sum. *Attorney General v. the Corporation of Ludlow*, 1 Hall & Tw. 216.

Monies were subscribed to purchase land and erecting thereon a Presbyterian church and school. Lands were purchased with portions of the fund, and conveyed to three releasees in fee, by deeds not perfected according to the requisites of the Mortmain Act, nor disclosing any charitable trust. The releasees, by a subsequent deed, conveyed the lands upon trust to be re-conveyed to them and others; and by a fourth deed, all the lands were assured to the use of the first releasees and others, upon trust, for maintaining a place of worship and schools in connexion with the Established Church of Scotland, for the purposes of which they were held and used by the trustees. The last of these deeds only was perfected under the Mortmain Act. On an information and bill filed by some of the trustees and some of the *cestuis que trust* under the fourth deed to enforce performance of the trusts,—Held, first, that whether the three former deeds were or were not void, some of the parties to the fourth deed being at the time of its execution in possession of the lands dedicated by that deed to charitable purposes, and the possession having been subsequently held according to that deed, none of the parties could be heard to dispute its validity. Secondly, that the liability of the lands to be recovered by title paramount to that of the grantor was no objection to the suit.

Doubts being in 1844 entertained whether any one of the four deeds of 1832 were valid, some of the trustees claimed the land under a title paramount, treating the deeds as invalid, and brought a friendly action of ejectment against the minister in possession, in which the question was fairly

argued, and recovered judgment in such action, and the same trustees and the minister set up the title under the ejectment of 1844 as an adverse title in the suit to enforce the trusts of the deeds of 1832. The Court ordered them on this ground to pay the costs of the suit to the hearing.

Some of the parties to the suit were original subscribers to the fund, but they were parties in other characters; no subscriber solely represented, or was made party to represent, the original subscribers as a class:—Held, that the suit was not defective for want of parties. *Attorney General v. Munro*, 2 De Gex & S. 122.

(G) COSTS.

A charity scheme was directed. The relator without the sanction of the Master incurred expense in obtaining information. The Court refused to allow the ordinary costs, but as it had proved useful to the charity allowed the money out of pocket *bonâ fide* expended. *Attorney General v. Ironmongers' Co.*, 10 Beav. 194.

The Master was directed to charge defendants with the rents of a charity property from the filing of the information come to their hands. He charged them with rents accrued before, but paid after that period. This report was confirmed. On petition by the defendants to be relieved from payment, the Court declined to interfere except on a re-hearing, as there was no plain mistake in the mode of taking the accounts. *Attorney General v. the Drapers' Co.*, 10 Beav. 558.

A trustee for a charity, against whom an information was properly filed, made a case by his answer, from which it must have been manifest that the trustee was not a debtor to the charity, and that the result of taking the accounts would not be of advantage to the charity. A decree was, nevertheless, sought and obtained, directing the accounts to be taken:—Held, that no costs subsequent to the hearing ought to be given on either side. *Attorney General v. Gibbs*, 1 De Gex & S. 156.

Exceptions to the Master's report taken by the Attorney General, proceeding *ex officio*, having been allowed, the costs of like exceptions taken by trustees of the charity were allowed out of the charity estate, with the consent of the Attorney General.

The decree having reserved subsequent costs, the Court has power to give the defendants the extra costs of exceptions to the report which had been abandoned by the Attorney General. *Attorney General v. Ward*, 17 Law J. Rep. (N.S.) Chanc. 485; 11 Beav. 203.

Whether the trustees of charity lands are entitled as of right to be heard in support of the Attorney General appearing for the charity—*quære*.

An information on behalf of a charity against a corporation claimed certain lands long since confounded by the latter with its own property, and of which it had granted building leases. The claims of the charity only partially succeeded, and no fraud was imputable to the corporation. The information also prayed for a scheme in respect of the charity. The Court, to avoid the expense and difficulty of apportioning and setting off the costs, gave none to the corporation, and ordered those of the other defendants and of the relators to be paid out of the charity funds. *Solicitor General v. the*

Corporation of Bath, Attorney General v. Blair, 18 Law J. Rep. (N.S.) Chanc. 275.

CHARTER.

[See MUNICIPAL CORPORATION.]

CHELSEA HOSPITAL AND PENSIONERS.

Poundage on pensions abolished by 10 Vict. c. 4; 25 Law J. Stat. 4.

Acts rendering effective the service of Chelsea and Greenwich out-pensioners amended by 10 & 11 Vict. c. 54; 25 Law J. Stat. 194.

CHESTER.

Doubts as to the election of members of parliament removed by 9 & 10 Vict. c. 44; 24 Law J. Stat. 120.

CHURCH.

[See CLERGY—PREROGATIVE—SEQUESTRATION—TITHES.]

(A) CATHEDRAL CHURCH [JURISDICTION OF VISITOR, AND APPEAL TO VISITOR AGAINST OUSTER].

(B) DISTRICT CHURCH. [See (D) Commendam.]

(C) PAROCHIAL CHAPELRY.

(D) COMMENDAM.

(E) SEXTON [RIGHT TO APPOINT].

(F) CHURCHYARD. [See (I) Church Building Act.]

(G) LEASES [CONFIRMATION OF].

(H) DILAPIDATIONS.

(I) CHURCH BUILDING ACT.

The holding of vestry and other meetings in churches prevented, and the appointment of vestry clerks provided for by 13 & 14 Vict. c. 57; 28 Law J. Stat. 110.

(A) CATHEDRAL CHURCH [JURISDICTION OF VISITOR, AND APPEAL TO VISITOR AGAINST OUSTER].

To a mandamus to restore J H to the freehold office of chorister, lay clerk or singing-man of the Cathedral Church of Chester, conferring a right to vote for members of parliament, to which he had been duly appointed by the dean and chapter of such cathedral church, and from which he had been unjustly and without reasonable cause removed by the said dean and chapter, there was a return stating the foundation of the cathedral church, and some of the rules, ordinances and statutes for the government of the same, providing, amongst other things, for the expulsion of any of the lay clerks skilled in singing, at the discretion of the dean and chapter, and appointing the Bishop of Chester for the time being visitor of the cathedral church, to watch and take special care that the statutes and ordinances were inviolably preserved, and to visit the church,

and upon every one of the articles contained in the statutes, and upon every other article whatever that concerns the state, advantage and honour of the church, to interrogate the dean and all other ministers of the church concerning any misdemeanours or crimes whatsoever, and to punish or correct the same, and to execute everything necessary for the extirpation of vice, and judged lawfully to belong to the office of visitor:—Held, upon demurrer to the return, that the Bishop of Chester, as ordinary and special visitor, had exclusive jurisdiction to inquire into and determine the legality of the removal; and that an appeal to the bishop for that purpose was the only mode by which the party removed could properly proceed.

Held, also, that the omission to state in the return the particular offence on account of which the removal had taken place, was no good ground of objection to the return. *Regina v. Dean and Chapter of Chester*, 19 Law J. Rep. (N.S.) Q.B. 485; 15 Q.B. Rep. 513.

(B) DISTRICT CHURCH.

[See (D) Commendam.]

(C) PAROCHIAL CHAPELRY.

A parochial chapelry must have been coeval with the parish, that is, immemorial, but, in the absence of evidence to the contrary, its existence may be inferred from modern usage, like other ancient rights and exemptions.

"Chapelry" in the 1 & 2 Will. 4. c. 38. s. 14. means a parochial chapelry strictly so called, not merely a district recently treated as a parochial chapelry.

Upon a trial, in which the question at issue was whether St. H was a parochial chapelry, the statement of a witness of what he had heard from a prior incumbent of St. H as to the chapelry of St. H is admissible, as the rights of such a chapel are of a public nature.

Held, also, that a return made by the incumbents of St. H and of the mother church of Prescott, and another clergyman, in answer to queries sent to them by the bishop of the diocese, for the information of the Governors of Queen Anne's Bounty, when an augmentation took place, was admissible, as being in the nature of an inquisition in a public matter.

Held, also, that a case stated by a former incumbent of St. H for the opinion of a proctor, was admissible against his successor.

Facts upon which the Court, acting as a jury, held that the claim to be a parochial chapelry was not established. *Carr v. Mostyn*, 19 Law J. Rep. (N.S.) Exch. 249; 5 Exch. Rep. 69.

(D) COMMENDAM.

The first count of a declaration stated that the plaintiff was rector of parish A, and as such rector entitled to certain fees for churchings and registration of baptisms. That an order in council was made erecting a district chapel within the said parish, which directed that two-thirds of the fees arising from the solemnization of marriages, churchings, baptisms and burials in the said chapel should during the incumbency of the plaintiff belong and be paid to the plaintiff, and the residue to the minister of the said district chapel. That the de-

fendant was appointed minister of the said district chapel, and by reason thereof became the proper person to solemnize marriages, &c. in the said chapel, and to receive the fees accruing in respect thereof; that it thereby became the duty of the defendant to receive such fees and to pay to the plaintiff as such rector two-thirds thereof; that in consideration of the premises, and that the plaintiff at the request of the defendant had permitted the defendant to receive the said fees, the defendant promised to receive all fees and pay over two-thirds to the plaintiff. Averment, that marriages, &c. had been solemnized within the said chapel by the defendant, and that fees became due in respect thereof which the defendant could and might have received. Breach, that the defendant wrongfully neglected to receive such fees, &c. and had not paid two-thirds thereof to the plaintiff. The second count was for money had and received. The defendant pleaded non assumpsit; that the plaintiff was not the rector of the parish A, and also that he had accepted another living of W, whereby the benefice of A became void. The evidence was that the plaintiff was duly instituted and inducted to the rectory of A in 1810, and had ever since acted as such, no other person having been presented thereto by the patron. The living of A was not rated in the king's books, and was created by an act which expressly prohibited it from being held in commendam. In 1820 the plaintiff accepted the living of W. The district chapel mentioned in the declaration was duly erected within the parish A, and the order in council stated in the declaration was made on the 20th of June 1843. In 1842 the defendant was duly appointed minister of the district chapel. At the time of the making the order in council there were certain accustomed fees payable in parish A, in respect of marriages, churchings, baptisms, &c. The defendant had received the fees for marriages, but had never received any fees in respect of baptisms or churchings:—Held, first, that no duty was imposed on the defendant to receive the fees for churchings and baptisms for the purpose of paying two-thirds over to the plaintiff, and that the first count was not proved.

Secondly, that the title of the plaintiff to the rectory of A was not absolutely avoided by his acceptance of W, and that he was therefore entitled under the second count to recover two-thirds of the fees for marriages actually received by the defendant.

Semble—per *Patteson, J.* that the first count would be bad on demurrer, for not shewing any consideration moving from the plaintiff. *King v. Alston*, 18 Law J. Rep. (N.S.) Q.B. 69; 12 Q.B. Rep. 971.

(E) SEXTON.

Right to appoint.

The inhabitants of a parish in vestry assembled have not at common law the right of appointing to the office of sexton. The presumption is that the incumbent has the power of appointing when the offices of parish clerk and sexton are united. But when they are separate, and the sexton's duty is to take care of the things in the church and to keep it in order, and also to dig the graves,—*semble*, that the right of appointing the sexton belongs to the minister and churchwardens together. *Cansfield v.*

Blenkinsop, 18 Law J. Rep. (N.S.) Exch. 861; 4 Exch. Rep. 234.

(F) CHURCHYARD.

[See (I) Church Building Act.]

(G) LEASES.

Confirmation of by Patron Paramount.

The perpetual curate of a curacy, augmented by the Governors of Queen Anne's Bounty, made a lease for years of mines, &c., which was confirmed by the ordinary and immediate patron, but was not confirmed by the patron paramount. The successor of the perpetual curate accepted the rent reserved for five years, and inspected the mines under the powers contained in the lease:—Held, that the lease was void at common law for want of confirmation by the patron paramount, and, therefore, was not set up by the acceptance of rent by the lessor's successor in the curacy. *Doe d. Brammall v. Collinge*, 18 Law J. Rep. (N.S.) C.P. 305; 7 Com. B. Rep. 939.

(H) DILAPIDATIONS.

A perpetual curate (not removable at the will of the donor or patron) possessed of a house and lands in right of his curacy, is bound to keep the same in repair. Therefore an action for dilapidations is maintainable by the new incumbent against his predecessor in the curacy for leaving such house or lands out of repair. *Mason v. Lambert*, 17 Law J. Rep. (N.S.) Q.B. 366; 12 Q.B. Rep. 795.

The executors of a deceased rector are not liable in an action on the case for dilapidations, by reason of such rector's having pulled down a barn belonging and adjoining to the rectory, and erected another at the distance of a mile and a half on a more convenient site, and on rectory land, without obtaining a faculty or licence from the bishop for that purpose. Nor are they liable for dilapidations in respect of buildings which are not parcel of the freehold.

Where gravel pits had been opened on rectory land, and gravel taken therefrom by the surveyors of the highways for the purpose of their repair, without sloping down the ground, as required by the statute 13 Geo. 3. c. 78. s. 31,—Held, that neither the taking such gravel by the surveyors and omitting to slope down, nor the neglecting to compel the surveyor to slope down, could be considered waste on the part of the rector.

Held, also, that under a plea of no waste to a count in the nature of waste charging the removal of the gravel and the neglect to slope down, the defendants (the executors) might shew that the acts done were the acts of the surveyor of the highways.

But held, that the defendants were liable in respect of so much of the gravel as was dug out and sold generally by the rector himself, such digging and sale being equivalent to an opening of gravel pits. *Huntley v. Russell*, 18 Law J. Rep. (N.S.) Q.B. 239.

In an action for dilapidations the declaration alleged that the rector "was rector of the parish church of T, in the county aforesaid, and was seised in right of the said rectory of certain buildings thereto belonging, and of certain glebe lands, lying

and being, to wit, in the parish aforesaid." It appeared that the rectory comprised the parish of C, in which the greater part of the glebe lands were situate:—Held, that the plaintiff was entitled to recover only in respect of dilapidations to premises in the parish of T. *Warren v. Lugger*, 18 Law J. Rep. (N.S.) Exch. 256; 3 Exch. Rep. 579.

An action is maintainable by the executors of a deceased incumbent against the executors of his predecessor, for dilapidations which occurred during the incumbency of the predecessor. *Bunbury v. Hewson*, 18 Law J. Rep. (N.S.) Exch. 258; 3 Exch. Rep. 558.

(I) CHURCH BUILDING ACT.

Under the 59 Geo. 3. c. 134. s. 39. the Church Building Commissioners are empowered to stop up paths and entrances in churchyards, with the consent of two Justices, and on notice being given in the manner and form prescribed by 55 Geo. 3. c. 68:—Held, that the notice required must be given before the making of the order by the Commissioners. *Regina v. Arkwright*, 18 Law J. Rep. (N.S.) Q.B. 26; 12 Q.B. Rep. 960.

CHURCHWARDENS AND OVERSEERS.

[See Poor, Audit, and Order of Removal—RATE, Poor Rate.]

(A) ELECTION AND APPOINTMENT OF.

(B) DUTIES AND LIABILITIES.

(C) VESTING OF PROPERTY IN.

(A) ELECTION AND APPOINTMENT OF.

In the parish of S, in London, there was a select vestry, consisting of the parson and those persons who had served the office of churchwarden, or paid a fine for not doing so; and by this body the churchwardens were elected. From the earliest records of the parish, commencing in 1648, it appeared that a fresh churchwarden was annually elected to serve the office of junior churchwarden, and the junior churchwarden for the preceding year became the senior churchwarden for that year. This custom had been acted upon from the year 1648 up to the great fire of London, when two persons acted as junior and senior churchwardens during five years; the custom was then renewed and acted upon up to the year 1734, and during the interval from that year to 1775 there were no records; from the latter year to 1824 the same course was pursued, with four exceptions. Upon a case, on which it was agreed that the Court should have the power of drawing inferences in the same manner as a jury,—Held, that there was a custom that a parishioner, not a member of the select vestry, should be elected every year to serve the office of junior churchwarden, who in the next ensuing year should succeed to the office of senior churchwarden, and at the expiration of that year should become a member of the select vestry, by which means its members would be supplied; and that the election of G, a member of the select vestry, who had served previously the offices of junior and senior churchwarden, to serve the office of junior churchwarden in

1844 was void. *Gibbs v. Flight*, 16 Law J. Rep. (n.s.) M.C. 73; 3 Com. B. Rep. 581.

In ejectment by churchwardens and overseers, proof that the lessors of the plaintiff have acted in that capacity is sufficient, without proof of their appointment. *Doe d. Bouley v. Barnes*, 15 Law J. Rep. (n.s.) Q.B. 293; 8 Q.B. Rep. 1037.

The Court will not grant a mandamus to overseers to produce their appointment for the inspection of a rated inhabitant; the defect suggested in such appointment being properly the subject of an appeal to the Sessions. *Regina v. Harrison*, 16 Law J. Rep. (n.s.) M.C. 33; 9 Q.B. Rep. 794.

The mayor of a borough has the sole power of appointing the overseers under stat. 43 Eliz. c. 2. s. 8. and stat. 5 & 6 Vict. c. 76. s. 6. *Regina v. Preston*, 18 Law J. Rep. (n.s.) M.C. 10; 12 Q.B. Rep. 891.

(B) DUTIES AND LIABILITIES OF.

An overseer is, since the statute 3 & 4 Vict. c. 26, compellable as well as competent to give evidence in proceedings before Justices touching the relief or removal of the poor. *Regina v. Vickery*, 17 Law J. Rep. (n.s.) M.C. 129; 12 Q.B. Rep. 478.

The 1st and 2nd sections of 11 & 12 Vict. c. 91. do not transfer the personal liability of overseers for debts contracted for legal proceedings for parish business to their successors in office. *Chambres v. Jones*, 19 Law J. Rep. (n.s.) Exch. 239; 5 Exch. Rep. 229.

(C) VESTING OF PROPERTY IN.

Certain trust property, including T Farm, was, in 1831, conveyed to new trustees, upon trust, to apply the rents for and towards the repair of the parish church of P, and for the benefit of the poor of the said parish, in such manner as the same have heretofore been usually applied, and according to the intention of the several charitable persons who devised the same. Among other property, conveyed in the same deed, were some cottages, described as four cottages in C Lane, wherein poor families are permitted to live rent-free:—Held, that the legal estate in all these lands vested in the parish officers, under statute 59 Geo. 3. c. 12. s. 17, although there were trustees in existence; and that it was imperative that an action for the use and occupation of T Farm should be brought by the parish officers. [See next case.]

Held, also, that the description of the cottages in C Lane, did not imply that they were held on any special trust. *Rumball v. Munt*, 15 Law J. Rep. (n.s.) Q.B. 180; 8 Q.B. Rep. 382.

Lands were conveyed in 1749 to A and B, their heirs, &c., upon trust to permit and suffer the churchwardens and overseers of D to receive the rents and profits to and for the use and benefit of the poor of the parish of D, with power to appoint new trustees and to grant leases for twenty-one years; and the power of the trustees was extended and their title confirmed by local acts; by the operation of which and by conveyances under the powers of the original deed of trust, the legal estate was vested in known existing trustees:—Held, first, that the nature of the trust was not special, so as to prevent the operation of the statute 59 Geo. 3. c. 12. s. 17; secondly, that the words of the 17th

section of that act were imperative, and not merely enabling, in cases to which it was applicable. But held, lastly, that in cases in which there were known living trustees, section 17 did not contain words sufficiently strong to divest the legal estate from such trustees, and that property so circumstanced could not be considered as “belonging to the parish” within the meaning of the statute (overruling *Rumball v. Munt*, 15 Law J. Rep. (n.s.) Q.B. 180; 8 Q.B. Rep. 382). *Churchwardens and Overseers of St. Nicholas, Deptford, v. Sketchley*, 17 Law J. Rep. (n.s.) M.C. 17; 8 Q.B. Rep. 394.

CLERGY.

[See CHURCH—INSOLVENT—LIBEL—MARRIAGE—MORTUARY—SEQUESTRATION—TITHE.]

- (A) BISHOP [CONFIRMATION OF BY ARCH-BISHOP].
- (B) INSTITUTION [REFUSAL ON ACCOUNT OF UNSOUND DOCTRINE].
- (C) BENEFICE [AVOIDANCE OF].
- (D) NON-RESIDENCE.
- (E) STIPENDIARY CURATE.
- (F) DISCIPLINE.
- (G) FEES.
- (H) APPEAL IN SPIRITUAL CAUSES.

The law relating to holding benefices in plurality amended by 13 & 14 Vict. c. 98; 28 Law J. Stat. 292.

(A) BISHOP [CONFIRMATION OF BY ARCHBISHOP].

Under the 25 Hen. 8. c. 20. s. 5, after an election of a bishop by the dean and chapter of a cathedral church by virtue of a *congé d'élire* and letters missive, the person so elected is to be reputed and taken by the name of the lord elected of the see, and the king is thereupon to issue letters patent to the archbishop commanding him to confirm the said election, and to invest and consecrate him, and if he fail to do so for twenty days he is to incur the penalties of a *præmunire*:—Held, by *Lord Denman, C.J.* and *Erle, J.*, that the archbishop acting merely ministerially is bound to confirm the bishop elect, and that he has no authority to hear any opposition advanced against the person so elected; per *Patteson, J.* and *Coleridge, J.*, that confirmation is a judicial act, which the archbishop is to conduct according to the principles of the canon law, and that parties opposing are entitled to appear in his court, and to enter their objections.

Held, also, per *Patteson, J.* and *Coleridge, J.*, that the opposers not having been allowed to appear and be heard, there was a declining of jurisdiction by the archbishop, for which a mandamus would lie. *Regina v. Archbishop of Canterbury, in re Hampden*, 17 Law J. Rep. (n.s.) Q.B. 252; 11 Q.B. Rep. 483.

(B) INSTITUTION [REFUSAL ON ACCOUNT OF UNSOUND DOCTRINE].

In a proceeding by *duplex querela* by a clerk, presented to a benefice, against his diocesan for refusing him institution, it was alleged, in return to a monition with intimation by the bishop, calling upon him to shew a reasonable and lawful cause why the

clerk should not be instituted, that the presentee was of unsound doctrine respecting the efficacy of the sacrament of baptism, inasmuch as he held in his examination that spiritual regeneration is not conferred in that sacrament—that infants are not made therein members of Christ and children of God, contrary to the teaching of the Church of England in her Articles and Liturgy:—Held, that baptismal regeneration is the doctrine of the Church of England, and that infants immediately at baptism receive spiritual regeneration, and that the bishop had shewn sufficient cause why he should not institute the presentee.—[Since overruled in Privy Council].

The space of twenty-eight days specified in the 95th canon, for a bishop to inquire into "the sufficiency and qualities of every minister after he hath been presented unto him to be instituted into any benefice," is *not* an absolute limitation rendering an examination after that period void. A bishop is entitled to a *reasonable* time for such examination. The canon is directory; there are no prohibitory words to confine a bishop to the space of twenty-eight days. *Gorham v. the Bishop of Exeter*, 2 Robert. 1.

(C) BENEFICE [AVOIDANCE OF].

A clerk in holy orders being in possession of a perpetual curacy with cure of souls, augmented by the governors of Queen Anne's Bounty, and having, without dispensation, been instituted and inducted into another benefice with cure of souls:—Held, that he have forfeited the former, which was on sentence declared void. *Burder v. Mavor*, 1 Robert. 614.

[See CHURCH, Commendam.]

(D) NON-RESIDENCE.

Where a beneficed clerk had been imprisoned under sentence of the Court of Queen's Bench, and the bishop of the diocese had, after monition, ordered him, under the 1 & 2 Vict. c. 106. s. 54, to reside on his benefice, and, on non-compliance with the order, had sequestered the benefice, which had remained under sequestration for one year.—The Court refused a prohibition to restrain the bishop from giving notice, under section 58, to the patron that the benefice was void. *In re Bartlett*, 18 Law J. Rep. (N.S.) Q.B. 11; 12 Q.B. Rep. 488.

Under the 54th section of the statute 1 & 2 Vict. c. 106, which gives power to the bishop of the diocese to issue a monition in certain cases, requiring a beneficed clergyman to reside upon his benefice, it is for the bishop to determine both as to the fact of non-residence and also as to the sufficiency of the excuse for non-residence set up in the return to the monition. If the bishop come to a wrong decision upon the matter, the remedy is by appeal to the archbishop, and not by an application for a writ of prohibition.

Where such clergyman is in prison, under sentence of a Court for the publication of a libel, that is no "legal cause of exemption" within the meaning of the words in the 54th section.

When a benefice has continued for one whole year under sequestration issued under the 54th section for disobedience of the order requiring residence, the benefice becomes void without any further step being taken by the bishop; the subsequent pro-

vision in the 54th section, as to giving notice, being only for the purpose of giving the bishop a right to present by lapse. *In re Bartlett*, 18 Law J. Rep. (N.S.) Exch. 25; 3 Exch. Rep. 28.

A suit was instituted by the nominee of the bishop duly authorized, in the Consistory Court, to recover from a clergyman one-third of the profits of his benefice on account of his non-residence thereon, being the penalty imposed by the statute 1 & 2 Vict. c. 106. s. 32. The proceedings were regularly taken in pursuance of that statute. The decree of the Consistory Court pronounced that the defendant was rector of the rectory and parish church of W, being lawfully instituted and inducted thereto; and that by non-residence he had forfeited one-third part of the annual value of the benefice of W, and condemned him in the payment of such third part, &c. with costs, the amount of such third part of the annual value of his said benefice and of such costs to be ascertained in the usual manner by the registrar of the court. The sentence was confirmed, on appeal, in the Arches Court and in the Privy Council. On a subsequent motion for a prohibition to the Consistory Court against proceeding further in the suit,—Held, in accordance with the decision of the Arches Court (1 Robert. 367) and the Privy Council (5 Moore, P.C. 305), upon the same points which had been raised in the appeal before them,—first, that this was not a criminal proceeding within the 3 & 4 Vict. c. 86, s. 23, and therefore, that it was unnecessary that the conditions precedent for a criminal proceeding according to that statute should have been fulfilled; secondly, that it sufficiently appeared that the defendant held a benefice with a cure of souls; thirdly, that the sentence was not illegal for directing the amount of the third part of the annual value of the benefice to be ascertained by the registrar. *Rackham v. Bluck*, 16 Law J. Rep. (N.S.) Q.B. 82; 9 Q.B. Rep. 691.

(E) STIPENDIARY CURATE.

The power of a bishop to appoint a stipendiary curate under the 1 & 2 Vict. c. 166. s. 75, is only when an incumbent under the circumstances there mentioned is absent for a period exceeding three months altogether, or to be accounted at several times in the course of any one year; and by section 120 the year is to be reckoned from the 1st of January to the 31st of December. *Sharpe v. Bluck*, 10 Q.B. Rep. 280.

(F) DISCIPLINE.

Before the passing of the statute 3 & 4 Vict. c. 86, 'An act for better enforcing Church Discipline,' an archbishop or bishop had no power at his *visitation* to proceed to sentence of deprivation against a clergyman of his diocese for simony, "personally and without process in court." Such a power therefore is not reserved by section 25 of the above act, which is not to affect any authority over his clergy, which an archbishop or bishop may exercise (at the time of its passing) according to law, personally and without process in court.

Where, at a visitation, the Court received evidence upon charges of simony, against a clergyman, decided that the charges were proved, and passed sentence of deprivation against him, and interdicted

him from exercising any of the functions belonging to his office of dean, on pain of sentence of the greater excommunication,—this Court granted a writ of prohibition, after the sentence of deprivation had been passed. *Regina v. Archbishop of York*, 10 Law J. Rep. (N.S.) Q.B. 306; 2 G. & D. 202.

The statute 52 Geo. 3. c. 155. does not take away the jurisdiction of the bishop over a clerk in holy orders, who officiates in an unconsecrated chapel without the bishop's licence, though such chapel has been duly registered under that statute. Nor is such clerk protected by the Toleration Act, 1 Will. 4. c. 18. s. 4, from proceedings in the ecclesiastical court for breach of discipline, in officiating in such chapel; as that section only relieves parties from proceedings in the ecclesiastical court "by reason of their non-conforming to the Church of England." *Barnes v. Shore*, 15 Law J. Rep. (N.S.) Q.B. 296; 8 Q.B. Rep. 640.

Articles against an ordained minister of the Church of England for officiating in an unconsecrated chapel after the revocation of his licence by the bishop, sustained. An allegation responsive to the articles pleading he had prior to the service of the citation seceded from the Established Church, and had taken certain oaths, &c. prescribed by the Toleration Acts, rejected, on the ground that those acts do not apply to a minister of the Established Church, and that one in holy orders cannot disavow himself of such orders.

An unconsecrated proprietary chapel, into which strangers are admitted, is not a "private house" or "chapel," within the meaning of the 71st canon; consequently to read the service of the church in such a building is publicly to read, &c.

To found a sentence under the general ecclesiastical law, it is not necessary that all the offences charged be proved. *Barnes v. Shore*, 1 Robert. 382.

Articles against a clergyman for publicly reading prayers, preaching, and administering the sacrament of the Lord's Supper in an unconsecrated building called Sackville College Chapel, without the licence of, and contrary to the inhibition of the bishop of the diocese, sustained. What constitutes a public reading of the prayers. *Freeland v. Neale*, 1 Robert. 643.

A beneficed clergyman being suspended for misconduct and condemned in costs, is entitled to a relaxation of the suspension on the Judge being satisfied with the certificate of good conduct during his suspension, though the costs be not paid; but he is not entitled to be dismissed from the suit until he has paid the costs. *Brookes v. Cresswell*, 1 Robert. 606.

A beneficed clergyman, having been suspended for three years, and further until he exhibited a certificate of good conduct, and having resumed on the expiration of the term his clerical duties without exhibiting such certificate, pronounced in contempt, and the contempt decreed to be signified. *Bishop of Lincoln v. Day*, 1 Robert. 724.

A priest in holy orders, without preferment, having been convicted at a Quarter Sessions of attempting a nameless offence, was subsequently articled against, and a sentence was prayed against him of degradation. That prayer was refused, but a sentence of unlimited suspension was pronounced. *Clarke v. H—*, 1 Robert. 377.

(G) FEES.

Debt by the plaintiff, the rector of St. Marylebone, and the minister of the new church of that parish, against the defendant, who was the master of the parish workhouse, to recover fees alleged to be due upon the burial of certain paupers. The 51 Geo. 3. c. 151. empowered the vestrymen of St. Marylebone to purchase land for erecting a new church and making a cemetery. By section 35. Dr. H and his successors were declared to be ministers of the new church, and the patron of the living was empowered to appoint successively ministers of the new church, who were to enjoy such oblations, mortuaries, glebes, tithes, profits, and other ecclesiastical dues as the present minister ought to have. By section 49. the vestrymen were empowered to settle the rates and fees for burial in the cemetery, and to alter and amend the same. By section 50. the vestrymen were prevented from reducing the burial fees below the amount payable in the cemeteries of the parish. By section 71. the vestry were empowered to borrow 150,000*l.* upon the credit of the rates and burial fees, and to assign any portion of such rates or fees to the parties advancing the money. In 1733 the then minister and the parish authorities referred to a third party the settlement of the minister's fees, and a table of fees was accordingly prepared by the referee. From the year 1733 down to the year 1838, a fee of 1*s.* 6*d.* was paid by the parish officers to the rector, for the burial of a pauper in any of the cemeteries of the parish. From 1835 to the present time the sum of 1*s.* 6*d.* has been paid to the rector, and 1*s.* to the clerk and sexton, in pursuance of a table of fees, settled by the vestry, containing the following item:—"Paupers from the workhouse 2*s.* 6*d.*" The defendant had given orders for the burial of certain paupers in the cemetery of the new church. The burial service was not performed by the plaintiff or any of his curates, but by the reader of one of the chapels in the parish:—Held, that the fees in question were due only by immemorial custom or by some act of parliament; that no such immemorial custom was stated in the case, nor were the Court empowered by the parties to infer as a jury the existence of such a custom; and that no such fees were due by virtue of the act of parliament. Held, also, that if such fees were due, they must be recovered in the ecclesiastical court. *Spry v. Gallop*, 16 Law J. Rep. (N.S.) Exch. 218; 16 Mee. & W. 716.

[Apportionment of. See CHURCH, Commendation.]

(H) APPEAL IN SPIRITUAL CAUSES.

The appeal from the court of the archbishop, in all ecclesiastical causes, is under 25 Hen. 8. c. 12. s. 4. to the High Court of Delegates (and since 2 & 3 Will. 4. c. 92. to the Queen in Council), and is not, in causes where there is matter in contention touching the Queen, to the Upper House of Convocation, under 24 Hen. 8. c. 12. s. 9.

Where a clerk presented by the Queen to a vicarage held by her in right of her crown was refused institution by the bishop of the diocese on the ground of unsoundness of doctrine, and had instituted a *duplex querela* in the Arches Court of

the archbishop, which had been dismissed, and had afterwards appealed to the Queen in Council, the right of the Queen to present a fit clerk not being in controversy,—*Quære*, whether the Queen had an interest in the matter in contention within the meaning of 24 Hen. 8. c. 12. s. 9. *Ex parte Bishop of Exeter, in re Gorham v. Bishop of Exeter*, 19 Law J. Rep. (N.S.) Q.B. 279; 15 Q.B. Rep. 52.

Under 25 Hen. 8. c. 19. s. 4, all appeals in ecclesiastical suits, whether relating to the subject or to the Crown, are to be from the courts of the archbishops to the High Court of Delegates (and since 2 & 3 Will. 4. c. 92, to the Queen in Council), there to be finally determined.

The provisions in 24 Hen. 8. c. 12. s. 9, that if any of the causes therein mentioned should touch the king, the final appeal is to be to the Upper House of Convocation of the province, is not incorporated with 25 Hen. 8. c. 19. s. 4, which enacts generally that parties may appeal from the courts of the archbishops to the king in Chancery, &c.

Semble—that the words in 25 Hen. 8. c. 19. s. 3, that all manner of appeals in what nature or condition soever, or what cause or matter soever they concern, shall be made “after such manner, form and condition” as is limited for appeals by 24 Hen. 8. c. 12, in the causes there mentioned, incorporate only the manner of proceeding in appeals in general indicated by sections 5, 6, and 7. of the former act, but do not re-enact the particular provision enacted by section 9. of that act.

An enactment distinct and without exception in itself is not to be controuled or limited by a doubtful implication to be drawn from a previous section of the same statute, especially in respect of the prerogatives of the Crown, which are not to be affected, except by distinct enactment. *Ex parte Bishop of Exeter, in re Gorham v. Bishop of Exeter*, 19 Law J. Rep. (N.S.) C.P. 200.

In a suit of *duplex querela*, before an archbishop, whether the subject-matter thereof touches the Crown or not, an appeal is given by the 25 Hen. 8. c. 19. to the High Court of Delegates, and since 2 & 3 Will. 4. c. 92. to the Queen in Council, there to be finally determined.

If this were not the case, the Court of Exchequer has jurisdiction to grant a prohibition.

Semble—that the 25 Hen. 8. c. 19. has repealed the 9th section of the 24 Hen. 8. c. 12, which enacts, that in matters “touching the king,” the appeal from certain ecclesiastical courts shall be to the Upper House of Convocation.

The Crown, as patron, having presented a clerk to a living, the bishop refused him admission on the ground of his opinions being unsound and not in accordance with the doctrines of the Church of England; the clerk, thereupon, brought a suit of *duplex querela* in the archbishop's court, complaining of the archbishop's decision, and stating that his doctrines were not inconsistent with those of the Church of England.

Quære—whether this proceeding was a matter “touching the king,” within the statute 24 Hen. 8. c. 12. *Ex parte Bishop of Exeter, in re Gorham v. Bishop of Exeter*, 19 Law J. Rep. (N.S.) Exch. 376; 5 Exch. Rep. 630.

COAL ACTS.

The act for establishing an office for the benefit of coalwhippers in London, amended by 9 & 10 Vict. c. 36; 24 Law J. Stat. 96.

The Coal Act, 1 & 2 Will. 4. c. lxxvi. s. 54, directs coals delivered in sacks to be weighed, if required, each sack “with the coals therein, and afterwards to weigh, in like manner, each sack without any coals therein.” A weighing by putting the sacks of coals successively in one scale of the weighing machine against weights equal to the weight each sack should contain, and an empty sack in the other scale, is not a weighing according to that section.

The Coal Act, 1 & 2 Will. 4. c. lxxvi., provided for the delivery of a seller's ticket, with coals, imposing a penalty, upon neglect, not exceeding 20*l*., and enacted (sect. 77), that all penalties not exceeding 25*l*. should be levied and recovered before any Justice or Justices of the Peace. The 1 & 2 Vict. c. ci. repealed so much of the former act as related to the delivery of a seller's ticket; and by a new enactment required a seller's ticket (according to a certain form) to be delivered, under a penalty not exceeding 20*l*., but the act was silent as to any mode of recovering the penalty:—Held, that an action for the penalty by the buyer was not maintainable. *Meredith v. Holman*, 16 Law J. Rep. (N.S.) Exch. 126; 16 Mee. & W. 798.

When a statute for the purpose of protecting the buyers, prescribes regulations to be followed in the sale and delivery of an article, the vendor cannot recover the price of such article sold and delivered by him without observing the regulations.

By the 1 & 2 Vict. c. ci. s. 3, with any quantity of coals exceeding 560 lb., delivered by any cart, within the city of London, &c., the seller shall deliver or cause to be delivered to the purchaser or his servant, immediately on the arrival of the cart, &c. in which such coal shall be sent, and before unloading, a ticket, according to a certain form, under a penalty, unless the coals are purchased at the coal market. To debt for goods sold and delivered, the defendant pleaded in substance that the goods were quantities of coals sold and delivered by him to the plaintiffs, respectively exceeding 560 lb. and respectively delivered within the city of London, in divers, to wit, two carts, without delivering, before any such quantities of coals were unloaded, a ticket signed by the plaintiffs according to the form of the statute; and that the defendant did not purchase the same at the coal market:—Held, that the statute being passed for the protection of the purchasers of coal, the plea was an answer to the action. Also, on special demurrer, that the statute applies if the quantity at one delivery exceeds 560 lb. though delivered in carts each containing less than 560 lb.; that if the vendor be prevented, by any act of the purchaser, from delivering the ticket, that is matter to be replied; that the vendor's name must be written in the ticket as a signature, though it would be sufficient if written by an agent; and that the negation in the plea of the delivery of a ticket was sufficiently applied to each delivery. *Cundell v. Dawson*, 17 Law J. Rep. (N.S.) C.P. 311; 4 Com. B. Rep. 376.

COLLEGE.

[See CHARITY—JURISDICTION—FELLOWSHIP.]

The words "a collegii emolumentis discedere" in college statutes, held to import an absolute forfeiture of a fellowship, and not merely a temporary suspension of the right to receive the emoluments thereof.

The word "discedere" as applied to a fellow vacating his fellowship, held not to be confined to a vacancy by death. *In re St. Catherine's Hall, Cambridge, ex parte Goodwin*, 1 Mac. & G. 473; 1 Hall & Tw. 601.

College statutes required that, *cæteris paribus*, preference be given to a candidate from a specified district, and a M.A. was to be elected *si talis commode reperiri poterit*:—Held, that a candidate who was a M.A. and from the specified district was not entitled to preference over other candidates, except in cases of equality in other respects. The statutes also required that every one admitted a fellow should be *in sacerdotio constitutus*. Fellows were usually admitted six months after their election:—Held, that admission to deacon's orders was sufficient, and that a layman might be elected who would not at the expiration of six months from his election be old enough to take deacon's orders, it not being impracticable to obtain a faculty from the Archbishop of Canterbury for ordination under the usual age, and the college being willing and having power to extend the period of probation beyond six months. *In re University College, Oxford, ex parte Moorsom*, 17 Law J. Rep. (N.S.) Chanc. 298; 2 Ph. 521.

COLONY.

[See FOREIGN LAW.]

COMMISSION OF REBELLION.

[See HABEAS CORPUS.]

COMMITMENT.

[See •CONVICTION—MALICIOUS TRESPASS—MASTER AND SERVANT—RATE, POOR RATE.]

[*Stamp v. Sweetland*, 5 Law J. Dig. 179; 8 Q.B. Rep. 13.]

A warrant of commitment, directing the gaoler to imprison a party for three months, omitting the day of the month on which it was granted,—held bad. *In re Fletcher*, 13 Law J. Rep. (N.S.) M.C. 16.

A warrant for the committal of a party to prison, until he find sufficient sureties to keep the peace, is bad, if it omit to specify the time for which, in default of such sureties, he is to be kept in prison. The warrant need not mention the amount in which the sureties are to be bound. *Prickett v. Gratres*, 15 Law J. Rep. (N.S.) M.C. 145; 8 Q.B. Rep. 1020.

A warrant of committal, under the 8 & 9 Vict. c. 127, issued from the Palace Court, after reciting that the defendant "was and now is indebted to J H D in the sum of 4*l.* 10*s.* and no more, besides

costs of suit, amounting to 5*l.* 5*s.*, by virtue of a judgment" in the Exchequer, &c., ordered that the defendant "shall be committed for the term of twenty days to the common gaol, wherein debtors, under judgment and in execution of the superior courts of justice, may be confined within the county of Surrey." The warrant was directed to H H, an officer of the said (Palace) court, and to the keeper of the debtors prison above mentioned, for the county of Surrey, and the defendant was imprisoned under it in Horsemonger-lane gaol, being the debtors county gaol for Surrey:—Held, first, that the warrant was not bad in omitting to state that the sum due was not a balance of an account originally exceeding 20*l.*, inasmuch as the defendant might be imprisoned in respect of a judgment debt under 20*l.*, although originally exceeding that amount; secondly, that the twenty days' imprisonment began to run from the day of the defendant being lodged in gaol; thirdly, that the place of imprisonment was sufficiently stated in the warrant; and, lastly, that the warrant was rightly directed, the execution of the process not being confined by the 8 & 9 Vict. c. 127. to the high bailiff of Westminster. *Ex parte Foulkes*, 15 Law J. Rep. (N.S.) Exch. 300; 15 Mee. & W. 612.

After judgment recovered against the defendant in the county court for a debt he became insolvent, and obtained his discharge from the Insolvent Debtors Court, having inserted the debt in his schedule. He was afterwards arrested under a warrant of commitment from the Judge of the county court, made subsequent to the discharge by the Insolvent Court:—The Court refused to grant a *habeas corpus* to discharge the defendant out of custody, as the warrant of commitment was a subsisting valid commitment.

It was objected that the warrant was bad, because it did not appear on the face of it that the defendant was examined on oath touching his estate and effects; also because it stated two offences, viz. that the defendant had obtained credit by false pretences, and had made a transfer of his property to defraud his creditors; also because it stated that the defendant had made a delivery, gift or transfer of the property to defraud his creditors, and was therefore uncertain; also because it ordered the defendant to be imprisoned for forty days, or until he be sooner discharged by due course of law:—Held, that as the warrant was partly a civil and partly a penal proceeding, these objections could not be sustained. *Ex parte Purday or Pardy*, 19 Law J. Rep. (N.S.) M.C. 95; 1 L. M. & P. 16.

COMMON.

- (A) RIGHT OF ENTRY TO ABATE NUISANCE.
- (B) COMMON PUR CAUSE DE VICINAGE.
 - (a) Custom between adjoining Commons.
 - (b) Custom between private Estates.
 - (c) What Usage will establish.

- (A) RIGHT OF ENTRY TO ABATE NUISANCE.

The 8 & 9 Vict. c. 118. for the inclosure and improvement of commons amended by 9 & 10 Vict. c. 70; 24 Law J. Stat. 174.

The provisions for inclosing and improving commons extended by 10 & 11 Vict. c. 111; 25 Law J. Stat. 290.

Further provisions for the inclosure and improvement of commons and other lands made by 12 & 13 Vict. c. 83; 27 Law J. Stat. 159.

Where a house has been unlawfully erected on a common, a commoner whose enjoyment of the common is interrupted by it may pull it down. But he is not justified in pulling it down if there are persons in it at the time. And therefore to a declaration in trespass for pulling down a house, which stated that plaintiff and his family were actually present and residing in the house at the time, a plea by the defendant, a commoner, that the house interrupted his enjoyment of the common, and that he therefore pulled it down, was held ill.

Quare—if the plea was bad for not averring notice to plaintiff to abate the nuisance.

A parol licence by a commoner to build a house on a common will not, though executed, run with the land in respect of which the right of common is claimed, so as to bind a subsequent owner of such land.

Quare—if it would have been binding as between the original parties. *Perry v. Fitzhove*, 15 Law J. Rep. (N.S.) Q.B. 239; 8 Q.B. Rep. 757.

(B) COMMON PUR CAUSE DE VICINAGE.

(a) Custom between adjoining Commons.

Since the statute 2 & 3 Will. 4. c. 71, common of vicinage from time immemorial may be claimed by a commoner, who states his right to have existed for thirty years; the substance of the custom being, that cattle lawfully on one common have been used to stray upon the other.

Evidence of reputation is admissible to prove a right of common *pur cause de vicinage*. *Pritchard v. Powell*, 15 Law J. Rep. (N.S.) Q.B. 166; 10 Q.B. Rep. 589.

(b) Custom between private Estates.

Common *pur cause de vicinage* cannot be claimed as matter of customary right by the owner of a farm against the owner of the adjoining farm, though there is no fence or inclosure between them. Such a right could only have its origin in a grant or in manorial custom. *Jones v. Robin*, 15 Law J. Rep. (N.S.) Q.B. 15; 10 Q.B. Rep. 581.

Semble, that common *pur cause de vicinage* may exist between two proprietors of neighbouring farms, independently of any rights of common on either side.

But a claim of such a right by an individual, as annexed or incident to a private estate, cannot be good by custom, but must be pleaded as a prescription in a *que estate*. *Jones v. Robin (in error)*, 17 Law J. Rep. (N.S.) Q.B. 121; 10 Q.B. Rep. 620.

(c) What Usage will establish.

A plea of common *pur cause de vicinage* is not supported by proof that sheep have been accustomed to stray from wastes subject to common of pasture, into adjoining lands, not separated from the wastes by any fence or visible boundary, it appearing that the owners of the sheep which so

strayed, as well as the owners of the respective lands, made a regular practice of turning them back to the place whence they had strayed. *Clarke v. Tinker*, 15 Law J. Rep. (N.S.) Q.B. 19; 10 Q.B. Rep. 604.

COMMON PLEAS.

[See JUDGMENT.]

Barristers at law to have equal rights as serjeants in the Common Pleas. 9 & 10 Vict. c. 54; 24 Law J. Stat. 123.

The receipt and amount of fees receivable by certain officers of the Court of Common Pleas regulated by 13 & 14 Vict. c. 75; 28 Law J. Stat. 203.

COMPANY.

[See BOND—CONTRACT—COPYHOLD—INJUNCTION—PLEADING—PRACTICE, PROCESS—PRODUCTION AND INSPECTION OF DOCUMENTS—RATE—RELEASE—STAYING PROCEEDINGS.]

(A) RAILWAY AND OTHER INCORPORATED COMPANIES.

(a) Construction of Acts of Parliament.

- (1) *Bye-Laws.*
- (2) *Voting by Proxy.*
- (3) *Tolls.*
- (4) *Exception or Proviso.*

(b) Shares.

- (1) *Allotment of.*
- (2) *Sale and Transfer of.*
- (3) *Forfeiture of.*
- (4) *Deposits, Payment of.*
- (5) *Registry of Shareholders.*
- (6) *Proprietorship.*

(c) Dividends.

(d) Calls.

(1) Liability to.

(i) *Where Shares transferred after Call made and before payable.*

(ii) *By signing Subscribers' Agreement and Entry of Name in Registry of Shareholders.*

(iii) *Executors.*

(iv) *Legatees.*

(v) *Infants.*

(2) Making.

(3) *Notice, Proof of.*

(4) *Action for, and Pleadings.*

(e) Liability of Promoters and Provisional Committee-men.

(1) At Law.

(i) *In general.*

(ii) *To the Return of Deposits.*

(iii) *Evidence in Actions against.*

(2) In Equity.

(f) Directors.

(1) *Powers, Duties, and Liabilities.*

(2) *Election of.*

(g) Duties and Liabilities of Companies.

(1) *To Shareholders.*

(2) *To other Persons.*

(h) Actions and Suits against. [See (g) Duties and Liabilities of Companies.]

- (i) *Injunctions to Railway Companies.* [See (g) *Duties and Liabilities of Companies*, and titles *INJUNCTION — RAILWAYS CLAUSES CONSOLIDATION ACT — LANDS CLAUSES CONSOLIDATION ACT.*]
- (j) *Compensation.* [See title *LANDS CLAUSES CONSOLIDATION ACT.*]
- (B) *BANKING COMPANY.* [See title *BANKER AND BANKING COMPANY.*]
- (C) *CANAL COMPANY.* [See title *CANAL COMPANY.*]
- (D) *MINING COMPANY.* [See title *MINE.*]
- (E) *COMPANIES REGISTERED UNDER 7 & 8 VICT. c. 110.*
 - (a) *Registration and Incorporation.*
 - (b) *Complete Registration, Necessity for and Effect of.*
 - (c) *Deed of Settlement.*
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 - (11) *Transferor under invalid Transfer of Shares.*
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(13) *Persons acting as Shareholders.*

(14) *Former Members of the Company.*

(l) *Liability of Contributory.*

(1) *Extent of.*

(2) *Mode and Time of disputing Liability.*

(m) *Practice.*

(1) *Service and Advertisement of Petition.*

(2) *Dismissing the Petition.*

(3) *Service and making of the Order.*

(4) *Discharging the Order.*

(n) *Costs.* [See (f) *Official Manager.*]

(G) *EXECUTION AGAINST SHAREHOLDERS.*

The gauge of railways regulated by 9 & 10 Vict. c. 57; 24 Law J. Stat. 158.

The provisions for inclosing and improving commons extended by 11 & 12 Vict. c. 99; 26 Law J. Stat. 254.

Commissioners of Railways appointed by 9 & 10 Vict. c. 105; 24 Law J. Stat. 284.

The time for making railways may be extended on application to the Commissioners of Railways by 11 Vict. c. 3; 26 Law J. Stat. 13.

The abandonment of railways and dissolution of railway companies facilitated by 13 & 14 Vict. c. 83; 28 Law J. Stat. 209.

(A) *RAILWAY AND OTHER INCORPORATED COMPANIES.*

(a) *Construction of Acts of Parliament.*

(1) *Bye-Laws.*

The Plumbers' Company of London were incorporated by a charter of James the First, and empowered thereby to make bye-laws. They made a bye-law, that the master and wardens might call, choose, elect, and admit into the livery of the company such person free of the art or mystery of plumbing as they should think fit; and that every person so chosen should, immediately upon notice thereof, prepare himself to serve the same place at the then next meeting of the master and wardens, in such seemly and decent manner as formerly had been used; and that every person so called and chosen into the same livery, and accepting the same, should bring in and pay at the next meeting unto the master and wardens, to the use, maintenance, and relief of the company, and to the officers of the company, for entering the same, and for the warning given, such fees as formerly had been paid in like cases; "and which of them soever, so called and chosen into the same livery, refuseth to pay the said fees, or what person or persons, so called and chosen to be of the same livery, and refuseth the same, shall forfeit and pay to the master and wardens for the time being, for every such default, the sum of 5*l.* or less, at the discretion and pleasure of the master and wardens, so it be not less than 40*s.*"

In a declaration in debt on this bye-law, against a person who had been elected into the company, and taken the oath to obey the bye-laws,—Held, first, that the bye-law was not bad for uncertainty in the amount of the penalty; secondly, that the declaration was not bad for not shewing that the company was a company that had a livery, a livery being mentioned in the charter and bye-law; thirdly, that it was not bad for not shewing that

the defendant was a freeman of the City of London; for that the Court could not take notice that none but freemen of the City of London were admissible into the livery of a company unless it had been certified to the Court by the Recorder of London; fourthly, that the master and wardens alone might sue for the penalty, though it was reserved to the use of the company generally.

The breach alleged in the declaration was, that the defendant although requested, and although a reasonable time had elapsed, and although he was and continued such freeman, did not nor would attend or serve the said place to which he had been so chosen, and did not nor would attend and serve the said place at the next meeting or at any subsequent meeting of the master and wardens, but therein made default and refused to prepare himself to serve the said place:—Held, that the breach was well assigned; for that one refusal, to which by the bye-law the penalty was attached, was the refusal to prepare to serve, and to serve at the next court. *Piper v. Chappell*, 14 Mee. & W. 624.

The 5 Will. 4. c. x. incorporated the London and Croydon Railway Company, and (by sec. 106. empowered the company to make bye-laws for the good government of the affairs of the company, and for regulating the proceedings, and remunerating and reimbursing the expenses of the directors, and for the management of the undertaking, and of the officers and servants of the company in all respects whatever, and to impose and inflict reasonable fines and forfeitures upon persons offending against the same, not exceeding 5*l.* for any one offence, to be levied and recovered as any penalty might by that act be levied and recovered; such bye-laws to be binding upon and be observed by all parties; provided that they were not repugnant to the laws of England, or the directions of that act.

The 148th section enacted that it should be lawful for the company to make orders and regulations for regulating the travelling upon and use of the railway, and for or relating to travellers upon the line; such orders and regulations to be binding upon travellers and passengers passing upon the railway, upon pain of forfeiting and paying a sum not exceeding 5*l.*

By section 163. penalties and forfeitures imposed by the act (of which there were several) or by any bye-law might be recovered in a summary way, by the adjudication of Justices; half the penalty to go to the informer and the other half to the company.

And section 165. enacted that it should be lawful for any officer or agent of the company to seize and detain any person whose name and residence should be unknown to such officer or agent, who should commit any offence against that act, and to convey him, &c. before a Justice without any warrant or other authority than that act.

The company made a bye-law, whereby a passenger not producing or delivering up his ticket was to be required to pay the fare from the place where the train originally started:—Held, that this was not a bye-law imposing a penalty or forfeiture; and that the arrest of a passenger not producing his ticket, and refusing to pay the fare from the place where the train originally started, was illegal.

Quere—Whether the 165th section gives power to

apprehend a person, except for an offence against the act of Parliament itself.

Quere, also, whether the bye-law was a reasonable and valid bye-law. *Chilton v. London and Croydon Rail. Co.*, 16 Law J. Rep. (N.s.) Exch. 89; 16 Mee. & W. 212.

(2) Voting by Proxy.

By the 7 & 8 Vict. c. 21. it is enacted that any "letter or power of attorney, or other instrument, made for nominating a proxy, and chargeable with duty under this act, shall authorize such proxy to vote on any matter at one meeting of the proprietors, &c., the time of the holding whereof shall be specified in such instrument, or at any adjournment of such meeting, and shall not be further available."

By a local act, 7 & 8 Vict. c. ciii., it was enacted that it should be lawful for the plaintiffs to "depute and appoint any one of the elder brethren of their guild or brotherhood, by writing under their common seal, to represent their guild or brotherhood at all meetings of the company, &c., and to vote at such meetings as the proxy of the said guild or brotherhood on whatever question, matter, or thing might be proposed, discussed, or considered thereat":—Held, that there was no inconsistency in the provisions of the two acts, and that the general proxy to vote at all meetings was good. *Trinity House at Hull v. Beadle*, 18 Law J. Rep. (N.s.) Q.B. 78; 13 Q.B. Rep. 175.

(3) Tolls.

The Great Western Railway Company are entitled to take tolls authorized by the 5 & 6 Will. 4. c. cvii., 6 & 7 Will. 4. c. xxxviii. and 1 Vict. c. xcii. until they have completed the purchase of either the Birmingham and Oxford Junction Railway, or the Birmingham, Wolverhampton and Dudley Railway; but after such completion the tolls both on the original line and on such purchased line must be reduced to the lower scale fixed by the 10 & 11 Vict. c. cxlix. and 10 & 11 Vict. c. cexxvi. *Attorney General v. Great Western Rail. Co.*, 19 Law J. Rep. (N.s.) Exch. 407; 5 Exch. Rep. 520.

(4) Exception or Proviso.

To an action for money had and received the defendant pleaded, that after the passing of the 7 & 8 Vict. c. 110, and after the 1st of November 1844, the defendant, as the broker and agent of the plaintiff, sold on account of the plaintiff fifteen scrip shares of and in a certain joint-stock company, called the Boston, Newark and Sheffield Railway Company, for the sum of 94*l.* 2*s.* 6*d.*, the formation of which company was commenced after the 1st of November 1844, and which, at the time of such sale was a joint-stock company established in England for profit, within the meaning of the said act of parliament, that is to say, a partnership whereof the capital was intended to be divided into shares, and so as to be transferable without the express consent of all the co-partners, and not then being a banking company, school, or scientific or literary institution (following the words of the 2nd section); and that the said sum of 94*l.* 2*s.* 6*d.* so received by the defendant for the plaintiff, was the price and proceeds of the sale by the defendant of such shares; and that at the time of the sale, and of the receipt

of the said sum, the said joint-stock company had not been completely registered, nor had obtained any certificate of complete registration:—Held, on demurrer, that the clause at the end of section 2. in the 7 & 8 Vict. c. 110. was an exception and not a proviso; and that the defendant ought to have negatived in his plea that the company was one which could not be carried into execution without the authority of parliament. And *per Alderson, B.*, assuming the sale to be illegal, the defendant, who had received the proceeds from the purchaser, could not refuse to pay them over to the seller, on the ground of the illegality of the transaction. *Bousfield v. Wilson*, 16 Law J. Rep. (N.S.) Exch. 44; 16 Mee. & W. 185.

(b) Shares.

[*Pearson v. London and Croydon Rail. Co.*, 5 Law J. Dig. 676; 14 Sim. 541.]

(1) Allotment of.

A projected railway company issued prospectuses, containing names of provisional directors, and directing applications for shares to be made, in a form annexed, to the provisional committee of management of the company. An application was accordingly made by the defendant on the 13th of October in the prescribed form, and a letter of allotment sent to him on the 15th of December, announcing that the committee had allotted him certain shares. At the foot of this letter was the form of a banker's receipt, which purported to be given "on account of the provisional committee." It also appeared by resolutions that there was a provisional committee, and also a part thereof formed into a committee of management, by whom the business of the formation of the company was conducted. Between the time of application and the allotment to the defendant, some of the members of the provisional committee had withdrawn from that body, and others had been added:—Held, that the contract to take shares and pay the deposit was made with the provisional committee and not with the committee of management; and,

Quære—Whether the change in the state of the company between the application and allotment affected the contract.

It appearing that the committee had delayed to allot the shares until it became impossible to carry on the concern,—

Quære—Whether the defendant's proposal was accepted within a reasonable time. *Woolmer v. Toby*, 16 Law J. Rep. (N.S.) Q.B. 225; 10 Q.B. Rep. 691.

The defendant having applied to a railway company for an allotment of 100 shares, undertaking to accept the same or any less number, and to pay the deposit thereon, received an assignment of sixty shares, by a letter of allotment, from the company, headed by the words "Not transferable":—Held, in an action by the company against the defendant, to recover the deposit, that the contract was not binding on him, inasmuch as his proposal was absolute, whereas the acceptance in the letter of allotment was conditional, as it contained a qualification that the contract was "not transferable." *Duke v. Andrews*, 17 Law J. Rep. (N.S.) Exch. 231; 2 Exch. Rep. 290.

By a railway act, power was given to the directors to borrow money upon debentures, when all the shares should be allotted and half the capital paid up. The company having a great number of shares unallotted, contracted to sell them to the defendant at a discount of 5*l.* per share, and upon payment by the defendant of the whole sum agreed upon, the company were to deliver debentures to the amount of 5*l.* per share to the defendant, payable three years after date, provided they were in a position legally to do so. At the time of the contract, much less than half the capital had been paid up:—Held, upon demurrer to a bill by the company for specific performance, that the contract could not be enforced. *West Cornwall Rail. Co. v. Mowatt*, 17 Law J. Rep. (N.S.) Chanc. 366.

[See (4) Deposits, Payment of.]

(2) Sale and Transfer of.

The 26th section of the 7 & 8 Vict. c. 110. enacts, "That in any joint-stock company, commenced after the 1st of November 1844, until complete registration, a sale of shares by a subscriber, &c. shall be void, and every person entering into such contract shall forfeit a sum not exceeding 10*l.*:"—Held, that that section did not render void the sale of shares of a railway company commenced after the 1st of November 1844, and requiring an act of parliament for the execution of the railway, such company not being specially provided for in that section within the meaning of the words in the 2nd section, "except as hereinafter specially provided." *Young v. Smith*, 15 Law J. Rep. (N.S.) Exch. 81; 15 Mee. & W. 121.

A stockbroker, having an order to purchase shares in a foreign railway, bought a letter of allotment. There were no shares in the market, and the practice of the stock exchange was to buy and sell letters of allotment as shares, in that railway. In an action for the value and broker's commission,—Held, that the jury were properly directed to consider whether the order was to buy that which was sold in the market as shares, or to wait till the actual shares were procurable. *Mitchell v. Newhall*, 15 Law J. Rep. (N.S.) Exch. 292; 15 Mee. & W. 308.

The defendant, a sharebroker, bought for the plaintiff certain scrip certificates of the Kentish Coast Railway Company, which had been sold in the share-market as genuine scrip, and at a premium. In an action by the plaintiff to recover the price paid to the defendant, on the ground of their not being genuine,—Held, that the question for the jury was whether the defendant obtained that which he desired to buy. *Lambert v. Heath*, 15 Law J. Rep. (N.S.) Exch. 297; 15 Mee. & W. 486.

A sharebroker employed to purchase shares or scrip of a railway company, does not thereby undertake to procure them absolutely and at all events, but only to use due and reasonable diligence to endeavour to do so.

A employed B, a sharebroker at Manchester, and lodged money in his hands, to procure for him fifty shares in a certain railway company. B, without disclosing the name of his principal, entered into a contract with H, another sharebroker, to purchase them for him. According to the usage of the Stock

Exchange at Manchester, there are two "settling days" in each month, on which all transactions between brokers, and between them and their principals, are to be settled, although in some instances settlement is not enforced by brokers on the prescribed days. H did not perform his contract with B by the next settling day; and B having, after that day, refused to return A his money,—Held, that A was entitled to recover it back from B in an action for money had and received. *Fletcher v. Marshall*, 15 Mee. & W. 755.

The plaintiff having on the morning of a certain day agreed to sell railway scrip to the defendant, the defendant in the afternoon of the same day signed the following document, with a view to its being shewn to the plaintiff: "Bought of N K (the plaintiff) fifty shares in the H, H, and B Railway Company, at 10*l*. per share".—Held, that the contract between the parties was contained in this document; that it required an agreement stamp, although signed by the defendant only; and that the sale of railway scrip was not a sale of "goods, wares, or merchandise," within the meaning of the exemption in the Stamp Act, 55 Geo. 3. c. 184. Sched. Part I, tit. 'Agreement.' *Knight v. Barber*, 16 Law J. Rep. (n.s.) Exch. 18; 16 Mee. & W. 66.

The plaintiff, a sharebroker at Leeds, bought for and by the orders of the defendant ten railway shares, to be paid for on delivery. The shares were delivered, and had fallen in price between the time of the sale and the delivery. The plaintiff not being able to pay at the time of delivery the vendor demanded the shares back from the plaintiff, who gave them back to the vendor, who sold them at the then market price, and called upon the plaintiff, according to the usage of the Stock Exchange at Leeds, to pay the difference, which he did:—Held, that the plaintiff was entitled to recover the sum so paid from the defendant as money paid to his use, as he must be taken to be cognizant of the usage of the Stock Exchange, which his broker attended. *Pollock v. Stables*, 17 Law J. Rep. (n.s.) Q.B. 352; 12 Q.B. Rep. 765.

The defendants, who were sharebrokers at Liverpool, on the 30th of August 1845, bought for the plaintiff, who was also a sharebroker, thirty-eight T and D railway shares, at the price, according to the advice note, of 2*l*. 8*s*. 6*d*. per share. The scrip had not then issued, and the 2*l*. 8*s*. 6*d*. was therefore premium. The deposit of 1*l*. 7*s*. 6*d*. per share first appeared in the printed share lists (which were sent daily to the plaintiff) on the 2nd of September, and the amount of such deposits (4*l*l. 5*s*.) was paid by the defendants to the persons from whom they bought the shares. In an account sent by the defendants to the plaintiff on the 19th of September, they omitted to charge the sum paid for the deposits, and the plaintiff, who purchased for other persons, as broker, (though he dealt with the defendants as a principal,) only charged 2*l*. 8*s*. 6*d*. per share, and had settled accounts with such other persons on that footing before any claim was made for the deposits.

The defendants, also, on the 18th of September, bought for the plaintiff eighty S S railway shares, at the price, according to the advice notes, of 4*l*. 10*s*. per share. The 4*l*. 10*s*. did not include the deposit of 2*l*. 10*s*. per share, which first appeared in the share lists about the 26th of September; and

in settling with the vendors the defendants paid them the deposits, amounting to 200*l*. in addition to the 4*l*. 10*s*. per share. But on the 26th of September the shares were sold by the defendants for the plaintiff at 7*l*. per share, which sum included the deposits, and the plaintiff was credited with the full amount. In an account furnished to the plaintiff by the defendants on the 2nd of October, and also in subsequent accounts, the plaintiff was only debited with the 4*l*. 10*s*. per share, and he only debited his principals with that amount, and settled with them on that footing.

On the 19th of November, the defendants, having received a letter from the plaintiff demanding a balance of 605*l*. 14*s*. 10*d*., examined their books, and discovered the mistake with regard to the deposits, and immediately acquainted the plaintiff with it:—Held, that they were entitled to set off the 200*l*., and also the 4*l*l. 5*s*. *Dails v. Lloyd*, 17 Law J. Rep. (n.s.) Q.B. 247; 12 Q.B. Rep. 531.

The defendant having employed the plaintiff, a sharebroker, at Liverpool, to sell twenty railway scrip for him, the plaintiff sold them to F, another Liverpool sharebroker. The defendant not having delivered the shares to the purchaser at the time when they ought to have been delivered, the latter bought twenty other scrip in the market, at an advanced rate, and applied to the plaintiff for the difference between the contract price and that at which he bought them. The plaintiff paid the difference, and brought an action against the defendant for money paid, to recover the amount. By the usage of the Liverpool share market, brokers are responsible to each other for the fulfilment of contracts relating to the sale and purchase of scrip:—Held, that the defendant was liable to the plaintiff; and, *semble*, *per Parke, B. and Rolfe, B.*, that the defendant would have been liable even if he had not been cognizant of such usage. *Bayliffe v. Butterworth*, 17 Law J. Rep. (n.s.) Exch. 78; 1 Exch. Rep. 425.

Until the deed of transfer upon the sale of railway shares has been registered by the transferee, whose duty it is to procure such deed to be registered, the transferor continuing the registered owner is liable for all subsequent calls, and cannot, after he has been compelled to pay the amount of such calls, recover the same from the transferee, upon the common count for money paid to his use. *Sayles v. Blane*, 19 Law J. Rep. (n.s.) Q.B. 19.

By a rule of the Hull Stock Exchange brokers are individually responsible to each other for the fulfilment of their contracts. Plaintiff was a broker of that exchange, and sold, on behalf of the defendant, to one R, also a broker, certain railway shares then in the course of registration. Defendant refused afterwards to complete the contract; but no conveyance of the shares, as required by 8 & 9 Vict. c. 16. ss. 14, 15, was ever tendered him to execute. R subsequently purchased shares in the railway at a higher price, in the place of those contracted for, and the plaintiff paid him the difference, after notice from the defendant not to make the payment:—Held, that the payment by the plaintiff, before a transfer was tendered to the defendant, was a payment in his own error, and which he was not entitled to recover against the defendant, in an action for money paid to his use; secondly, that a letter,

written by defendant to plaintiff, requesting all further communications to be made to his attorney, did not dispense with a tender of the transfer.

A contract for the sale of shares is not a contract for the sale of goods, wares or merchandise, within the 17th section of the Statute of Frauds. *Bowlby v. Bell*, 16 Law J. Rep. (N.S.) C.P. 18; 3 Com. B. Rep. 284.

On the 15th of October the defendants bought of the plaintiffs 100 railway shares, to be paid for on the 31st of October. On the 14th of October a call was made upon the shares. On the 1st of November the plaintiffs applied to the defendants for a name to be inserted in the deed of transfer, which, by the custom of the share market, was to be prepared by the vendors. The defendants refused to give a name, and subsequently, on a tender of the shares being made, declined to accept them. The 16th section of the 8 & 9 Vict. c. 16. prohibits a shareholder from transferring his share until he shall have paid all calls due upon his share. The plaintiffs had not paid all the calls due upon the shares:—Held, in an action against the defendants for the price of the shares, that the plaintiffs were entitled to the verdict on the issue raised on the plea that they were not ready and willing to transfer the shares, as they were in a condition, by paying the calls, to make a valid transfer. *Shaw v. Rowley*, 16 Law J. Rep. (N.S.) Exch. 180; 16 Mee. & W. 810.

In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken. *Shaw v. Holland*, 15 Law J. Rep. (N.S.) Exch. 87; 15 Mee. & W. 136.

Plaintiffs, on the 20th of October 1845, sold the defendant twenty railway shares at 25s. premium, no day being mentioned for the delivery of the scrip. On the 21st of October the shares had fallen to 14s. premium, and on that day, but after business hours, the defendant gave the plaintiffs notice that he should not take the shares. On the 22nd the shares were at 8s. premium, and the price continued to fall till the 6th of December, when the plaintiffs sold the shares at 17s. discount. An action being brought for breach of the defendant's contract,—Held, that the proper measure of damages was the difference in price between the 20th and 22nd of October. *Polt v. Flather*, 16 Law J. Rep. (N.S.) Q.B. 366.

(3) Forfeiture of.

The power given by 8 & 9 Vict. c. 16. s. 29. to companies to declare shares forfeited for the non-payment of calls, is not an alternative remedy with the right of action; and, therefore, in an action for calls, a plea *puis darrien continuance* that the company had declared the shares forfeited, is bad.

The plaintiffs having demurred to a plea of *puis darrien continuance*, the Court at the instance of the plaintiffs directed the case to be argued on the first paper day in term. *Great Northern Rail. Co. v. Kennedy*, 19 Law J. Rep. (N.S.) Exch. 11; 4 Exch. Rep. 417.

Construction of a railway act as to the forfeiture of interest on shares upon which the calls were not all paid up. *Naylor v. South Devon Rail. Co.*, 1 De Gex & S. 32.

(4) Deposits, Payment of.

The declaration stated that the plaintiffs had agreed with 200 other persons to endeavour to form a joint-stock company for making a certain railway; that a deposit of 2l. 2s. for each share was to be paid by the allottees; that the plaintiffs were the committee of management of the said company, and that they allotted to the defendant twenty-five shares in the said company, upon the terms that a deposit of 2l. 2s. per share should be paid by the defendant on or before the 9th of November 1845, to the account of the company, to certain bankers then agreed upon, to wit, &c., of all which premises the defendant then had notice. The declaration then averred mutual promises, and alleged that although the plaintiffs were always ready and willing to fulfil all things on their parts, and although the 9th day of December had elapsed, yet the defendant did not, before the 9th day of December, pay to the said bankers the deposit of 2l. 2s. Fourth plea, that the plaintiffs were not always ready and willing to perform the terms in the declaration mentioned; fifth, that the defendant had not notice of the said several premises in the declaration mentioned; sixth, that before the commencement of the suit, the plaintiffs and the company, without the consent of the defendant, agreed to abandon, and did abandon, their endeavours to form a company:—Held, on demurrer, that the pleas were bad and that the declaration was good. *Duke v. Dive*, 16 Law J. Rep. (N.S.) Exch. 234; 1 Exch. Rep. 36.

Declaration in assumpsit, that on a certain day, to wit, on &c. the plaintiffs had agreed together with divers, to wit, 200 other persons, to establish a joint-stock company for making a railway, which required the authority of parliament; the capital, to wit, &c. to be divided into shares of 20l. each, and a deposit of 2l. 2s. per share to be paid by the persons to whom they should be allotted by a committee of management; that the plaintiffs were the committee of management; that the plaintiffs, to wit, on &c., at the request of the defendant, allotted him thirty-five shares in the proposed company, upon certain terms then agreed upon between them, that is to say, that the deposit on each share should be paid by the defendant on a certain day, to certain bankers then agreed upon; and thereupon in consideration of the premises, and that the plaintiffs, at the request of the defendant, had promised the defendant to perform the said terms on their part, the defendant promised the plaintiffs to perform the said terms on his part. Averment of the plaintiffs' readiness and willingness; and, breach, the non-payment by the defendant of the deposit:—Held, on general demurrer, that the declaration disclosed a contract between the plaintiffs and the defendant, on which they might sue him without joining the other members of the company. Also, that the declaration was good, though it did not allege that the company was provisionally registered pursuant to the 7 & 8 Vict. c. 110, or that it was formed previously to the date of that act.

And held, on special demurrer, that the declaration was not bad for not alleging that the company was continuing when the shares were allotted to the defendant; nor for not shewing with sufficient cer-

tainty that the defendant accepted the allotment; nor for not shewing with certainty what the terms to be performed by the plaintiffs were. *Duke v. Forbes*, 17 Law J. Rep. (N.S.) Exch. 37; 1 Exch. Rep. 356; 5 Dowl. & L. P.C. 198.

(5) *Registry of Shareholders.*

The Companies Clauses Consolidation Act for Scotland (8 & 9 Vict. c. 17. s. 9), requires in the same terms as the English statute of that name, "a book to be kept, containing, in alphabetical order 'the names of the shareholders,' with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares." The 29th section of the statute makes such book *prima facie* evidence of a person being a shareholder, and of the number and amount of his shares.

Held, first, that as this was an exceptional privilege in favour of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and secondly, that an entry in the book, describing A as possessed of a certain number of shares, numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence.

The statute requires that a book, to be called "the Register of Shareholders" shall be kept. The book actually kept was marked "Register of Proprietors."

Held, that this variation in the title did not prevent it from being given in evidence.

An exception, abandoned in the court below, was allowed to be argued here. *Bain v. Whitehaven and Furness Junction Rail. Co.*, 3 H. L. Cas. 1.

The only register of shareholders which, by 8 & 9 Vict. c. 16. s. 28. is made *prima facie* evidence of a party being a shareholder in the company, is the register duly prepared and sealed under the provisions of the 9th section; and, therefore, where such sealed register described the holders of shares to be "Brownrigg and others, trustees," it was held to be no evidence against a co-trustee of Brownrigg, although his name was set out at length in the alphabetical register of the shareholders, as joint-owner of such shares, and the secretary swore that the entry in the sealed register referred to the same shares and the same persons. *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Brownrigg*, 19 Law J. Rep. (N.S.) Exch. 27; 4 Exch. Rep. 425.

The Court refused to grant a mandamus to remove the common seal of a railway company, which had been improperly affixed to the register of shareholders provided under 8 & 9 Vict. c. 16. (the Companies Clauses Act). *Ex parte Nash*, 19 Law J. Rep. (N.S.) Q.B. 296; 15 Q.B. Rep. 92.

(6) *Proprietorship.*

A railway company having resolved to raise money upon loan notes payable at the end of five years, with an option to the holders to convert them at the end of three years into shares at a certain rate per share, under the powers of an act of parliament for that purpose, to be applied for immediately, advertised for tenders, one-half of the

loan to be paid in February 1842, and the residue by instalments, the last of which was to be in July 1842. On the payment of the last instalment, loan notes were delivered, promising to pay the sums expressed in them on the 15th of February 1847, with an indorsement referring to the resolution, and stating that application was being made for an act under which the bearer would be entitled on February 15, 1845, to convert the loan notes into shares at the specified rate, provided previous notice were given. An act was obtained authorizing the issue of new shares to such amount, and to be disposed of in such manner, for such prices, and by such ways and means as by an order of a meeting of the company should be determined. It was resolved at a subsequent meeting that the new shares should be raised and allotted amongst the holders of the loan notes in the manner and upon the terms directed by the act.

Held, that the effect of the act and subsequent resolution was to allot the new shares among the loan note holders, not unconditionally, but as they had acquired a right to such allotment by virtue of the antecedent contract.

That the periods of five years, at the end of which these notes were to be paid off, and of three years, at the end of which the option of converting the loan notes into shares was to be exercised, were to be reckoned from the time of paying the first instalment.

That time was of the essence of the contract.

That the indorsement on the notes did not enlarge the time for exercising the option.

Quere—Whether the company had power to require notice of the option to be given previously to February 15, 1845, or whether the holders not objecting to the indorsement were bound by it. *Campbell v. London and Brighton Rail. Co.*, 5 Hare, 519.

A majority of the shareholders in the Exeter and Crediton Railway Company passed a resolution in favour of leasing their railway to the Taw Vale Company, which was worked upon the narrow-gauge principle. A majority of the directors of the Exeter and Crediton Company (seven in number), being desirous of leasing the line to the Bristol and Exeter Company, upon the broad-gauge principle, refused to carry out the wishes of the company, and retained possession of the common seal. The minority of the directors (three in number), who concurred with the shareholders, filed a bill in the name of the company for an injunction against the seven directors, to restrain them from leasing the railway to the Bristol and Exeter Company, and from opening the line upon the broad-gauge. The injunction was granted. Subsequently, the seven directors moved, in the name of the company, that the bill might be taken off the file. The Vice Chancellor directed the motion to stand over until the wishes of the shareholders should be distinctly ascertained at a general meeting; and the Lord Chancellor, upon appeal, confirmed this decision.

A motion was then made before the Vice Chancellor to dissolve the injunction, on the ground that the majority against the opening of the railway upon the broad-gauge principle had been obtained by an improper sale of shares to the South-Western Railway Company. The Court held, that it could

not interfere to prevent the shareholders from disposing of their interest in any legal manner, although such transfer of interest might entirely change the original intention and prospects of the company; and that the injunction must consequently be continued to restrain any acts of the directors which should be inconsistent with the wishes of the majority of the shareholders. *Exeter and Crediton Rail. Co. v. Buller*, 16 Law J. Rep. (N.S.) Chanc. 449.

(c) Dividends.

The Brighton, Lewes and Hastings Railway Company was by the 8 & 9 Vict. c. cc. empowered to transfer a portion of the line thereby authorized to be made to the South-Eastern Railway Company. The act contained a provision that, if the portion of the line to be transferred should not be completed within three years from such transfer, it should not be lawful for the South-Eastern Railway Company to pay any dividends until the whole of the railway should be opened to the public for traffic. On the 21st of August 1845, a deed was executed transferring a portion of the line to the South-Eastern Railway Company, but they neglected to complete that portion of the line within the three years limited for that purpose. Upon a bill filed by a shareholder, on behalf of himself and others,—Held, that the act was imperative, and that the South-Eastern Railway Company could not, after the expiration of the three years, pay any dividend whatever until the line was opened to the public for traffic.

Held, also, that the Court might exercise a discretion, and upon a proper case being made might abstain from exercising its authority to restrain the payment of a dividend which had been declared, and leave was given to bring forward such a case on affidavit.

Held, also, that the plaintiff by receiving dividends was not prevented from applying for the intervention of the Court to prevent a public benefit from being carried out, and the company and the directors were restrained from paying any future dividends, and also, an insufficient case having been made, from paying the dividend which had been already declared until the line was open for traffic. *Carlisle v. South-Eastern Rail. Co.*, 19 Law J. Rep. (N.S.) Chanc. 478.

(d) Calls.

(1) Liability to.

(i) Where Shares transferred after Call made and before payable.

An act of parliament incorporating a company provided, that until a transfer of shares should be delivered to the secretary the seller should remain liable for all future calls, and that no shareholder should be entitled to transfer any share until he should have paid all calls for the time being due on it. It also enabled the company to make calls on the shareholders, and enacted that if at the time appointed for payment of a call the holder of any share failed to pay it, the company might sue "such shareholder," and a form of declaration was given, stating that the defendant "is a holder of one or more shares." It also provided that on the trial it should be sufficient to prove that the defendant, at the time of making the call, was a holder of one

or more shares, and enabled the company on non-payment of any call to declare the shares forfeited.

Held, that a person who was a shareholder at the time when a call was made, and notice thereof given to him, but who had, before the call became payable, transferred his shares and delivered the transfer to the secretary, was liable to be sued for the calls. *North American Colonial Association of Ireland v. Bentley*, 19 Law J. Rep. (N.S.) Q.B. 427.

(ii) By signing Subscribers' Agreement and Entry of Name in Registry of Shareholders.

An allottee of scrip in a railway company, who has subscribed the subscribers' agreement, and sold his scrip in the market before the act of parliament is obtained, and whose name has been entered on the register of shareholders without his consent, is liable for calls until the name of the purchaser is inserted in the register of shareholders.

By the subscribers' agreement, signed by the defendant, the company was to be formed for making a railway from D to M, and thence to A, and the directors were empowered to do all that was necessary for the formation of a railway from D to M and A. The subscribers were to be bound by such regulations as the legislature should impose. The act of parliament gave powers to the company to purchase and work a canal, and enacted, that the railway should extend only from D to M:—Held, that the undertaking, which was authorized by the legislature, was the same as that contemplated in the subscribers' agreement, and that the defendant was bound by that instrument. *Midland Great Western Rail. Co. (Ireland) v. Gordon*, 16 Law J. Rep. (N.S.) Exch. 166; 16 Mee. & W. 804.

By an agreement, dated July 1847, A, for the considerations thereafter mentioned, agreed with an incorporated railway company to take certain shares and to pay 4*l.* per share in respect thereof on or before the 15th of August 1847, and that so soon as 15*l.* per share should have been paid on the said shares, and the said company was in a position legally to do so, they should deliver to A mortgage debentures of the railway company, bearing interest, for the sum of 24,675*l.*, being at the rate of 5*l.* per share. This agreement was duly confirmed by the company and A's name was, in consequence of it, and without any other authority, entered in the register of shareholders, and he had notice of such entry and register on such authority, and confirmed and ratified the same and assented thereto. A was elected and acted as a director of the company after the making the agreement, and his name remained on the register as the person entitled to these shares, until a call was, in December 1847, duly made upon them, of which he had due notice. In an action against A to recover the call, the register of shareholders, duly authenticated and containing an entry of A's name as a shareholder, was produced at the trial.

On a special verdict finding these facts, it was held, that A was liable as a registered shareholder to the call.

That, assuming the stipulation as to the delivery of the mortgage debentures to be illegal, it would be no defence to an action brought, not upon an executory contract, but on the statutable liability to pay calls.

But that the stipulation being merely that the company would deliver the mortgage debentures when they were in a position legally to do so, was not illegal, and would not vitiate the contract on the part of A.

Held, also, that an action for the call made in December 1847 might be maintained without proof that A had paid the 4l. per cent. per share. *West Cornwall Rail. Co. v. Mowatt*, 19 Law J. Rep. (n.s.) Q.B. 478; 15 Q.B. Rep. 521.

In an action for calls upon certain shares in a railway company, under the statute 8 & 9 Vict. c. 16. s. 26, it appeared that the defendant was not an original subscriber, but had purchased scrip certificates of the shares in question, and before the call was made sent them in to the company, with a claim to be entered in their books as the holder thereof. His name was entered in a draft register of shares, and a receipt for the scrip sent to him; but his name was not entered in the *sealed* register until after the call was made:—Held, that the plaintiffs were not entitled to recover; and, *semble*, that in this respect there is no difference between the case of an original subscriber and that of a transferee. *Newry and Enniskillen Rail. Co. v. Edmunds*, 17 Law J. Rep. (n.s.) Exch. 102; 2 Exch. Rep. 118.

(iii) *Executors.*

A declaration in debt for calls stated that one C N was a shareholder and proprietor of 160 shares in the Neptune Marine Insurance Company, and that by the deed of settlement of the company, it was provided that any member of the said company, or his *executors* as such executors, being indebted to the company, should, upon demand, pay such debts without requiring the accounts of the partnership to be taken, and as if such member or his executors were strangers to the company; and that the directors should have full power to call for the further payment by each shareholder, or his executors, of the sum of 45l. on every share held by him. The declaration then alleged that the company caused to be enrolled in Chancery a memorial, verified as by the said act was required, of the names, residences, and descriptions of the directors and secretary of the company, and the shareholders, in the form in the schedule to the act annexed. There were pleas of *non est factum*; that the call was not made whilst the defendant was a shareholder and proprietor of the 160 shares; and a plea traversing the enrolment of the memorial.

The 56th clause in the deed of settlement provided, "that every member being indebted to the company shall upon demand pay such debt," &c. The 64th clause empowered the directors "to call for the further payment by each shareholder of the sum of 45l." The memorial described one of the shareholders of the company thus:—"A R director of the Hon. East India Company, and major-general in the East India Company's service, shareholder." This description corresponded with that given in the register of the company.

Held, first, that there was no variance between the deed of settlement and the statement of it in the declaration as to the liability of the executors, as the executors of an original subscriber were bound to pay in the event of a call being made upon them. Secondly, that the memorial was sufficient within

the meaning of the act of parliament, as it corresponded with the description in the register. *Wills v. Murray*, 19 Law J. Rep. (n.s.) Exch. 209; 4 Exch. Rep. 843.

(iv) *Legatees.*

A testator bequeathed some Great Western Railway shares, in respect of which he had executed the parliamentary contract, and also some Great Western Railway shares which he had purchased before the act passed from a person who had subscribed the contract. All the calls on these shares had not been paid at the time of the testator's death:—Held, that, as between the testator's estate and the legatee, the testator's estate was liable to pay the future calls on both sets of shares. *Jaques v. Chambers*, 16 Law J. Rep. (n.s.) Chanc. 243.

(v) *Infants.*

By the express words of the 8 & 9 Vict. c. 16. an infant is liable for calls. *The Cork and Bandon Rail. Co. v. Casenove*, 10 Q.B. Rep. 935.

To an action in the statutable form against a shareholder for calls on railway shares, infancy at the time the calls were made is no defence, it not appearing either that the infant became a shareholder by contract, or that he ever repudiated his interest in the shares:—Held, also, that the Court could not infer from his appearance by attorney, that he was of full age. *Leeds and Thirsk Rail. Co. v. Fearnley*, 18 Law J. Rep. (n.s.) Exch. 330; 4 Exch. Rep. 26.

Debt for calls on railway shares. Plea, that the defendant became possessed of the shares by contract, and not otherwise, and that at the time of the contract and of the making of the calls he was an infant; that while he was an infant he repudiated the contract, and gave notice to the plaintiffs thereof, and that he then held the shares at their disposal, and that from thence hitherto he had always held the shares at the plaintiffs' disposal:—Held, a good answer to the action. *Newry and Enniskillen Rail. Co. v. Combe*, 18 Law J. Rep. (n.s.) Exch. 325; 3 Exch. Rep. 565.

Shares in a railway company were transferred to the defendant, being an infant. After he came of age a call was made. In an action of debt for such call, the declaration was in the statutory form, and the defendant pleaded, that at the time when he first became and was the holder of the said shares, and at the time of his making and entering into the contracts, by force, virtue, and in pursuance of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiffs, and were incurred by him the defendant, and at the time of the making and entering into the contracts by the force, virtue, and in pursuance of which the plaintiffs claimed to be entitled by law to make the said call on him the defendant, and to demand and have the amount as in the said declaration alleged, he, the defendant, was within the age of twenty-one years. The replication traversed the plea:—Held, that "contract" meant that by which the defendant became a member of the company, and that the plea was proved by proof of his infancy at the time of the transfer.

Quære—Whether the word "contract" being so construed, the plea was an answer to the action.

Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Pilcher, 19 Law J. Rep. (N.S.) Exch. 207; 5 Exch. Rep. 24.

(2) *Making.*

A call may be considered to be made as soon as a notice announcing that the directors have resolved to make a call has been sent to the shareholders. *Shaw v. Rowley*, 16 Law J. Rep. (N.S.) Exch. 180; 16 Mee. & W. 810.

A deed of settlement provided that the directors should meet weekly on a day to be named by them, and on such other days as they should think fit; but that the secretary, or any other director, might call an extraordinary board, by sending a notice at least one clear day before the time of meeting, specifying the day and hour fixed for the meeting, and the purpose thereof, and that the business transacted by the directors, being at least five in number, at such extraordinary meeting should bind the company.

The declaration alleged that certain persons, to wit, (naming them) ten of the directors, then and there being duly constituted, and being a board of directors for the management of the affairs of the company, according to the provisions of the deed at a certain meeting held pursuant to the deed at the office of the company, duly made a call for money for the purposes of the company, &c. according to the provisions of the deed. The defendant pleaded that the said directors did not duly make the said call according to the said deed of settlement *modo et formâ*.

It was proved that the call in question was made by the directors at a meeting held on Tuesday the 11th of April 1848, Wednesday being the ordinary weekly meeting, and that the secretary had summoned the directors by letter, stating he was directed to summon them for a special board on special business. The minutes of the meeting stated it was a special meeting, and that the further consideration of the affairs of the company, adjourned from the 7th of March, was resumed.

Held, that this was not an extraordinary meeting requiring notice of the purpose of the meeting to be given, and that the call was rightly made.

Seem—that the competency of the meeting to make the call was not denied by the pleadings. *Wills v. Murray*, 19 Law J. Rep. (N.S.) Exch. 209; 4 Exch. Rep. 843.

By the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16. s. 16), no shareholder is entitled to transfer any share after any call shall have been made in respect thereof, until he has paid all calls then due on such share:—Held, that the resolution of the directors, that a call shall be made, is itself the call within the meaning of this enactment. *Ex parte Tooke*, 18 Law J. Rep. (N.S.) Q.B. 343.

A railway act provided that, for the purpose of voting, 25*l.* of the capital should represent a share, and that no one should vote in respect of any less proportion. The 22nd section of the 8 Vict. c. 16, the Companies Clauses Consolidation Act, empowered the company to make calls. The 90th section authorized the directors to exercise all the powers of the company except as to matters directed by that and the special act to be transacted by a

general meeting of the company. Neither the 8 Vict. c. 16. nor the special act directed calls to be made at a general meeting of the company. The special act directed that three months at least should be the interval between successive calls. After the formation of the company, the shares were altered to 20*l.* each.

The directors on the 11th of January passed a resolution for a call to be paid on the 15th of February, and on the 8th of May a resolution for a second call to be paid on the 19th of June.

Held, in an action against a shareholder to recover the amount of these calls, first, that the calls were not illegal, by reason of the shares having been altered to 20*l.*; secondly, that it was competent for the directors to make a call; and lastly, that an interval of three months had elapsed between the two calls pursuant to the act. *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co. v. Mitchell*, 19 Law J. Rep. (N.S.) Exch. 89; 4 Exch. Rep. 540.

Under an act of parliament the capital of a railway was converted into shares of the nominal value of 27*l.* 10*s.*, 22*l.* and 31*l.* upon which unequal sums were due, and upon which profits were payable in proportion to the money actually paid. A bill was filed by a holder of shares of 31*l.* on behalf of himself and the other holders of such shares, alleging that the directors had formed a scheme to conduct the affairs of the company without regard to the general benefit of the shareholders, but for the benefit of the holders of shares of 27*l.* 10*s.* and 22*l.*; and that in furtherance of such design they had made a call of 10*l.* on the holders of shares of 31*l.*, and that they had done various other acts stated in the bill to intimidate and induce the shareholders to consent to terms which would give an advantage to the holders of shares of 27*l.* 10*s.* and 22*l.* It was also alleged that the call was not required for the works which the company had power to make, and it prayed for an inquiry to ascertain how much of the 10*l.* was required for the purposes of the company, and for an injunction to restrain the proceedings to enforce payment of more of such calls than should be found necessary. The bill also alleged that the plaintiff and other holders of 31*l.* shares had not paid the call, but that some had:—Held, upon a demurrer by the company for want of equity and for want of parties, that, as the bill contemplated a continuance of the company, the Court could not entertain jurisdiction and assume to interfere in the internal management of the company, and that the plaintiff was not entitled to relief on this bill.

Held, also, that the bill was defective for want of parties, as the plaintiff sued as well for shareholders who had paid, as for those who had not paid, and also because the bill did not allege that the holders of other shares were fully represented by the defendants; and the demurrer was allowed, and leave to amend the bill refused.

The clauses in a railway act upon which a plaintiff intends to rely should be stated in the bill; and, if omitted in the bill, cannot be referred to upon demurrer, although the act is a public one. *Bailey v. the Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 19 Law J. Rep. (N.S.) Chanc. 377; 12 Beav. 433.

[See (1) *Liability to*, (iii) *Executors*.]

(3) Notice, Proof of.

In order to prove the service of a notice of a call, the plaintiff proved that it was the duty of C to fill up the printed notices and direct them to the shareholders; that on the day of the call he had received instructions to send out such notices; that he had been seen in the act of making out such notices, and putting them into a basket ready to be posted, and that he had at that time a list in his hand. It was proved that all the letters in the basket were posted. C was dead at the time of the trial, but a list, containing the name of the defendant, was produced in his hand-writing, with an indorsement by him "letters sent out."

Held, that this list so indorsed was admissible, as it might reasonably be inferred that it was a contemporaneous entry. *Eastern Union Rail. Co. v. Symonds*, 19 Law J. Rep. (N.S.) Exch. 287; 5 Exch. Rep. 237.

(4) Action for, and Pleadings.

The directors of a railway company made a call of 1*l.* 15*s.* per share, ordering, at the same time, the sum of 15*s.* per share, *part* thereof, to be paid on the 28th of February, and the remaining 1*l.* on the 7th of May, and between the two latter days brought an action to recover the instalment of 15*s.*

Held, that they were not entitled to recover this amount, being part of a call. *Ambergate, Nottingham, Boston and Eastern Junction Rail. Co. v. Coulthard*, 19 Law J. Rep. (N.S.) Exch. 311; 5 Exch. Rep. 459.

Debt for calls. The declaration stated that the defendant, on the 27th of November 1848, and from thence hitherto, *hath been and still is* the holder of forty shares in the said company, and then, and at the time of the commencement of this suit, was and *still is* indebted to the company in 300*l.* for calls, whereby an action hath accrued by virtue of a certain act of parliament (the Companies Clauses Consolidation Act), and also by virtue of the Midland Great Western Railway of Ireland Act, 1845, and of the Midland Great Western Railway of Ireland Act (Mullingar to Athlone, 1846), to demand of the defendant 300*l.*:—Held, that the declaration was not bad on special demurrer by reason of the averment as to the time of the holding of the shares and the debt to the company, or the statement as to the two special acts. *Midland Great Western Rail. Co. (Ireland) v. Evans*, 19 Law J. Rep. (N.S.) Exch. 118; 4 Exch. Rep. 649.

The form of declaration in an action for calls prescribed by 8 & 9 Vict. c. 16, s. 26, is not open to any objection on special demurrer. *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Webster*, 19 Law J. Rep. (N.S.) Exch. 146.

The form of declaration given by the 26th section of the 8 & 9 Vict. c. 16, the Companies Clauses Consolidation Act, is not applicable in an action for calls against an executor, where the calls were made in the lifetime of the testator. *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Cotesworth*, 19 Law J. Rep. (N.S.) Exch. 240; 5 Exch. Rep. 226.

Debt for calls. The first count stated that the defendant, on &c., *was and still is* the holder of thirty-nine shares in the said company, and before,

&c., *was and still is* indebted to the said company in respect of the calls theretofore duly made by the said company, each of the said calls being, &c.; whereby and by reason of the said sum being wholly unpaid, an action hath accrued by virtue of a certain act of parliament (the special act), and a certain other act (another special act), &c. The second count was similar, but stated the action to have accrued by virtue of a certain act of parliament (the Companies Clauses Consolidation Act) and a certain other act (the special act). The special act first referred to in the first count contained the same clause as the Consolidation Act, 8 & 9 Vict. c. 16, s. 26, and the second special act incorporated the Consolidation Act.

Held, on special demurrer, that the declaration was not bad for not adopting the precise language of the special and general acts, nor for not referring to the general act in the first count. *East Lancashire Rail. Co. v. Croxton*, 19 Law J. Rep. (N.S.) Exch. 313; 5 Exch. Rep. 287.

In an action by a company for calls under the 8 & 9 Vict. c. 16, ss. 26, 27, the defendant, under a traverse of his being a shareholder in the company, may not only dispute that he is such *de facto*, but may shew that he is not a shareholder *de jure*, so as to be entitled to a share in the profits of the undertaking. Therefore, in such a case, where the special act enacted that the provisions of the general act as to the distribution of the capital into shares and the enforcing the payment for calls should be incorporated with it, and that the company might create new shares in the manner to be agreed upon at a general meeting of the company, the defendant was allowed to plead, first, never indebted; secondly, that he was not a shareholder; and, thirdly, a traverse of the calls having been made; but was not allowed to plead that there had been no meeting of the company before the shares had been created; nor that the shares were not agreed to be created at the meeting of the company. *Shropshire Union Railway and Canal Co. v. Anderson*, 18 Law J. Rep. (N.S.) Exch. 232; 3 Exch. Rep. 401.

In an action for calls by a railway company, the defendant was allowed to plead, first, never indebted; secondly, a traverse of the defendant being the holder of shares; thirdly, that the calls were fraudulently made by the plaintiffs for fraudulent and illegal purposes (specifying them); fourthly, that after the accruing of the causes of action, it was agreed between the plaintiffs and the defendant and others that the calls should be rescinded, and that the defendant should not be called upon to pay, and that such agreement was accepted in satisfaction of the causes of action; fifthly, that the amount of capital required by one of the company's acts to be subscribed before they were at liberty to put in force the powers of the original act, had not been *bond fide* subscribed for, and that the plaintiffs had no power to make calls until such subscription had been made.

The following pleas were disallowed:—first, that the defendant was placed on the register of shareholders by the fraud of the plaintiffs; second, that the defendant was one of the persons mentioned in the company's act as having subscribed to the undertaking, by virtue of which subscription he became holder of the shares, and that he was induced to

subscribe by fraud of the plaintiffs and others: third, that before the passing of the company's act, and before any register of shareholders made, and before making any calls, the defendant, being an original subscriber, sold and delivered his scrip to a person unknown; that the vendee applied to be registered, and that the company agreed to register him as holder of the said shares; that the company afterwards registered the defendant's name for the said shares against his will and against the will of the vendee, and that the defendant never was holder of the said shares except as aforesaid: fourth, that the plaintiff's act was obtained by fraud of the plaintiffs and others: fifth, traverse of notice of calls. *Waterford, Wexford, Wicklow and Dublin Rail. Co. v. Logan*, 19 Law J. Rep. (N.S.) Q.B. 259.

In an action for calls by a railway company the declaration alleged that the defendants were and still are the holders of certain shares, and being such holders were indebted to the company in the amount of calls upon them:—Held, that the plea of never indebted was not an admission that the defendants were shareholders in the company. *Birkenhead, Lancashire and Cheshire Junction Rail. Co. v. Brownrigg*, 19 Law J. Rep. (N.S.) Exch. 27; 4 Exch. Rep. 426.

To an action for work and labour and money paid, brought against the Metropolitan Sewage Manure Company, the defendants pleaded as to 100*l.*, parcel, &c., a set-off, stating that the plaintiff was and still is the holder of 100 shares in the said company, and was and still is indebted to the defendants in 100*l.* in respect of a call of a certain sum of money, to wit, 1*l.* upon each of the said shares, theretofore and whilst the plaintiff was the holder of the said shares as aforesaid, to wit, on &c. duly made by the defendants, which said sum of money is still due, and equals the said sum, parcel, &c.—*Seemle*, that the plea was bad in not averring pursuant to the 8 & 9 Vict. c. 16. s. 26, (the Companies Clauses Consolidation Act,) that an action had accrued to the company by virtue of this and the special act. *Moore v. Metropolitan Sewage Manure Co.*, 18 Law J. Rep. (N.S.) Exch. 164; 3 Exch. Rep. 333.

(e) *Liability of Promoters and Provisional Committee-men.*

[See ATTORNEY AND SOLICITOR, Bill of Costs.]

(1) *At Law.*

(i) *In general.*

After the formation of a railway company the defendant wrote to the secretary, consenting to become a member of the provisional committee. His name was then published as one of the committee, and he afterwards acted as chairman at one of the meetings of the committee. In an action for the price of stationery, supplied to the order of the secretary,—Held, that the jury were properly directed that it was matter of inference that the defendant had, by consenting to join the provisional committee, constituted the secretary his agent to order such things as were necessary to enable the committee to go on; and that the jury had properly found for the plaintiff in respect of the stationery supplied after such consent.

Quære—Whether, if goods are supplied to a rail-

way company under an order given by a majority of the provisional committee, and to which the minority objected, any action can be maintained for them against those members who formed the minority. *Barnett v. Lambert*, 15 Law J. Rep. (N.S.) Exch. 305; 15 Mee. & W. 489.

In an action against A, B, and C, the declaration contained a special count for not accepting and paying for machinery manufactured by the plaintiff, and counts for goods bargained and sold, and on an account stated. It appeared in evidence that the machinery in question had been ordered by A and B as members of a proposed company, prior to the time when C joined the company, under a written contract, by the terms of which the plaintiff was to be at liberty to draw monthly such sums as he wished, not exceeding the price of the work done. Payments were accordingly made to the plaintiff from time to time, all of which were subsequent to the time of C joining the company, and several of the cheques were drawn at meetings at which he was present. C took a very active part in making experiments with, and suggesting alterations in, the machinery, and on one occasion promised payment:—Held, that the special count could not be maintained, as the fact of C subsequently acquiring an interest in the subject-matter could not render him liable as a party to the prior contract; and that there was no ground for implying a new contract after he became a member.

Held, also, that the count for goods bargained and sold was not sustained, as, if the property in the machinery passed by the payments made on account, it passed according to the contract under which the payments were made, and to which C was not a party. *Beale v. Moulds*, 16 Law J. Rep. (N.S.) Q.B. 410; 10 Q.B. Rep. 976.

Prospectuses were printed, and articles of stationery supplied by the plaintiff, by order of the solicitor of a railway company in November 1845. The defendant was a member of the provisional committee, and attended two meetings as such in October 1845:—Held, that there being no evidence that the solicitor had any authority to order the work or articles in question on account of the defendant or of the provisional committee, the defendant was not *prima facie* liable to pay for them. *Cooke v. Tonkin*, 16 Law J. Rep. (N.S.) Q.B. 153; 9 Q.B. Rep. 936.

The defendant attended meetings of the directors of a company from November 1837 to March 1838. In July 1838 an act of parliament passed, by which the defendant was named and appointed a director of the company. A judgment by confession was entered against the secretary of the company in November 1843. The plaintiff had not interfered in the affairs of the company since March 1838:—Held, that the above facts did not sufficiently establish that the defendant was a member at the time of the judgment. *Scott v. Berkeley*, 16 Law J. Rep. (N.S.) C.P. 107; 3 Com. B. Rep. 925.

A prospectus issued by a projected railway company gave the names of a provisional committee, and also of a committee of management, and one of the clauses of the prospectus empowered the committee of management to apply the funds of the company for all the expenses incurred in the formation of the company:—Held, that the committee of management were not thereby empowered

to pledge the credit of the provisional committee for advertisements inserted in a newspaper, and that a verdict of a jury to this effect was right. *Dawson v. Morrison*, 16 Law J. Rep. (N.S.) C.P. 240.

In actions against a provisional committee-man for work done and goods supplied under the order of the solicitor to the company,—Held, that the law would not imply, from the mere fact of a defendant agreeing to be a provisional committee-man, an authority given by him to every other committee-man to give the order out of which the contract arose, by himself or by the solicitor or secretary, nor an authority to such solicitor or secretary to give it in behalf of the committee.

Such an agreement amounts to no more than a promise that he will act with other persons appointed, or to be appointed, for the purpose of carrying the particular scheme into effect.

A provisional committee is an association formed for carrying into effect the preliminary arrangements necessary to promote the scheme: it is not a partnership, for it constitutes no agreement to share in profit or loss.

Where a provisional committee-man authorizes his name to be inserted in a particular prospectus, the question is, what inference as to his liability a reasonable man would draw from its contents, under the circumstances?

Where a prospectus sets forth the names of the acting committee the question is, whether it means that the provisional committee are thereby excluded from the management, or that they have appointed the acting committee, or the majority of it, to act on their behalf and as their agents?

Where a prospectus states the name of the solicitor, the question is, does it mean that he will be employed by the acting committee, or that he has already been appointed to act by all whose names were mentioned? And further, what was the business at the time of the contract usually transacted by solicitors for such companies?

In an action against a provisional committee-man for work and labour, to which he pleaded the general issue, there being evidence of the defendant having consented to be a provisional committee-man, and of acts done by him relating to the proposed scheme,—Held, that the jury were properly directed to consider whether the defendant had, in fact, become a provisional committee-man; whether he had authorized the solicitor or secretary or any member of the committee to hold him out to the world as personally responsible for the necessary and usual expenses incurred in forming such a company; and if so, then whether his name was held out, the work done, and the credit given on the faith of his being personally responsible. *Reynell v. Lewis and Wyld v. Hopkins*, 16 Law J. Rep. (N.S.) Exch. 25; 15 Mee. & W. 517.

The plaintiff and another were the registered promoters of a railway company, provisionally registered under the 7 & 8 Vict. c. 110. At a meeting of the provisional committee, the plaintiff was appointed secretary, and his co-promoter solicitor to the company; and other persons, of whom the defendant was one, a managing committee:—Held, that these facts did not entitle the plaintiff to recover against the defendant, an acting member of the committee, for services subsequently rendered

by him as secretary, without shewing that the defendant contracted with him as principal, independently of his acts as a member of the managing committee. *Wilson v. Curzon*, 16 Law J. Rep. (N.S.) Exch. 122; 15 Mee. & W. 532.

In an action brought against a member of the provisional committee of a proposed railway company, upon a contract entered into by the committee of management appointed by such provisional committee, it is a question of fact for the jury to determine from all the evidence in the cause whether the defendant had made the committee of management his agents for the purpose of pledging his individual credit. *Williams v. Pigott*, 17 Law J. Rep. (N.S.) Exch. 196; 2 Exch. Rep. 201.

Where an authority is expressly given to several persons with no stipulation that any specified number shall form a quorum, they must all join in exercising the authority.

The defendant, a member of a provisional committee of a railway, joined in a resolution appointing eight specified persons as a managing committee, who were authorized to take the most energetic measures towards carrying out the scheme, but there was no provision that any number less than the whole might act:—Held, that the defendant was not bound by an order (within the scope of the authority) given by six only out of the whole committee. *Brown v. Andrew*, 18 Law J. Rep. (N.S.) Q.B. 153.

Assumpsit by a surveyor against the defendant as a member of the acting committee of an intended railway. Prospectuses were issued, subscriptions made, and deposits received to the amount of more than 22,000*l*. The plaintiff was appointed valuer by one of the members of the committee, and his appointment was assented to by the defendant, who was a constant attendant at its meetings, and who afterwards was a party to an agreement for referring the plaintiff's bill to two persons for settlement:—Held, that the jury were properly directed that the question was, whether the defendant could have intended to pledge his own personal credit to the plaintiff by employing him. *Higgins v. Hopkins*, 18 Law J. Rep. (N.S.) Exch. 113; 3 Exch. Rep. 163.

In actions by tradesmen against individual members of a provisional or managing committee, for work done or goods supplied to a proposed company, the proper question to be decided by the jury is, whether the defendant either personally or by his authorized agent entered into a contract with the plaintiff for the goods or services in question.

A party by merely becoming a provisional committee-man incurs no liability; but his consenting to become so may be important, if it be shewn that in so doing he knew of and authorized the incurring of expenses necessary to the formation of the company, and the goods and services sued for were so necessary.

A person by acting on a provisional committee may authorize an agent to issue orders on his credit, without giving or intending to give him any direct authority to that effect; and it is immaterial whether the defendant in acting as he did intended to pledge his individual credit or whether the plaintiff knew who were the particular persons forming the committee.

A previous authority to the agent to contract on

his behalf may be inferred from the subsequent conduct or admissions of the defendant; but to render him answerable, by reason of such admissions, they must appear to have been made from a consciousness of a legal personal liability to the plaintiff in respect of the particular demand, and not merely from a desire by paying a proportion of the demand to prevent litigation, or from a misconception of the law as to the liability of provisional committee-men merely as such.

If, however, it should appear that the plaintiff in supplying the goods and performing the services looked only to the deposits as a fund from which payment was to be made, he will have no cause of action against individual members of the committee. *Bailey v. Macaulay*; *The same v. Pearson*; *The same v. Haines*; *The same v. Bracebridge*; *Dawson v. Hay*; and *Wilson v. Holden*, 19 Law J. Rep. (N.S.) Q.B. 73; 15 Q.B. Rep. 533.

By an agreement whereby the plaintiff agreed to allow his name to be put on the list of the provisional committee of a railway company, and the defendants undertook to indemnify the plaintiff from all personal responsibility, and to hold him harmless against all costs, charges, and expenses that then had been or might thereafter be incurred in and about the formation of the company, their meetings, advertisements, surveys and other expenses of carrying out the company, applying for an act of parliament, or anything relating thereto.

Held, that this was an indemnity against lawful claims only, and, therefore, did not apply to the costs incurred in the defence of an action improperly brought against the plaintiff as a member of the provisional committee, and the costs of a Chancery suit which arose out of the action. *Lewis v. Smith*, 19 Law J. Rep. (N.S.) C.P. 278.

(ii) *To the Return of Deposits.*

Assumpsit to recover deposits from a member of the provisional committee of a railway company, provisionally registered under the 7 & 8 Vict. c. 110. It appeared that the prospectus announced the capital to be 2,000,000*l.*, in 80,000 shares of 25*l.* each; and the deposit required was stated to be 2*l.* 12*s.* 6*d.* per share. The plaintiff applied to the provisional committee for shares, and received a letter of allotment for thirty shares, which requested payment of the deposit thereon to one of certain bankers therein named on or before a certain day, otherwise the allotment would be null and void; and which stated, "This letter, with the bankers' receipt appended hereto, will be exchanged for scrip, on your presenting it at the office of the company, and executing the parliamentary contract and subscribers' agreement." The plaintiff paid the deposits in due time; and, after several applications for scrip, was informed by the secretary that the directors did not mean to issue scrip; and, on the plaintiff requiring the repayment of her deposit money, she was told by one of the provisional committee, not the defendant, that a statement would be made of the concerns of the company and the surplus divided:—Held, first, that if the scheme proved abortive, the application for shares and payment of the deposits amounted to nothing, and the allottee might recover the amount deposited from the defendant in an action for money

had and received; secondly, that there was evidence from which the jury might infer that the concern was abandoned.

An association of this nature does not amount to a partnership.

Quære—Whether under such circumstances a special count in assumpsit for not delivering scrip is maintainable. *Walstab v. Spottiswoode*, 15 Law J. Rep. (N.S.) Exch. 193; 15 Mee. & W. 501.

In an action for money had and received brought by a depositor against one of the committee of management of a projected railway company, it appeared from the prospectus that the capital was to have been 3,000,000*l.*, in 120,000 shares, deposit 1*l.* 7*s.* 6*d.* per share. The plaintiff requested an allotment of sixty shares, stating "I undertake to accept the same, subject to the regulations of the company, and to sign the legal documents, and to pay, when required, the deposit." To this the following answer (in substance) was sent: "Not transferable. The L and E R Company, capital 3,000,000*l.*, in 120,000 shares of 25*l.* each, &c.—Sir,—The committee have, at your request, allotted you sixty shares, upon condition that the deposit be paid on or before the 18th of October, in default of which such allotment will be forfeited." Before the day so appointed for the payment of the deposit, the committee of management issued an advertisement, stating that they had completed the allotment of shares, and apologizing to disappointed applicants. There was evidence that the plaintiff saw this advertisement; within a day or two he paid his deposit, and he afterwards executed the subscription deed, which gave authority to the committee to pay expenses out of the sum subscribed. The committee allotted only 58,000 shares, though they had had the opportunity of allotting the whole 120,000. The deposits had been expended, and there were no funds to make the deposit required by the House of Commons. The plaintiff, with a knowledge of the last two circumstances, attended a meeting which was called of the shareholders, and moved that the deposits should be returned, but was outvoted. Afterwards the scheme was abandoned:—Held, first, that the application for and the allotment of the shares did not, at the time when the plaintiff paid the deposit, constitute a contract binding upon the plaintiff to take and pay for shares in a concern consisting of 58,000 shares only.

Secondly, that the application being unconditional, and the form of the allotment conditional, the contract was not, upon that account, binding upon the plaintiff.

Thirdly, that the jury were warranted in saying that the advertisement, stating that the committee had completed the allotment of shares, was a fraudulent misrepresentation, and a material inducement to the plaintiff to pay his money; and that the plaintiff was therefore entitled to recover it back in an action for money had and received.

Fourthly, that the payment of the deposit having been obtained from the plaintiff by misrepresentation, the deed executed by him under the same belief formed no answer to the action.

Fifthly, that the plaintiff's subsequent attendance at the meeting did not preclude him from bringing the action. *Wontner v. Shairp*, 17 Law J. Rep. (N.S.) C.P. 38; 4 Com. B. Rep. 404.

A railway company, provisionally registered, required a deposit of 2*l.* 12*s.* 6*d.* on each share allotted. The plaintiff had twenty shares allotted to him, on which he paid the required deposit and received scrip certificates for the shares. He signed the subscribers' agreement, which gave the provisional committee power to carry on the undertaking, or any part of it, or to abandon the whole, or any part of it, and, out of the money which should come to their hands, by way of deposits or otherwise, to make such deposits or investments as might be required by the standing orders of parliament, and to pay salaries, &c. and also towards the costs of obtaining acts of parliament, &c.; and, generally, to apply such monies in paying and satisfying all other costs, expenses, or liabilities, which they might incur in relation to the undertaking. The undertaking proved abortive, and the company was dissolved under the 9 & 10 Vict. c. 28, but without fraud. In an action for money had and received, to recover a deposit from a member of the provisional committee, the plaintiff having been nonsuited,—Held, that the nonsuit was right, inasmuch as the plaintiff was not entitled to recover either the 2*s.* 6*d.* per share, paid as a deposit of 10*s.* in every 100*l.*, under the 23rd section of 7 & 8 Vict. c. 110, or the 1*l.* 10*s.* per share required to be deposited by the standing orders. *Garwood v. Ede*, 17 Law J. Rep. (N.S.) Exch. 29; 1 Exch. Rep. 264.

The plaintiff signed a letter of application for shares in a railway company, provisionally registered, therein undertaking to sign the subscribers' agreement and parliamentary contract when required. He never received any letter of allotment, but having paid the deposit on 500 shares, he received scrip certificates for them, which in form were:—"The subscribers' agreement and parliamentary contract having been signed by the person to whom the certificate is issued." In fact he never signed the subscribers' agreement or the parliamentary contract at all. The scheme having proved abortive, he brought an action against one of the managing committee for money had and received:—Held, that he had placed himself in the same position as if he had signed the parliamentary contract, and was not entitled to recover. *Clement v. Todd*, 17 Law J. Rep. (N.S.) Exch. 31; 1 Exch. Rep. 268.

In 1845 a railway company, provisionally registered, issued a prospectus, which stated the capital to be 1,500,000*l.*, in 60,000 shares of 25*l.* each. The plaintiff having applied for shares, and having received a letter of allotment for forty shares, requiring him to pay the sum of 105*l.* as a deposit thereon, on or before the 16th of October, paid the amount on that day. On the 4th of November, the plaintiff signed the subscribers' agreement, containing the usual terms as to the disposition of the deposits. Of the whole amount of shares, about 35,000 were allotted, and out of this number deposits were paid up on 18,160 only. These facts were not communicated to the plaintiff before signing the deed:—Held, in an action by the plaintiff to recover from a member of the managing committee the whole amount of his deposits, that the withholding of the above facts did not amount to fraud, so as to avoid the subscribers' agreement.

Vane v. Cobbold, 17 Law J. Rep. (N.S.) Exch. 97; 1 Exch. Rep. 798.

A party to whom shares in a projected railway company had been allotted received a letter of allotment, on which was indorsed, "The directors assume the right to carry out their intentions by the adoption of all such measures as they may deem requisite for obtaining the necessary parliamentary powers to form a company for the construction of," &c., "and to apply the amount paid for deposits in discharge of any liabilities incurred by them, under the *general powers vested in them* for the prosecution of the undertaking." The allottee paid the deposit on the shares allotted to him, and, the undertaking having failed, sued one of the directors for a return of the deposit money:—Held, that the expression "general powers" meant the general powers which the directors assumed for the purpose of carrying the undertaking into effect; and that if all the deposits had been applied for that purpose in a reasonable and proper manner, and before it was clear that the scheme must fail, the plaintiff was not entitled to recover.

Whether the deposit money has been reasonably expended, is a question for the jury. *Jones v. Harrison*, 17 Law J. Rep. (N.S.) Exch. 132; 2 Exch. Rep. 52.

In an action for money had and received against A, B, and C, three of the provisional committee of a projected railway company, to recover deposits paid by the plaintiff, an allottee of shares, on the ground of fraud, it appeared that the money was paid by the plaintiff to certain bankers, who gave him a receipt on account of five persons as trustees of the company. A, alone of the defendants, was a trustee:—Held, that the action could not be maintained.

Semble—that to support such an action it is not necessary to shew that the plaintiff was induced to pay his deposit by a fraudulent misrepresentation; it is sufficient that such a misrepresentation was made before the plaintiff paid the money.

The alleged fraud consisted in statements published by the secretary to the company relative to the number of shares allotted, and the money paid upon them, which afterwards proved to be false. It was not shewn that the defendants had given any authority to the secretary to make these statements. The jury having found that they were fraudulently made—*semble*, that the defendants were liable for such fraudulent misrepresentations. *Watson v. Charlemont*, 18 Law J. Rep. (N.S.) Q.B. 65; 12 Q.B. Rep. 856.

The plaintiff addressed to the defendants, the members of a managing committee of a railway company, a letter of application for 200 shares, and undertook to accept them or any less number, and to pay the deposit, &c. A letter of allotment was afterwards sent to him in the usual form, headed, "Not transferable," and requiring him to pay a deposit of 2*l.* 2*s.* per share. The words relating to the deposit were erased, and on the letter was indorsed a memorandum, stating that the committee thinking it would be an accommodation to subscribers if they were allowed the option of either paying the whole or a portion of their deposits then, and the remainder at a future day, and considering

it unnecessary to lock up the large sum of money over and above what any expenses could require in the then state of the money market, there being no absolute necessity for so doing, informed him that the bankers were authorized to receive in part of his deposit 10s. per share before the 17th of November, and the remainder before the 8th of February:—Held, first, that the letter of allotment did not require a stamp; secondly, that the deposits having been advanced for preliminary expenses, and having been so applied, could not be recovered back. *Willey v. Parratt*, 18 Law J. Rep. (N.S.) Exch. 82; 3 Exch. Rep. 211.

An allottee of shares in a projected railway company sued an active member of the managing committee to recover back his deposit. On the trial the defendant refused to produce the plaintiff's letter of application for shares, and objected that the letter of allotment which the plaintiff tendered in evidence was inadmissible for want of an agreement stamp. The Judge, however, received it in evidence. The plaintiff then put in evidence a prospectus issued by the committee, which limited the liability of the allottees to the extent of their deposits; and he proved that he had paid his deposit to the company's bankers to the credit of the company. He also shewed that the company had not prepared their surveys in time so as to enable them to apply to parliament for an act during the ensuing session, and he gave much evidence with a view of proving that the scheme had failed altogether. The Judge in substance directed the jury that it was for them to say what the contract between the parties was; and that if they were of opinion that the plaintiff did not become a partner or agree that his deposit should be employed in payment of the preliminary expenses, and that the scheme had failed, the plaintiff was entitled to recover back his deposit. The jury found for the plaintiff. In error in a bill of exceptions tendered by the defendant,—held, first, that the letter of allotment was properly received without a stamp as it did not constitute part of a written contract, unless it agreed in terms with the letter of application, which was not to be presumed when the defendant, who had the letter of application, and could have shewn what its terms were, refused to produce it. Secondly, that on the facts stated the action for money had and received would lie against the defendant. Thirdly, that as the contract did not depend on the prospectus and letter of allotment only, but was to be gathered partly from the acts of the parties, it was a question of fact for the jury to say what the contract was; and that the Judge had submitted the proper question for their determination. *Moore v. Garwood*, 19 Law J. Rep. (N.S.) Exch. 15; 4 Exch. Rep. 681.

The plaintiff, an allottee of shares in a projected railway company, paid his deposit into the bank named in the prospectus, which had been circulated by the defendant's sanction—his name appearing therein as one of the provisional committee and as chairman of the committee of management. The defendant had not personally superintended the allotment of shares, and had taken no active part in the concern, having been present once only at any meeting, when he acted in the capacity of chairman, but dissented from the proceedings.

The project having failed, the plaintiff sued the defendant in an action for money had and received for the recovery of his deposit:—Held, that the defendant was not liable.

In such action letters written by the secretary of the company to the plaintiff, there being no other evidence of their being written by the defendant's authority, were held to be inadmissible against the defendant. *Burnside v. Dayrell*, 19 Law J. Rep. (N.S.) Exch. 46; 3 Exch. Rep. 224.

An allottee of shares in an undertaking for the formation of a projected railway, which afterwards proves abortive, and is abandoned without fraud or misconduct, may maintain an action for money had and received against a member of the committee of management, to recover back the amount of his deposit paid to the credit of such committee, unless it can be shewn that he has consented to or acquiesced in the previous application of the money by the committee to the purposes of the undertaking; and it is for the defendant to prove such consent or acquiescence.

Where the plaintiff in such a case established that the undertaking had been abandoned as abortive, by reason chiefly of default in payment of the deposits, and the only evidence offered by the defendant of consent and acquiescence on the part of the plaintiff in the application of the amount of his deposit, was the plaintiff's letter of application stating that he agreed to accept the shares "subject to the provisions of the subscribers' agreement, and to execute the same," and the letter of allotment in answer, stating that scrip for the shares would be delivered on the plaintiff's "executing the parliamentary contract and subscribers' agreement," and also a subscribers' agreement, dated subsequently to the letter of allotment, but not executed by the plaintiff, which purported to give to the directors, or committee of management, much larger powers than the 7 & 8 Vict. c. 110. s. 23. authorized, and to enable them in the exercise thereof to expend the deposits,—Held, that as the subscribers' agreement was not such as the plaintiff could properly have been called upon to execute, he was not bound by the application of the deposits to any preliminary expenses incurred by the committee of management; and therefore, the project having been abandoned as abortive, the plaintiff was entitled to recover back the amount of his deposit.

Held also, that a resolution, purporting to be moved by the defendant, and contained in a minute-book kept and written by the secretary to the undertaking, and which was handed by the managing committee to a committee appointed to inquire into the affairs of the concern, as one of their books, was admissible in evidence against the defendant. *Ashtapel v. Sercombe*, 19 Law J. Rep. (N.S.) Exch. 82; 5 Exch. Rep. 147.

Where a report was made to the committee of management, shewing that all the essential statements in the prospectus issued were false,—Held, that an allottee might recover back his deposits paid in ignorance of the report. *Jarrett v. Kennedy*, 6 Com. B. Rep. 319.

In action to recover back a deposit by an allottee, secondary evidence was given of the letter of allotment, the original being lost, but the letter of application was not produced; the former was headed

"Not transferable;" the deposit was paid in 1841, but in 1848 nothing had been done:—Held, that there was sufficient evidence of abandonment of scheme, and plaintiff entitled to recover, for if there was no letter of application, the letter of allotment and payment of deposit constituted the contract, and if there was such a letter, the words "not transferable" imposed a new term. *Chaplin v. Clarke*, 4 Exch. Rep. 403.

(iii) *Evidence in Actions against.*

The defendant was a member of the provisional committee of a projected railway scheme, and took part in a meeting on the 9th of September, at which A and B were appointed engineers, and R S M secretary to the company. B never acted as engineer, but there was no proof that his appointment had ever been revoked. The whole engineering work was done by A and C. At a meeting of the board, (but whether at the above-mentioned meeting, or at some later period, it was left uncertain) defendant said that he thought that the solicitors should pay the engineers and be repaid their advances out of the money that should come in from the shareholders. The names of any individuals as the engineers were not mentioned during the meeting. The defendant attended several meetings subsequent to the first-mentioned meeting. On the trial of an action by A and C against the defendant for payment for their work as engineers of the company, in order to shew that C had been appointed one of the joint engineers, the plaintiffs tendered in evidence the following letter, written and sent by the secretary to C. "Minute of the Board, September 13, 1845. Resolved that C be requested to accept the office of joint engineer to this line. R S M, secretary. Mr. O was requested to communicate this resolution to C with as little delay as possible. R S M." The plaintiffs also proposed to read in evidence the following entry in the minute-book in the handwriting of the secretary, whose duty it was to enter in the book minutes of the proceedings of the board. "Minute of the Board, Sept. 13, 1845. Resolved that C be requested to accept the office of joint engineer to this line." There was no signature to the resolution, though the word "chairman" followed, and a space was left for the chairman's signature. There was no heading stating the names of any persons present at the meeting. Nor was there any independent proof that any meeting of the board took place on the 13th of September. The Judge rejected both documents, and directed a verdict for the defendant:—Held, that as against the defendant, the letter of the secretary was not evidence, as there was no proof that he had a general or special authority from the defendant to write it; that the entry in the minute book was properly rejected, as it did not sufficiently appear to have been a resolution adopted by the board; and that, without the documents, there was no evidence at all to go to the jury. *Rennie v. Wynn*, 19 Law J. Rep. (N.S.) Exch. 2; 4 Exch. Rep. 691.

In an action by engineers against a provisional committee-man, the plaintiffs having put in evidence the resolutions of the committee, at which the defendant was present, the defendant tendered in evidence a resolution made in the absence of the

plaintiffs, to the effect that the committee were not to incur any personal liability:—Held, that the evidence was receivable for the purpose of shewing that the committee-men were not to be personally responsible, and that each member was not to have the power of binding the rest. *Rennie v. Clarke*, 19 Law J. Rep. (N.S.) Exch. 278; 5 Exch. Rep. 292.

An action having been brought against the defendant as a provisional committee-man of a railway company, provisionally registered, for work done on behalf of the company, and judgment having been obtained against him, an order in Chancery was made for winding up the affairs of the company under the Winding-up Act, 11 & 12 Vict. c. 45, and an official manager appointed. The plaintiff being about to issue a *ca. sa.* upon the judgment, the Court stayed the proceedings until after proof by the plaintiff of his debt before the official manager. *Macgregor v. Keily*, 19 Law J. Rep. (N.S.) Exch. 126; 4 Exch. Rep. 801.

(2) *In Equity.*

[See PLEADING IN EQUITY, Demurrer.]

The promoters of an intended railway issued a prospectus, stating the particulars of the scheme, and that the landowners had been applied to, and were generally in favour of the line, and mentioning the number of the shares, and the amount of the capital. Three persons applied separately for shares, but agreed among themselves that they should be jointly interested in any shares which might be allotted to them. The promoters allotted certain shares to each of these three persons, and stated that all the shares were subscribed for, and the allottees signed the usual contracts required by the standing orders of parliament. An act was afterwards applied for, but was opposed by landowners who were proprietors of nearly half the land required, and it was ultimately rejected. It appeared that all the shares were not subscribed for, and the promoters offered to return to the shareholders all the money which remained, after paying the expenses. The three persons filed a bill against the promoters to recover the whole of their subscriptions. A demurrer, upon the ground of misjoinder of plaintiffs, and also for want of equity, was overruled. *Cridland v. De Mauley (Lord)*, 17 Law J. Rep. (N.S.) Chanc. 190; 1 De Gex & S. 459.

A bill was filed by four shareholders in a railway company, on behalf of themselves and the other shareholders, against the provisional committee. The bill stated (among other things) that the undertaking had been abandoned, and stated also various acts of improper conduct on the part of the defendants, and that a sum of money had been paid into court in respect of the undertaking, and prayed that an account might be taken of all the expenses incurred in the prosecution of the undertaking, and that the plaintiffs and the other shareholders might be declared to be liable only to a proportion of the expenses properly incurred, and that the defendants might pay all the other expenses, and that the funds in court might be paid out to the plaintiffs and other shareholders. To this bill the defendants demurred for want of equity and want of parties. The demurrer was overruled. *Apperley v. Page*, 16 Law J. Rep. (N.S.) Chanc. 100, 302; 1 Phill. 779.

A bill was filed by a solicitor against the provisional committee and directors of a railway company, and it stated that the plaintiff had been actively engaged in promoting a railway project, and had incurred considerable expenses, and that the same project had been duly registered under the 7 & 8 Vict. c. 110; that at a meeting of persons interested in the undertaking, resolutions were passed that the plaintiff should be continued as solicitor, and that certain other persons (the defendants) should form the provisional committee of the company; that, at the suggestion of the chairman at that meeting, an agreement was appended to the minutes, and signed by the chairman, copies of which were afterwards signed by the plaintiff, and sent by him to each member of the committee, and which agreement was to the effect, that the plaintiff would not hold any member of the provisional committee personally liable to him for the repayment of any past or future costs and expenses incurred in the promotion of the project, but that he looked to the deposits alone as the means of repayment, and the plaintiff thereby undertook to pay all the expenses of promoting the company up to the time of the payment of the deposits, the said deposits being held liable for such purpose by the directors of the company; that the plaintiff was duly registered as the solicitor of the company; deposits to a large amount were paid in, and the parliamentary contract and subscribers' agreement were duly signed, which last document provided that the directors should have full power out of the deposits to pay all fees, salaries, costs, charges, and expenses incurred or to be incurred; that shortly after the execution of the subscribers' agreement the plaintiff was dismissed from his situation as solicitor, and he then sent in to the company his bill of costs, payment of which was refused; and that the shareholders, other than the defendants, were so numerous, and their shares so fluctuating, that the plaintiff was unable to make them parties to the bill; and the bill prayed a declaration that the said deposits were charged with the payment of the plaintiff's bill of costs and disbursements made on behalf of the company, and for an injunction against the provisional directors parting with the fund. On general demurrer to the bill, it was held, that the plaintiff had an equity; and, the bill alleging that the provisional committee and directors had paid up the deposits upon their shares, and all resisted the plaintiff's claim, that it was not necessary that the shareholders of the company, other than the provisional committee and directors, should be parties to the bill.

Quere—Whether a security, taken by a solicitor for future disbursements, stands in the same predicament with a security for future costs. *Parsons v. Spooner*, 15 Law J. Rep. (N.S.) Chanc. 155; 5 Hare, 102.

The provisional committee of a projected railway company incurred certain joint liabilities, and were possessed of certain joint property. The scheme being abandoned, a majority of them agreed that 30*l.* should be paid by each of the provisional committee, to raise a fund for the payment of all their liabilities. The plaintiff having refused to pay his 30*l.*, an action was brought against him by the secretary, who was alleged to be a member of the

committee. He thereupon filed a bill, on behalf of himself and all other partners except the defendants, who were the secretary and nine members of the committee who had received the 30*l.*, from all the persons who had paid their contributions, alleging that no shares had ever been allotted, and that defendants had sufficient funds for the payment of all the joint liabilities, and praying that accounts might be taken of the monies come to their hands, and of all the joint liabilities, and that the funds in their hands might be applied in discharge of their liabilities, and for an injunction to restrain the action at law. A demurrer to this bill for want of equity was overruled; but a demurrer for want of parties, on the ground that all the persons who had contributed 30*l.*, and all the provisional committee-men, were necessary parties to the suit, was allowed. *Sharp v. Day*, 16 Law J. Rep. (N.S.) Chanc. 1; 1 Phill. 771.

A being a provisional committee-man of a joint-stock company, was called upon by a committee appointed to wind up the affairs of the company to contribute his share towards the expenses. On his declining to do so, they by arrangement with a creditor of the company, brought an action against A in the name of the creditor for the amount due to the latter. A then filed his bill for and obtained an injunction to restrain the proceedings at law. On the coming in of the creditor's answer, admitting the above facts, but stating that the committee who were suing in his name would guarantee A from all liability on his contributing 75*l.* as his proportion of the expenses, the Court continued the injunction on the terms of A bringing that amount into court. *Cutts v. Riddell*, 1 De Gex & S. 226.

(f) Directors.

(1) Powers, Duties, and Liabilities.

The Gravesend Cemetery Company, incorporated by 1 & 2 Vict. c. xxxv., were, by that act, authorized to make a cemetery and build chapels and other works therein. Section 46, defines the duties and powers of the directors, and empowers them "to do all acts whatever which the said company are, by this act, authorized to do for the management and direction of the affairs of the company; and for that purpose" . . . "to make contracts and bargains touching the undertaking," . . . "and to do and transact all other matters and things which shall be requisite to be done and transacted for the direction and management of the officers of the said company and the said directors." Section 47, enacts, that none of the directors shall be, individually or collectively, liable, by reason of his being party to, or making, signing, or executing, in his capacity of director, "any contract or other instrument," on behalf of the company:—Held, that the directors had no power, under the act, to accept bills of exchange. *Steele v. Harmer*, 15 Law J. Rep. (N.S.) Exch. 217; 14 Mee. & W. 831; s. c. (in error) 19 Law J. Rep. (N.S.) Exch. 34; 4 Exch. Rep. 1.

By an act of parliament incorporating a railway company, power was given to the directors to "appoint and displace any of the officers of the company"—Held, that the appointment of an attorney to the company, under this power, need not be under

seal. *Regina v. the Justices of Cumberland*, 17 Law J. Rep. (N.S.) Q.B. 102; 5 Dowl. & L. P.C. 431, n.

Three directors of a railway company, subject to the provisions of a special act, and of the 8 & 9 Vict. c. 16, signed a document, intended to operate as an order on the company's bankers, for payment of a third party of the company's money, in fraud of the company, and for a purpose in violation of the special act. The document was signed by them in their own names, and counter-signed by the secretary of the company, with the word "secretary" added to his signature. The three directors did not appear on the face of the document to sign as directors or to be directors. On the document was a stamp, containing the name of the company, impressed in a circular form round the date, "13th August 1847," which date was also at the head of the document. A similar stamp was impressed on all the documents of the company.

Held, that the document did not purport to be the cheque of the company, and was not binding on them. *Serrell v. Derbyshire, Staffordshire and Worcestershire Junction Rail. Co.*, 19 Law J. Rep. (N.S.) C.P. 371.

A company having been formed for the manufacture of glass, the directors entered into a contract to purchase a licence to use a patent for certain improvements in making glass, and constituted themselves trustees for the company. The purchase was subsequently sanctioned by a general meeting of the shareholders, but the speculation proving unsuccessful, dissatisfaction arose, and the directors were dismissed:—Held, that the company by reason of their having sanctioned the contract, were bound to indemnify the original directors against their liabilities in respect of the purchase. *Gleadow v. the Hull Glass Company*, 19 Law J. Rep. (N.S.) Chanc. 44.

A shareholder in a trading company filed a bill on behalf of himself and all the other shareholders, except the defendants, complaining of acts done by the directors and the other defendants, injurious to the interests of the company. The suit had not been authorized by any general meeting of the shareholders; but the acts complained of had been done in pursuance of a resolution passed at a general meeting, and were held to be within the general powers of the company. A demurrer on the part of the company for want of equity was allowed, upon the ground that an individual shareholder was not entitled to be plaintiff in a suit for such an object. *Lord v. the Copper Miners' Company*, 18 Law J. Rep. (N.S.) Chanc. 65; 2 De Gex & S. 308; 2 Ph. 740; 1 Hall & Tw. 85.

[See (b) *Shares*, (4) *Deposits*; (g) *Duties and Liabilities of Companies*.]

(2) *Election of.*

[Sec (g) *Duties and Liabilities of Companies*, (1) *To Shareholders*.]

(g) *Duties and Liabilities of Companies.*

[See *INJUNCTION*, Special *Injunction*.]

(1) *To Shareholders.*

The plaintiff, who was a shareholder in a railway company, filed a bill praying that a creditor of the

company might be restrained from bringing an action for the recovery of his debt from the plaintiff, and praying that the directors might be restrained from joining in such action against the plaintiff, and that the directors might be declared liable to satisfy all the creditors of the company out of the assets in their hands:—Held, upon demurrer, that although the plaintiff might have a good defence to the action at law, that would not prevent his proceeding in equity likewise; and that the defendants might be compelled to use the funds in their possession to discharge the liabilities of the company, instead of making use of the action by the creditor as a screw for the purpose of compelling payment of the debt by the plaintiff. Demurrer overruled. *Fernihaugh v. Leader*, 15 Law J. Rep. (N.S.) Chanc. 458.

An act of parliament was granted incorporating a company, called the Direct London and Portsmouth Railway Company, and empowering them to make a railway from Epsom to Portsmouth. The company abandoned the intention of making the railway from Epsom to Portsmouth, but they resolved to apply the capital subscribed in making so much of the railway as lay between Epsom and Leatherhead. Upon a bill by one of the original shareholders asking to restrain the company from taking land and applying the capital for making a portion of the line only,—Held, upon a demurrer for want of equity, that it must be considered that the legislature sanctioned the whole undertaking only; that the directors undertook to complete the entire work; and that, as shareholders must be considered to have subscribed their capital under such expectations, they were entitled to have them realized, if possible; that companies differed from partnerships for general trading purposes; that a company is established for public benefits, and it cannot resolve to apply capital to be raised for the completion of an entire work to the completion of a part; that such would be illegal against landowners and also against shareholders; that shareholders are not bound by the determination to perform a part of the work only, when the powers of the act of parliament are given for the completion of the whole, and that there might be a right to relief; and the demurrer was overruled. *Cohen v. Wilkinson*, 18 Law J. Rep. (N.S.) Chanc. 378, 411; 12 Beav. 125, 138; 1 Hall & Tw. 554; 1 Mac. & G. 481.

A bill was filed by a holder of scrip and registered shareholder of railway stock, on behalf of himself and others, holders of like scrip and stock, to restrain a company and the directors from applying to general purposes funds authorized to be raised for specific purposes. Demurrers on the grounds of want of equity, no right of suit, inconsistent kinds of relief, and want of parties, were overruled.

The bill alleged the intended misapplication of two specific funds,—Held, that the misapplication of one only of the two funds gave the plaintiff a right in equity to restrain such misapplication.

The plaintiff had purchased two scrip certificates, upon which he had paid calls, and in respect of one of which he had since become registered holder of the shares represented by it in certain new stock created by the company:—Held, that the interest which both scripholders and registered shareholders

had in the stock entitled them to sue in equity in respect of it; that the company was properly made a party; that the rights and liabilities of a shareholder were not so conflicting with those of a shareholder of stock as to render the relief prayed by the plaintiff one character inconsistent with that sought by him in the other; and that the original subscriber for the scrip or the vendor of it to the plaintiff was not a necessary party. *Bagshawe v. Eastern Union Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 193; 7 Hare, 114; affirmed 19 Law J. Rep. (N.S.) Chanc. 410; 2 Hall & Tw. 201; 2 Mac. & G. 389.

A railway communicated with a river, upon the banks of which the company were empowered to erect wharfs, &c., and take tolls. The navigation of the river having become deteriorated, the company were about to support a bill for improving it. An injunction was granted to restrain the application of the company towards that object.

Companies having funds for objects which are distinctly defined by act of parliament cannot be allowed to apply them to any other purpose whatever, however advantageous or profitable that purpose may appear to be to the company, or to the individual members of the company. *Munt v. Shrewsbury and Chester Rail. Co.*, 13 Beav. 1.

A railway company applied a portion of the capital of the company, raised under the powers given by their act of incorporation, in the purchase of shares in the Direct L and P Railway Company, which latter company had full notice of the purposes for which the monies were raised by the company advancing it. Upon a demurrer for want of equity to a bill filed by an individual shareholder,—Held, that the two companies were guilty of fraud and collusion, and were parties to the same breach of trust, and that the Direct L and P Railway Company were properly made parties to the suit, they having made themselves principals in the transaction.

Held, also, that the plaintiff, as an individual member of the company applying the money, had not only a right to sue the company, of which he was a member, for an illegal act, but also the other company, and all persons receiving the benefit of that act, without having first made an attempt to get the concurrence of the whole corporation of which he was a member. *Salomons v. Laing*, 19 Law J. Rep. (N.S.) Chanc. 291; 12 Beav. 377.

Five railway companies were amalgamated by act of parliament, under which the amalgamated company became entitled to 2,033 shares in the Direct L and P Railway Company. The amalgamated company subsequently subscribed for and obtained other shares in the Direct L and P Railway Company, which were taken in the names of three of the directors of the amalgamated company. The directors of this company, in concert with the directors of the Direct L and P Railway Company, afterwards formed a plan for the purchase of a portion of the line of the Direct L and P Railway Company, the remainder of which had, as alleged, been abandoned. Upon demurrer for want of equity and for multifariousness,—Held, that railway companies are bound to apply the monies authorized to be raised by act of parliament for the purposes directed by the act, and that after setting apart sufficient to meet con-

tingencies, the surplus may be divided among the shareholders; that dividends belonging to shareholders may be applied by them severally, but that neither the company nor any assemblage of shareholders have any right to dispose of the portion of any shareholder in general dividends without his consent; that any dealing with the capital of the company not authorized by the act of parliament is illegal, and relief may be given in this court; that a company having lawfully obtained shares in another company forms no reason why such company should purchase other shares in the same company, and divert the funds of the company from the purposes for which they were raised, for the support of another company, and the demurrer for want of equity was overruled.

Held, also, that the allegations in the bill relating to the purchase of that part of the Direct L and P Railway which passed from E to L and the purchase of the shares in the Direct L and P Railway Company were distinct, and that no relief could be given upon the two transactions in one bill, and the demurrer for multifariousness was allowed, and leave given to amend the bill. *Salomons v. Laing*, 19 Law J. Rep. (N.S.) Chanc. 225; 12 Beav. 339.

Three several acts of parliament were passed; the first for making a railway from Shrewsbury to Stafford, &c.; the second from Newtown to Crewe, &c.; and the third from Chester to Wolverhampton; and the name under which they were severally incorporated was "The Shropshire Union Railways and Canal Company." Each act authorized the raising of a separate sum of money. The first declared it to be general capital, and the two others to be part of the general capital. Another act of parliament was afterwards passed, which empowered the London and North-Western Railway Company to take a lease of the railway to be made under the first three acts, upon its completion, and it declared that they were and ever had been one and the same company, and not three separate companies. The directors proceeded to make the railway from Shrewsbury to Stafford, but subsequently they intimated an intention to apply to parliament for leave to abandon the rest; but they proceeded to make calls generally, upon which a bill was filed by an individual shareholder, praying that the company might be restrained from employing the funds, except for the purpose of constructing the whole line, and from making calls or enforcing payment by action, or declaring the shares to be forfeited:—Held, upon a demurrer, by the directors, for want of equity and for want of parties, that the power to raise money for the general purposes of the undertaking, and for other purposes connected therewith, was not sufficient to enable the company to apply the funds at large. Held, also, that an allegation that the company had abandoned a part of the line, and that it would be illegal to apply the funds to complete the part not abandoned, was insufficient, there being no allegation of any intention to apply the funds to complete the part not abandoned, though it might have been properly introduced.

The demurrer was allowed, and leave was given to amend. *Hodgson v. Powis (Earl)*, 19 Law J. Rep. (N.S.) Chanc. 356; 12 Beav. 392.

Upon an application for an injunction, held that

a railway company, formed by three acts of parliament, each of which authorized a separate line of railway to be made, and empowered the company to raise a separate sum of money, which was to be considered as part of the general capital, would, after they had made a part of their line of railway, but were unable to complete their contract with the public for making the whole series of lines, be restrained from making calls, or declaring shares forfeited, even though the purpose was for completing that portion of the line which had been made.

Circumstances under which the Court might be induced to exercise a discretion, and allow works to be completed. *Hodgson v. Powis (Earl)*, 19 Law J. Rep. (N.S.) Chanc. 418 ; 12 Beav. 529.

A bill, by individual members of a railway company, impugning the title of a corporate officer to exercise corporate functions, and seeking to take the corporate seal and property out of his hands, will not be sustained.

Seemle.—The proper course is at law by *quo warranto* or *mandamus*.

To a bill by four shareholders in a railway company against the directors and against the company, alleging that twelve out of the eighteen directors ought, at a certain time prescribed by the acts of parliament, to have ballotted out one-third of their number, and to have elected new directors in their stead, and alleging that, by their refusal or failure so to do, the twelve recusant directors were all rendered incompetent to act, and ceased to be *de facto*, and praying for an injunction to restrain them from voting or acting any longer as directors, and for a transfer of the corporate seal and funds to the six lawful directors, a general demurrer by the company for want of equity was allowed. *Mozley v. Alston*, 16 Law J. Rep. (N.S.) Chanc. 217 ; 1 Ph. 790.

An incorporated railway company issued new shares, in pursuance of a resolution declaring the purpose of such new issue to be the raising of a sufficient amount to pay off the existing mortgage and bond debts of the company.

The holder of some of the new shares filed a bill on behalf of himself and other holders of the shares, against the directors and the company, alleging facts to shew, and charging that they were about to apply the money paid in respect of the shares otherwise than in conformity with the resolution, and praying for a declaration that the money ought to be applied according to the terms of the resolution, and for a specific performance of the agreement thereby entered into, and for an injunction :—Held, allowing demurrers of the directors and the company, that the case fell within the authority of *Mozley v. Alston*, but the costs of only one demurrer were allowed. *Yettis v. Norfolk Rail. Co.*, 3 De Gex & S. 293.

The managing body of a railway company incorporated by act of parliament are not entitled to employ the funds of the company in, or to guarantee the payment of a dividend, or the repayment of capital to other parties who engage in undertakings which are not part of, or directly connected with, the works which are authorized by the act of parliament ; and that although they may increase the traffic of the railway, and although a majority of the shareholders in the railway company may

approve of such application of their funds ; and although the object may not be against public policy.

Where the directors of a railway company had proposed to guarantee the parties who should form a joint-stock steam-packet company, to run vessels from a port to which the railway would convey passengers,—Held, that one of the shareholders in the railway company was entitled to sue on behalf of himself and all the other shareholders (except the directors who were defendants), although some of these shareholders had taken shares in the steam-packet company.

Although a plaintiff who files a bill on behalf of himself and other shareholders in a railway company may be suing at the instigation of another rival company, that circumstance is not sufficient to prevent him from obtaining a special injunction on the merits of his case, upon a bill so framed. *Colman v. the Eastern Counties Rail. Co.*, 16 Law J. Rep. (N.S.) Chanc. 73 ; 10 Beav. 1.

Where a railway company has undertaken to complete a line or series of lines, they are bound to do so, and cannot without parliamentary sanction abandon any portion of the undertaking.

Existing contracts for making part of the line are no answer to an application to prevent the railway company from making a portion of the line with an intention of completing less than the whole.

Discretion of the Court upon an application for an injunction in such a case.

The directors of a railway company, with the concurrence of a majority of the shareholders, on finding the original undertaking impracticable, proceeded to construct a small portion only of the works. On an application by an individual shareholder, on behalf of himself and the other shareholders, for an injunction to restrain this proceeding, the Court refused to interfere, on the ground of the acquiescence of the plaintiff, and also, that the other shareholders had for eighteen months previously to filing the bill known, or had the means of knowing, the acts complained of. *Graham v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 12 Beav. 460 ; 2 Mac. & G. 146 ; 2 Hall & Tw. 450.

(2) To other Persons.

Where a company engaged competent engineers, who used the best materials and adopted the best method of making a bridge,—Held, not liable for any injury sustained by its breaking down, unless it arose from a deficiency in the work. *Grote v. Chester and Holyhead Rail. Co.*, 2 Exch. Rep. 251.

It is not incident to the employment of a guard or the superintendent of a station of a railway to enter into a contract with a surgeon to attend a passenger injured by an accident on such railway, and the railway company are not therefore liable to the surgeon for services rendered to such passenger, under a contract so entered into. *Cox v. Midland Rail. Co.*, 18 Law J. Rep. (N.S.) Exch. 65 ; 3 Exch. Rep. 268.

The defendants were a corporation established by act of parliament, one section of which enacted that the court of directors should have power to use the common seal on behalf of the company, and all contracts relating to the affairs of the company which should be signed by any three of the directors,

in pursuance of a resolution of a court of directors, should be binding on the company and all parties. The following section enacted that the directors should have full power to employ the workmen and regulate the traffic on the line and the rates and tolls, and appoint and displace the bankers and solicitors of the company, and all such managers, officers, *agents*, clerks, workmen, and servants as they should think proper. By a resolution made at a court of directors and signed by the chairman the plaintiff was appointed agent for the company to negotiate with the London and North-Western Railway Company or any other railway company for the lease of the line of the company:—Held, that the plaintiff was not entitled to recover for his services in respect of such negotiation, the resolution not having been sealed with the corporate seal or signed by three directors. *Cope v. Thames Haven Dock and Rail. Co.*, 18 Law J. Rep. (N.S.) Exch. 345; 3 Exch. Rep. 841.

It is sufficient to describe a company party to an action, by its name, without stating it to be a corporation, or how it became one. *Woolf v. City Steam-Boat Co.*, 18 Law J. Rep. (N.S.) C.P. 125; 7 Com. B. Rep. 103.

Declaration that before and at the passing of 'An Act for making a railway from the city of Chester to Birkenhead,' the plaintiff was and thence hitherto hath been the owner of a ferry across the Mersey, from Tranmere to Liverpool; that by the said act the defendants were empowered to make a railway, with all necessary stations, &c., commencing at, &c., in Chester, and terminating at or near Grange Lane, in Birkenhead. The declaration then stated a section of the act whereby the company were prohibited making a railway from the station at or near Grange Lane to, or to communicate with Woodside Ferry, until a branch railway should have been made from the main line to Birkenhead and Tranmere Ferries; and alleged that the defendants wrongfully, and for the purpose of evading the act, opened a railway from Grange Lane station to and to communicate with the shore of the Mersey between Woodside Ferry and Birkenhead Ferry and near Woodside Ferry, and conveyed passengers, &c. along the same to the Grange Lane station, although no branch railway had been made from the main line to Tranmere Ferry, in contempt of the act, and to the plaintiffs' damage, &c.:—Held, on general demurrer, first, that the declaration was bad, inasmuch as it did not contain any averment that the defendants had made a railway to, or to communicate with Woodside Ferry, or anything which amounted in terms to an infringement of the act. Secondly, that had the declaration contained such an averment, the action might have been maintained without any allegation of special damage, the prohibition being obviously for the special protection of a particular person. *Chamberlaine v. Chester and Birkenhead Rail. Co.*, 18 Law J. Rep. (N.S.) Exch. 494; 1 Exch. Rep. 870.

An incorporated railway company is not liable to be sued on a contract not under seal in respect of work done by a party in substituting a new line of railway for the old one, the contract stipulating for the maintenance by the party of all the works for two months after their entire completion; such case not falling within the excepted cases where the

affixing of the corporate seal may be dispensed with. *Diggle v. London and Blackwall Rail. Co.*, 19 Law J. Rep. (N.S.) Exch. 308; 5 Exch. Rep. 442.

A plaintiff sued as one of the public to restrain a railway company from closing it:—Held, that such a suit could not be maintained.

Upon the construction of a contract between an individual and a railway company, held that nothing had taken place which could give him a right to use horses, as the moving power, against the will and consent of the company. *Thorne v. Taw Vale Rail. and Dock Co.*, 13 Beav. 10.

The Great Western Railway Company entered into an agreement with two other railway companies that those two companies should be amalgamated, and then sell their railways to the Great Western Railway Company. One of the two companies was empowered by their act to sell their railway to the Great Western Railway Company, but the other company had no such authority; but an act was afterwards obtained, conferring powers upon them for that purpose. A change afterwards took place among the proprietors of one of the two companies, and they were unwilling to perform the contract: and, upon a bill being filed by the Great Western Railway Company to compel specific performance, put in a general demurrer for want of equity. The demurrer was overruled. *Great Western Rail. Co. v. Birmingham and Oxford Junction Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 243.

Where the engineer of a railway company informed a contractor by letter, that his tender for certain railway works was accepted by the company, but no document to such effect had been executed by the company, and they afterwards repudiated the contract; and the contractor afterwards filed a bill, seeking to make the company liable to him for the loss he had sustained, or to obtain from them the execution of a contract, and alleged that the company held monies for the purpose of paying him, and were trustees thereof for his benefit, under a written instrument,—a demurrer for want of equity was allowed. *Jackson v. North Wales Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 91; 1 Hall & Tw. 75.

A bill stated that A had contracted with a railway company to perform certain works, and that the company had agreed to pay for them in a certain specified manner, with the proviso, that, unless the engineer of the company should give his certificate, the works should not be considered as completed; that the works had been completed properly; but that the engineer, acting under the direction of, and in collusion with, the company, refused his certificate. The bill prayed a declaration that such refusal was a fraud upon A, and for an account and payment of the sums due to him. The bill was filed against the company, their secretary, and their engineer, who all demurred to the bill. All the demurrers were overruled. *Macintosh v. Great Western Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 94; affirmed 19 Law J. Rep. (N.S.) Chanc. 374; 2 Mac. & G. 74; 2 Hall & Tw. 250.

The plaintiffs covenanted with the defendants (a railway company) to do certain works within a given time to the satisfaction of the engineer of the company, and that if the works should not be so done, the company might enter into possession of the

plaintiff's plant, and complete the works. The company covenanted to pay for the works from time to time during their progress, according to the certificate of the engineer. All disputes were to be referred to the latter. The works were not completed within the period originally limited, and some time afterwards the company gave notice of their intention to enter, under the agreement, and complete the works. The plaintiffs filed a bill, stating that they had done all which they contracted to do, except what the company had prevented them from doing, and that they had not been fully paid for the work done; alleging that the engineer fraudulently and collusively with the company certified a less amount than what was due to the plaintiffs; and praying for an injunction and an account. A demurrer for want of equity was overruled, on the ground that the plaintiffs would be entitled to some relief at the hearing, and that the species of fraud alleged in the bill gave jurisdiction to the Court, although the plaintiffs had not completed the whole of their work.

The company consenting to the removal of the plant by the plaintiffs, and the latter not having on affidavits made out a case of *mala fides* on the part of the engineer or the company in determining the contract, a motion for an injunction against the company was refused, and the latter was left to assert at law its rights under the agreement.

If a plaintiff's motion is successfully opposed by a defendant on affidavits, and before answer, the rule is to reserve the costs until the hearing.—*Secus*, If the plaintiff moves on the defendant's answer. *Waring v. Manchester, Sheffield and Lincolnshire Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 450; 7 Hare, 482.

(h) *Actions and Suits against.*

[See (g) *Duties and Liabilities of Companies. PARTIES TO SUITS.*]

(i) *Injunctions to Railway Companies.*

[See (g) *Duties and Liabilities of Companies—INJUNCTION—RAILWAYS CLAUSES CONSOLIDATION ACT—LANDS CLAUSES CONSOLIDATION ACT.*]

(j) *Compensation.*

[See LANDS CLAUSES CONSOLIDATION ACT.]

(B) BANKING COMPANY.

[See title BANKER AND BANKING COMPANY.]

(C) CANAL COMPANY.

[See title CANAL COMPANY.]

(D) MINING COMPANY.

[See title MINE.]

(E) COMPANIES REGISTERED UNDER 7 & 8 VICT. c. 110.]

[See BANKRUPTCY, Fiat, *Annulling.*]

The Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110. amended by 10 & 11 Vict. c. 78; 25 Law J. Stat. 230.

(a) *Registration and Incorporation.*

The 2nd section of the Joint-stock Companies Act,

7 & 8 Vict. c. 110, enacts, "that except where the provisions of that act are expressly applied to partnerships existing before the said 1st of November," (1844) "it shall be held to apply only to partnerships, the formation of which shall be commenced after that date."

The Leeds and Bradford Railway Company were incorporated by act of parliament previously to the 1st of November 1844. Subsequently to that day, at a meeting of the Leeds and Bradford Company, it was resolved that that company should undertake the formation of an extension line of railway from the Leeds and Bradford Railway at Shipley to Colne. A parliamentary contract was duly entered into, and recited that "it had been deemed expedient that a railway should be made by the Leeds and Bradford Railway Company from Shipley to Colne, in extension of, and uniting with, the parliamentary line of the Leeds and Bradford Railway." An act was, accordingly, obtained, intitled, 'An Act to enable the Leeds and Bradford Railway Company to make a Branch from Shipley to Colne.' The shares in this line were allotted to the shareholders in the Leeds and Bradford; but when the act was obtained there were shareholders therein who were not shareholders in the Leeds and Bradford line:—Held, that the shareholders in the Shipley and Colne Railway were not a company the formation of which commenced after the 1st of November 1844, within the meaning of the 7 & 8 Vict. c. 110. s. 2. *Shaw v. Holland*, 15 Law J. Rep. (N.S.) Exch. 87; 15 Mee. & W. 136.

To an action for not accepting railway shares, the defendant pleaded that they were shares in a joint-stock company in England, exceeding, in the number of partners, twenty-five persons, and formed for the purpose of executing works which did not require the authority of Parliament; that the company had not been "formed or established" in any way whatsoever on or before the 1st of November 1844; and that, at the time of the contract, the company had not been completely registered, according to the provisions of the 7 & 8 Vict. c. 110. The 26th section of that act restrains the sale of shares in such a company until complete registration, if the formation of it had not been commenced before the 1st of November 1844. At the trial, it was shewn that S went to India, at his own expense, in 1843, and examined the country; that he proposed a railway between M and D, and that he spoke of it to persons who agreed to become connected with it; that he got a draft deed in July 1844, and brought it with him to England, where he arrived after the 3rd of November 1844; and that the company was provisionally registered in May 1845. The Judge left it to the jury to say whether the company had been commenced to be formed before the 1st of November 1844, and they found for the plaintiffs.

Semble—that the plea would have been bad on demurrer for not stating that the company had not been commenced to be formed before the 1st of November 1844, but was good on being pleaded over to.

Held, that whether the plea was good or bad, the above facts were not sufficient evidence to go to the jury that the formation of the company was commenced before the 1st of November 1844. *Baker*

v. *Plaskitt*, 17 Law J. Rep. (N.S.) C.P. 89; 5 Com. B. Rep. 262.

The promoters of a joint-stock company provisionally registered under 7 & 8 Vict. c. 110. have no right to assume the style of "corporation," nor to call on the registrar of joint-stock companies to register a return of such a name.

The objection that such a return is not conformable to the provisions of the act, may be taken advantage of upon demurrer to the return to a writ of mandamus requiring the registration of the return made by the promoters, as well as upon the original motion for the writ. *Regina v. Whitmarsh, in re the Sea Fire, Life Assurance Company*, 19 Law J. Rep. (N.S.) Q.B. 185.

The National Land Company was formed under a deed of settlement, stating that the company was formed for the purpose of purchasing land and erecting thereon dwellings to be allotted to members of the company, and also of raising a fund out of which sums of money should be paid to or applied for the benefit of members being allottees of land. The deed provided that the directors should from time to time, and as the funds should admit of, purchase land for the purposes of the company, to be divided among shareholders who should have paid the full amount of their shares; the shareholders by whom the allotments of land should be taken, and the allotments which they should take, being determined by lot in a manner therein provided. Each allotment was to be conveyed to the shareholder entitled to it, charged with a rent-charge at the rate of 5*l.* per cent. on the sum expended in the purchase and improvement of the land allotted, such rent-charges to be in their turn expended in the purchase of other land, to be allotted in a similar manner. There were powers for the directors, instead of allotting, to sell for the benefit of the company any land which they might have purchased, and either to retain for the benefit of the company or to sell or mortgage the rent-charges secured on the allotments as they might see fit. Whenever the funds of the company should exceed the amount necessary to provide allotments for all the shareholders, a dividend was to be declared out of the clear profits.

Held, that this was not a company established "for a commercial purpose or for any purpose of profit," within the 7 & 8 Vict. c. 110. s. 2, and that it was not entitled to be registered under that act.

Quære—Whether it was an illegal association under the Lottery Acts.

Semble—that the fact of the business of banking having been carried on by the directors (not in pursuance of the deed of settlement), would not make it a banking company so as to be excepted from the 7 & 8 Vict. c. 110. *Regina v. Whitmarsh (In re the National Land Company)*, 19 Law J. Rep. (N.S.) Q.B. 469; 15 Q.B. Rep. 600.

The first count stated that by a deed made between the plaintiff and the defendants, who were described as a "company registered and incorporated after a deed of settlement had been executed under the 7 & 8 Vict. c. 110," the defendants agreed to pay the plaintiff 15,000*l.* as soon as conveniently could be out of the money raised by the first calls or instalments on the shares of the company. Breach—that although divers instalments were paid, out of

which the company might have paid the money, they had not done so. The second count set out articles of agreement stating that the plaintiff had sold his patents to the company, and contained a covenant that the company should pay him 15,000*l.* in cash as soon as conveniently could be done out of the money raised on the first instalments or calls on the shares. Breach—that though the company could have raised the money, and a reasonable and convenient time for paying it had elapsed, yet they had not paid the plaintiff.

3rd plea to the first count—That the deed of settlement was obtained by the fraud of the plaintiff.

4th plea to the first count—That the registry and incorporation were obtained by fraud.

8th and 18th pleas—That the company was formed under deed of settlement to which the plaintiff was a party, by which it was agreed that the plaintiff was to be paid out of the first instalments after paying the necessary expenses of the company, and that no instalments, &c. had been received sufficient to pay the expenses and the 15,000*l.*

21st plea—That the company was not incorporated by charter or act of parliament, nor was the same "duly and lawfully" registered and incorporated.

22nd—That at the time when the company obtained a certificate of complete registration, the company was not formed by deed or writing under the hands and seals of the shareholders as required by the statute.

Held, that the 2nd count was good on general demurrer, and the breach properly assigned; that the 3rd, 4th, 8th and 18th pleas were bad on demurrer; that the 21st plea was bad, because the defendants were estopped from denying the fact of incorporation, and if that fact was not in issue, then the plea was bad because it raised a question of law; that the 22nd plea was bad for similar reasons. *Pilbrow v. Pilbrow's Atmospheric Rail. and Canal Propulsion Co.*, 17 Law J. Rep. (N.S.) C.P. 166; 5 Dowl. & L. P.C. 530; 5 Com. B. Rep. 440.

(b) *Complete Registration, Necessity for and Effect of.*

The circumstance that a joint-stock company is established for the execution of a railway requiring the authority of parliament, prevents the 26th section of 7 & 8 Vict. c. 110. from rendering the sale of shares before complete registration illegal.

And therefore, where to a declaration for goods sold, &c. the defendant pleaded that the goods, &c. were scrip certificates of shares in a joint-stock company, called the G U Railway Company, which joint-stock company (not being a banking company, or school, or scientific or literary institution, or friendly society, &c.) was formed after the 1st of November 1844; and that the company had not, at any time before the sale, obtained a certificate of complete registration; and to this plea the plaintiff replied, that the company was a railway company, the purposes of which could not be carried out without the authority of parliament, within the meaning of the proviso in the 2nd section of that act (setting it out); and that it had, within twelve months before the sale, &c. obtained a certificate of provisional registration:—Held, that the replication was an answer to the plea.

Held, also, that to a similar plea a replication,

that the joint-stock company was a company for executing a work which could not be carried into execution without the authority of parliament, was a good replication.

Held, lastly, that a plea setting up the illegality of the sale of shares under the statute, without negating the exception in the 2nd section as to banking companies, schools, &c. was ill on general demurrer. *Lawton v. Hickman*; *Loonie v. Oldfield*; *Eadon v. Bransom*; *Ray v. Hirst*; and *O'Neil v. Brindle*, 16 Law J. Rep. (N.S.) Q.B. 20; 9 Q.B. Rep. 563.

By 7 & 8 Vict. c. 110. s. 7, it is provided that no joint-stock company shall be completely registered, unless it is formed by a deed setting forth in the schedule several particulars, one of which is the name of the company; sect. 10. provides for a return of a change in any of the particulars set out in the schedule to the deed, after complete registration; sect. 25. incorporates companies completely registered by the name set forth in the deed, and declares that they shall continue so incorporated until dissolved:—Held, that a joint-stock company completely registered and thus incorporated by that act has no power to change its name after such incorporation. *In re Sheffield, Rotherham and Chesterfield Fire and Life Insurance Co.*, 16 Law J. Rep. (N.S.) Q.B. 407.

To a declaration in debt by a joint-stock company completely registered, pursuant to the 7 & 8 Vict. c. 110. s. 25, against a shareholder for certain instalments of capital due on calls in respect of his shares, the defendant pleaded several pleas, which stated "that the company was formed by deed under the Joint-Stock Companies Act, and that such deed ought to have contained provisions for prescribing the maximum number of directors, the amount of their qualification, the time for which they should hold office so that one-third should retire annually, and for determining at what periods the instalments of payment on capital were to be made, according to the requirements of the said act; that the said deed did not make provision for prescribing the maximum number of directors, &c.; that such deed was produced before the registrar as a proper deed, who thereupon, notwithstanding it was not conformable to the provisions of the said act, granted a certificate of complete registration to the said company, and that the plaintiffs never were a company completely registered otherwise than as hereinbefore mentioned, and that the defects in the deed had never been supplied by a supplemental deed:—"Held, on demurrer, that the pleas were bad. The certificate of the registrar of joint-stock companies incorporates a company under the 7 & 8 Vict. c. 110. s. 25, although the deed registered be a defective deed. *Banwen Iron Co. v. Barnett*, 19 Law J. Rep. (N.S.) C.P. 17; 8 Com. B. Rep. 406.

(c) Deed of Settlement.

A shareholder who has signed the deed which is registered cannot avail himself as a defence to an action for calls of any omission from the deed of certain provisions required by the 7 & 8 Vict. c. 110. to be inserted therein. *Banwen Iron Co. v. Barnett*, 19 Law J. Rep. (N.S.) C.P. 17; 8 Com. B. Rep. 406.

The deed of settlement of a joint-stock company provided that an extraordinary general meeting,

specially called for the purpose, might remove from his office any director for negligence, misconduct in office, or any other reasonable cause. A meeting was duly convened for the purpose, among other things, of removing I, C, and J from the office of directors for negligence, misconduct in office, and other reasonable cause. I and C attended the meeting, but merely to protest against its legality, and then retired; when the meeting unanimously removed I, C, and J from the office of directors. On bill by I and C, on behalf of themselves and other the proprietors, except the defendants,—Held, that the "reasonable cause" was such cause as in the opinion of the shareholders duly assembled should be considered reasonable; and that in the absence of proof of fraud, it was not competent to the Court to review the resolution of the meeting on the ground that unfounded statements were made, and the charges were not substantiated in such manner and by such evidence as a court of justice would require. *Inderwick v. Snell*, 19 Law J. Rep. (N.S.) Chanc. 542; 2 Mac. & G. 216; 2 Hall & Tw. 412.

(d) Directors.

(1) Power to contract or draw Bills on behalf of Company.

A declaration stated that the company was a joint-stock company completely registered; that one S P and one C L, then being two of the directors of the company, made their promissory note, and thereby promised, on behalf of the said company, to pay the plaintiff or his order 32l. 4s. 9d., the balance of his account due from the company, three months after date, which note was signed by the said S P and C L, and made by them, and in their names, and on behalf of the said company, and was expressed by them to be made on behalf of the said company, and countersigned by the secretary of the company; and thereupon the defendants, in consideration of the premises, then promised the plaintiff to pay him the amount of the said promissory note:—Held, on general demurrer, that the declaration was bad. *Thompson v. Universal Salvage Co.*, 17 Law J. Rep. (N.S.) Exch. 118; 1 Exch. Rep. 694; 5 Dowl. & L. P.C. 380.

In an action *ex contractu* against a joint-stock company, completely registered under the 7 & 8 Vict. c. 110, the plaintiff must prove that the contract was made by persons having authority from all the shareholders to bind them by such a contract; and this may be done by proving that the contract was sanctioned by the persons authorized by the deed of the company to conduct the affairs of the company. The plaintiff is not confined to proof of authority conferred by the deed, if he can in any other way shew that the whole of the shareholders have mediately or directly given authority to those making the contract to bind them; but it is not enough to shew that the contract was made or sanctioned by some of the directors, without proving that by the deed or otherwise the shareholders had authorized that number to act for them.

Therefore, where the deed of a company appointed eleven directors and declared that five should be a quorum, the company were held not to be bound by contracts made at a board meeting by three only of the directors.

If a contract be made or sanctioned by a competent number of the governing body, in such a manner that it would bind the company if only a partnership at common law, it binds it, though completely registered under 7 & 8 Vict. c. 110; for the 44th section, which enacts that contracts in the absence of certain requisites shall be void and ineffectual, also prohibits the company from taking the objection of the absence of these requisites.

The company cannot therefore object that a contract is not in writing, signed by two directors, and under the seal of the company, or signed by an officer of the company, but it may object that the persons making the contract had no authority at all to bind the whole shareholders.

Semble—that acts and admissions by a competent number of the governing body of the company are admissible as evidence against the company, and have the same legal effect as if made by the company itself, and, consequently, that a verbal statement made by the chairman, at a board meeting of the directors, to the plaintiff, that a distress made on his goods had been rightfully made by the landlord of the company, and that the company were bound by a contract made with the plaintiff in their name, to indemnify him against it, would have operated as a ratification of the contract with the plaintiff, and have been original evidence of the rightfulness of the distress (without producing or accounting for the absence of the lease to the company, under which the rent distrained for became due though shewn to be in writing), if there had been a competent number of the directors present at the board meeting, when the statement was made. *Ridley v. the Plymouth, Devon and Stonehouse Baking and Grinding Co.*, or, *the Plymouth, Stonehouse and Devonport Grinding and Baking Co.*; *Kingsbridge Mill Co. v. the Same*, 17 Law J. Rep. (N.S.) Exch. 252; 2 Exch. Rep. 711.

A joint-stock newspaper company having agreed to purchase the *Wesleyan Record* of H, two of the directors of the company gave him in part payment of the purchase-money a promissory note in the following form:—

“250*l.* On demand we jointly and severally promise to pay to Mr. Edward Healey or order the sum of 250*l.*, value received, for and on behalf of the Wesleyan Newspaper Association.” Signed, “P. S, J. W., Directors”:—Held, that P S and J W were personally liable to H for the amount of the note. *Healey v. Story*, 18 Law J. Rep. (N.S.) Exch. 8; 3 Exch. Rep. 3.

The deed of settlement of a registered joint-stock company contained a provision that the directors might issue a promissory note or accept a bill of exchange for the balance of a certain debt, not exceeding 1,000*l.* The directors accordingly issued a note for 1,000*l.*, but afterwards accepted and gave several bills, in place of the note, for smaller sums amounting together to 1,000*l.* and interest up to the time at which they were to become due:—Held, that the accepting of the bills was within the authority given by the deed. *Thompson v. Wesleyan Newspaper Association*, 19 Law J. Rep. (N.S.) C.P. 114; 8 Com. B. Rep. 849.

In an action against a registered joint-stock company for the price of goods supplied for the purposes of the company, used on their premises, and ordered

by their officers, it is unnecessary to give any evidence that those officers were authorized to make the contract, or that it was made pursuant to the provisions of the deed of settlement and the bye-laws of the company. *Smith v. Hull Glass Co.*, 19 Law J. Rep. (N.S.) C.P. 123; 8 Com. B. Rep. 668.

A document signed by two directors of a joint-stock company, and directed to their cashier, in the following form:—“Thirty days after date, credit Mrs. A or order with the sum of 311*l.* claims per Susan King, in cash on account of this corporation,” was held to be a promissory note; to be binding on the company, though it might not have been issued so as to bind the shareholders under the deed of settlement; and to be sufficiently signed under the 7 & 8 Vict. c. 110. *Allen v. Sea Fire, Life Assurance Co.*, 19 Law J. Rep. (N.S.) C.P. 305.

(2) Rights and Liabilities of.

To a bill filed by three directors of a company against the company to obtain re-payment of money lent by them to the company, a general demurrer was allowed, on the ground that such a case was within the 29th section of 7 & 8 Vict. c. 110, which invalidates all contracts with a company in which the directors are personally interested as the contracting parties. *Teversham v. Cameron's, &c. Co.*, 18 Law J. Rep. (N.S.) Chanc. 177; 3 De Gex & S. 296.

Declaration of various liabilities incurred by directors of a joint-stock company in respect of the acts of their co-director. *Benson v. Heathorn*, 2 Coll. C.C. 309.

(3) Removal of.

[See (c) Deed of Settlement.]

(e) Shares.

(1) Sale of.

The allottee of scrip in a provisionally registered public joint-stock company sold the scrip certificates in the market, and after the company obtained its act of parliament, and in default of the scrip-holder claiming to be registered within the time required by the company, was registered as the owner, and received sealed certificates of the shares. He subsequently paid calls and sold the shares in the market:—Held, that the allottee was trustee of the shares standing in his name for the purchaser of the scrip certificates.

The plaintiff (the purchaser of the scrip) discovering from the answer of the defendant (the allottee) that the amount received for the shares was only 9*l.*, and having previously grounds for supposing that a larger amount might be recovered, offered to abandon the suit upon payment of the 9*l.* and his costs. The defendant refused, and the Court decreed payment to the plaintiff of the 9*l.* and costs of the suit. *Beckett v. Billborough*, 19 Law J. Rep. (N.S.) Chanc. 522.

The shares of a proprietor of a joint-stock company were sold out without his authority, and not in conformity with the provisions of the deed by which the company was constituted. On a bill filed by a shareholder alleging that the sale was the fraudulent act of the secretary of the company, and

sanctioned by the directors, but assuming the transaction to be valid as against the transferee, and praying that the loss might be made good out of the assets of the company, demurrer, for want of equity, allowed, on the ground that the bill stated no case for making the company liable in damages.

Held, also, that the transferee was not a necessary party to the suit. *Duncan v. Luntley*, 2 Mac. & G. 30; 2 Hall & Tw. 78.

(2) *Forfeiture of.*

The deed of settlement of a joint-stock company, after giving power to the board of directors to make calls upon the shareholders of the company, declared that upon the neglect or refusal of any such shareholder to pay such calls after having received one calendar month's notice thereof, the board of directors should have power "at any time after the expiration of such calendar month to fix a day on or before which the amount due for the call and interest should be paid, and in default of payment to declare the shares in respect of which such default should be made thenceforth absolutely forfeited." By another provision in the deed power was given to the directors, if they should think fit, "to enforce the payment of the amount due in respect of any call, &c. instead of declaring the same to be forfeited":—Held, that under this deed, the power given to the directors was in the alternative, either to declare the shares of a shareholder making default in the payment of a call, &c. forfeited, or to enforce the payment thereof by action; and that after an action had been commenced against such shareholder for the recovery of a call, &c. due in respect of his shares, that amounted to an election by the directors so as to make a resolution subsequently come to by them, declaring the shares of such shareholder to be forfeited, a nullity. *Giles v. Hutt*, 18 Law J. Rep. (n.s.) Exch. 53; 3 Exch. Rep. 18.

(F) WINDING-UP ACTS.

[See ATTORNEY AND SOLICITOR, Lien for Costs.]

The dissolution of certain railway companies facilitated by 9 & 10 Vict. c. 28; 24 Law J. Stat. 78.

The acts for winding up joint-stock companies amended by 11 & 12 Vict. c. 45; 26 Law J. Stat. 121.

The Winding-up Act, 1848, amended by 12 & 13 Vict. c. 108; 27 Law J. Stat. 244.

(a) *What Companies are within the Acts.*

[See 11 & 12 Vict. c. 45. ss. 1, 2.]

(1) *Generally.*

A company, incorporated by act of parliament in 1830, authorized to raise capital in shares, and empowered to make a pier and works for landing passengers and goods:—Held, not to come within the provisions of the 11 & 12 Vict. c. 45. *In re Herne Bay Pier Co.*, 18 Law J. Rep. (n.s.) Chanc. 71; 1 De Gex & S. 588.

An association, provisionally registered, for the purpose of obtaining an act of parliament for the formation of a railway, whether it is the intention of the association to use the railway for the conveyance of passengers and goods in their own carriages,

or to let it out to others for that purpose, is an association "for a commercial or trading purpose;" and as such, though the project be afterwards abandoned, is within the operation of the Winding-up Act, 11 & 12 Vict. c. 45. *In re the London and Manchester Direct Independent Rail. Co., ex parte Barber*, 18 Law J. Rep. (n.s.) Chanc. 242; 1 Mac. & G. 176; 1 Hall & Tw. 238.

A mining company on the cost-book system, formed before the passing of the Joint-Stock Companies Winding-up Act is not within its operation. *In re Wheel Lovell Mining Co., ex parte Wyld*, 18 Law J. Rep. (n.s.) Chanc. 139; 1 Mac. & G. 1; 1 Hall & Tw. 125.

Under the Winding-up Act, the name of a gentleman was placed by the Master on the list of contributories who had become a provisional committee-man, upon the understanding that he was not to incur any liability for expenses. No shares were allotted. Motion to reverse the Master's decision refused. *In re the Direct West-End and Croydon Junction Rail. Co., ex parte Studley*, 19 Law J. Rep. (n.s.) Chanc. 417.

[See (b) *Jurisdiction of the Court*—(f) *Official Manager.*]

(2) *Foreign Companies.*

A company was formed for making a railway in Spain, with a board of directors both at Madrid and in London; the *locale* of the company to be in Spain, and its affairs to be regulated by the commercial code of Spain; two-thirds of the capital to be subscribed by English shareholders, and the remaining one-third by Spanish shareholders:—Held, that such a company was within the scope of the Joint-Stock Companies Winding-up Act, 1848, as far as regarded the English subscribers.

It appeared that the money subscribed by the Spanish shareholders had been returned:—Held, that such a reduction of the capital was a sufficient ground for winding up the company. *In re Madrid and Valencia Rail. Co. ex parte James*, 19 Law J. Rep. (n.s.) Chanc. 260; 1 Hall & Tw. 597; 2 Mac. & G. 169; 3 De Gex & S. 127.

An Anglo-Belgian company constituted a *société anonyme*, with domicile at Brussels, a board of directors there and in London, and shares divisible equally between English and Belgian allottees, was formed for making a railway and canal in Belgium; but being unable to complete the undertaking within the time limited, contracted, with the concurrence of the Belgian Government, to lend the caution-money to other railway companies for a definite period:—Held, on the petition of an English shareholder, that the company was within the operation of the Winding-up Acts, and that, notwithstanding the collateral contract into which the company had entered, the Court had jurisdiction to adjudicate in respect of the English shareholders.

Reference ordered to the Master to inquire whether the original undertaking had been finally abandoned, or merely suspended, and could hereafter, as between the company and the Belgian Government, be resumed; and, if abandoned or incapable of being resumed, whether it would be expedient to make an order to wind up the affairs of the company. *In re Dendre Valley Rail. and Canal Co., ex parte Moss*, 19 Law J. Rep. (n.s.) Chanc. 474.

(b) Jurisdiction of the Court.

The Winding-up Act (9 & 10 Vict. c. 28.) does not affect the jurisdiction of the Court of Chancery. *Jones v. Charlemont*, 16 Sim. 271.

A joint-stock company formed for the insurance of cattle sustained heavy losses in every year from the commencement of their business, and were under liabilities to a large amount, and had allowed a great number of the members to retire upon terms. Upon a petition being presented under the Winding-up Act for a dissolution, it was held, that the Court could only interfere upon proof of the existence of some of the tests of insolvency prescribed by the act, and was not entitled to go into the pecuniary accounts of the company; and that the permitting a number of the members to retire upon terms did not amount to a dissolution of the company.

Whether such a company is within the scope of the Winding-up Act—*quære*. *Ex parte Spackman in re Agriculturist Insurance Co.*, 18 Law J. Rep. (N.S.) Chanc. 261; 1 De Gex & S. 599; 1 Mac. & G. 170; 1 Hall & Tw. 229.

Several persons proposed to establish a company for making a foreign railway, and large sums of money were raised by the sale of scrip, but the scheme failed. An order was made under the 11 & 12 Vict. c. 45. and the 12 & 13 Vict. c. 108. to wind up the affairs of the company. A subscriber afterwards filed a bill for the same purpose, and also to obtain relief against the provisional directors for various improper acts with which he charged them:—Held, though there was a doubt whether the case came within the acts of parliament, that the jurisdiction of the Court of Chancery was not interfered with; that the proceedings under the acts of parliament ought to be continued; and that the proceedings by bill ought to be stayed. *Parbury v. Chadwick*, 19 Law J. Rep. (N.S.) Chanc. 562; 12 Beav. 614.

(c) Upon whose Petition a Company may be wound up.

[See 11 & 12 Vict. c. 45. s. 5.]

(1) Contributory sued for Company's Debt.

By a deed of settlement of a joint-stock company executors were not to be proprietors. Held, that they were nevertheless contributories, and might maintain a petition to wind up.

Where a company is insolvent it is no answer to an application that the difficulties are temporary. *In re Norwich Yarn Co.*, 12 Beav. 366.

A dispute having arisen between a mining company and one of the shareholders respecting his liability to pay calls, the company procured one of their creditors to bring an action against him. He served notice of the action on the company as required by the act, but they took no steps to stay the action, or indemnify the shareholder, who thereupon presented a petition for the dissolution and winding up of the company. There were no circumstances to satisfy the Court that the company were not in a solvent condition:—Held, that although the case came within the strict letter of the act, yet as the action arose out of the dispute between the shareholder and the company, and not from their in-

ability to pay, he was not entitled under the circumstances to an order for winding up the concern.

Where the tests which are directed by the act to be applied to try the solvency of a company, strictly and literally apply to a particular company, but the presumption arising therefrom is rebutted by evidence, so that there is no reason to believe that the company are insolvent, the Court will refuse to interfere. *In re Wheal Lovell Mining Co., ex parte Wyld*, 18 Law J. Rep. (N.S.) Chanc. 139; 1 Mac. & G. 1; 1 Hall & Tw. 125.

An action brought against a shareholder of a company in the Court of Session in Scotland is not an action brought in any of Her Majesty's courts of record, within the meaning of the 5th paragraph of the 5th section of the Joint-Stock Companies Winding-up Act.

A banking company issued debentures. An action was brought on one of those debentures against A a shareholder, residing in Scotland, in the Court of Session there. The company declined to indemnify him against such action:—Held, that this came within the 8th paragraph of the 5th section of the act, and that A had a right to petition for the winding up of the company. *In re Royal Bank of Australia, ex parte Latta*, 19 Law J. Rep. (N.S.) Chanc. 387; 3 De Gex & S. 186.

(2) Creditor of the Company.

A member of the managing committee of a provisionally registered railway company who had declined to take any shares and to whom no shares had been allotted, had paid 300l. to the solicitor employed on behalf of the company for costs:—Held, that he was entitled to have the company wound up. *Ex parte Cooke, in re the Eastern Counties Junction and Southend Rail. Co.*, 3 De Gex & S. 148.

(3) Where Company abandoned.

A company was provisionally registered for making a railway of 170 miles to complete the communication from London to the western coast of Ireland, and a subscription contract was executed authorizing the directors, among other things, to apply for an act to construct only a portion of the line if they thought fit. Afterwards a portion of the scheme was abandoned by the directors and the deposits applied to procure an act which was obtained for making a portion of the line, 40 miles only:—Held, not a proper case for an order upon the petition of a scrip-holder under the original agreement, for winding up the affairs of the company. *Ex parte Fisher, in re Wexford and Valencia Rail. Co.*, 3 De Gex & S. 116.

In 1845 a railway company was formed, and twenty shares in it were allotted to A, on which he paid a deposit at the rate of 55s. per share. The scheme was soon after abandoned. In October, 1846 the directors paid back to A (with the other shareholders) a sum, at the rate of 30s. a share, in respect of the amount deposited by him, and in February 1847 the directors paid also to A (with the other shareholders) a further sum at the rate of 3s. 3d. a share as a final dividend. The officers were then discharged and the place of business abandoned. A presented a petition for winding up the company under the Joint-Stock Companies

Winding-up Act. The facts stated by A in support of his petition were known to him before February 1847. The petition was refused. *Ex parte Murrell, in re London and South Essex Rail. Co.*, 18 Law J. Rep. (n.s.) Chanc. 260; 3 De Gex & S. 4.

(4) *Provisional Committee.*

Where members of the provisional committee of a projected railway company have with others incurred liabilities with reference to the intended company, they are entitled to have the affairs of the company wound up, although such liabilities may not affect the general body of subscribers. *Ex parte Holingsworth, in re Great Western, Southern and Eastern Counties Rail. Co.*, 3 De Gex & S. 7.

(5) *Other Cases.*

A scrip-holder in a provisionally registered railway company, who has not signed the subscription contract may present a petition to wind up the company. *Ex parte Capper, in re London, Bristol and South Wales Direct Rail. Co.*, 3 De Gex & S. 1.

The usual order for dissolving and winding up a company was made upon the petition of a shareholder, notwithstanding an action was then pending against him for payment of calls. *In re York and London Assurance Co., ex parte Hodsell*, 19 Law J. Rep. (n.s.) Chanc. 234.

(d) *Order for Winding up.*

[See (a) *What Companies are within the Acts*—(2) *Foreign Companies.* (b) *Jurisdiction of the Court.*]

Where upon a petition for an order under the Winding-up Act, it did not appear that there existed any debt or liability of the company, or that the petitioner had sustained or was likely to sustain any loss in respect of any debt of the company, and no assets were shewn to exist except such as might arise by compelling the directors to make good monies expended by them in purchasing shares to enhance the price of them in the market,—Held, not a proper case for an order. And the transactions complained of having occurred five years before the presentation of the petition, and having been the subject of an investigation and a suit instituted four years previously, and compromise, and also of another petition which had been abandoned on a compromise, the new petition was dismissed, with costs. *Ex parte Inderwick, in re Great Munster Rail. Co.*, 3 De Gex & S. 231.

Where the circumstances of the case rendered it doubtful whether there ever had been such a company as that sought to be wound up, the Court referred it to the Master to inquire whether the alleged company ever existed; and if it had existed, whether it was proper that it should be wound up. *In re North-Western Trunk Co.*, 3 De Gex & S. 266.

A petition for the dissolution and winding up of a company by an allottee, who had paid the required portions of the deposit on his shares, was opposed on the ground that all debts and claims had been settled by the company. The Court, not being satisfied that a certain claim against the company had been decided at law upon merits, and it being sworn that other debts were still due from it, and that several allottees of shares had not paid any

portion of the share deposits, made the usual order *In re Direct London, Portsmouth, &c. Rail. Co., ex parte Goldsmith*, 19 Law J. Rep. (n.s.) Chanc. 235.

A suit was instituted on behalf of the shareholders in a joint-stock banking company, for the purpose of making the directors personally liable for certain losses which had been sustained. The suit was still pending, but no decree had been obtained, and it appeared that there were no debts of the company remaining unpaid:—Held, that this state of things did not preclude any of the contributors to the company from obtaining an order under the Joint-Stock Companies Winding-up Act for the dissolution and winding up of the affairs of the company. *In re Marylebone Joint-Stock Banking Co., ex parte Walker, ex parte Troutbeck*, 18 Law J. Rep. (n.s.) Chanc. 81; 1 De Gex & S. 585; 1 Hall & Tw. 100.

The commencement by a creditor of proceedings, under Lord Dalhousie's Act, for the purpose of making a joint-stock company bankrupt, will not preclude a contributory from subsequently obtaining the usual order for dissolution and winding up under the Joint-Stock Companies Winding-up Acts, 1848, 1849.

Whether a creditor not being a contributory is entitled to oppose the petition of the latter—*quære.* *In re Port of London Shipowners' Loan and Assurance Co., ex parte Collingridge*, 19 Law J. Rep. (n.s.) Chanc. 234.

The Court has a discretion to refuse to order a company to be wound up under the Joint-Stock Companies Winding-up Acts, where there is reason to believe that more harm than good would be done by the order, and that such order would not be necessary or expedient. *In re Union Bank of Calcutta*, 19 Law J. Rep. (n.s.) Chanc. 388; 3 De Gex & S. 258.

In a provisionally registered railway company, 88,440 shares were allotted, the deposit being 5*l.* 5*s.* per share. On the bill being thrown out on the standing orders, the directors abandoning the undertaking, 3*l.* 10*s.* per share was returned to the holders of 88,375 shares, who thereupon delivered up the scrip certificates and took fresh ones, purporting to entitle the holders to a *pro rata* division of the funds remaining after settling the claims on and the liabilities of the company. The holders of 87,940 of these certificates received a further instalment of 10*s.* per share, and signed a release, admitting a certain balance only to be then in the hands of the directors.

An original holder of thirty shares, who received the former but not the latter instalment, presented a petition under the Winding-up Act, alleging a refusal or neglect on the part of the directors to produce accounts, and alleging a misapplication of 15,000*l.* on payment of a deposit on an agreement for the purchase of land, contrary to the Registration Act:—Held, not a case for making at once an order to wind up the company, or even, without further materials, for a reference to the Master under the section as to the expediency of winding up the company.

But, it appearing that the petitioner's application to see the accounts had not been attended to, the petition was ordered to stand over, to give him an opportunity of seeing them. *Ex parte Pocock, in re*

Direct London and Manchester Rail. Co., 1 De Gex & S. 731.

Winding-up order made in the case of an insurance company which had been dissolved and its business transferred to another office, there remaining a sum of 4,000*l.* to be divided among the shareholders. *Ex parte Phillips, in re London and Westminster Insurance Co.*, 3 De Gex & S. 3.

The circumstance that policies of a life insurance company are still in force, and that the liabilities of the company upon them cannot be settled for many years, is not sufficient to render it inexpedient to make an order for winding up such a company. *In re Universal Tontine Life Insurance Co.*, 3 De Gex & S. 112.

(e) *Reference to the Master.*

[See (a) *What Companies are within the Acts.* (d) *Order for Winding up.*]

Form of reference under 7 & 8 Vict. c. 111. *In re Forth Marine Insurance Co.*, 9 Beav. 469.

(f) *Official Manager.*

The plaintiff brought an action against a railway company, which was referred to arbitration. The arbitrator ordered the company to pay the plaintiff 3,300*l.* by instalments, and the order of reference was made a rule of court. The award was made, and payment of the first instalment became due in the interval between the passing of "The Joint-Stock Companies Winding-up Act, 1848," and "The Joint-Stock Companies Winding-up Amendment Act, 1849." During the same interval, and before the first instalment became due, the Vice Chancellor, under the act of 1848, made an order absolute for the dissolution and winding up of the company. The affairs were referred to a Master in Chancery, and an official manager was appointed. After the passing of the Winding-up Act, 1849, payment of the money then due under the award was duly demanded of the secretary and one of the directors of the company, which was refused. The plaintiff applied to make absolute a rule calling upon the company to shew cause why they should not pay the money due.

Held, that the Court will never make such a rule absolute unless the matter be free from doubt in point of law, and the rule was discharged.

Held also, that though the official manager was not named in the rule, he might appear (as representing the company) and shew cause against the rule.

Quære—Whether "The Joint-Stock Companies Winding-up Act, 1848," applied to railway companies, and, if it did, whether the act of 1849 is retrospective in its operation. *M'Kenzie v. Sligo and Shannon Rail. Co.*, 19 Law J. Rep. (n.s.) C.P. 142.

After an action had been commenced against C D, a member of a company, for goods supplied to the company, and issue joined therein, an order for the winding up of the company, under 11 & 12 Vict. c. 45, was obtained, and A B was appointed official manager. Leave was obtained by the plaintiff to proceed at law, and a Judge's order was made to substitute the official manager as defendant. The plaintiff then entered a suggestion on the record, stating "that the action was commenced and has

hitherto been prosecuted against C D, as a person authorized to be sued, as the nominal defendant, on behalf of the company," the subsequent appointment of the official manager, and the order for substitution.

Held, that the acts and declarations of C D were not admissible in evidence against the official manager. *Armstrong v. Normandy*, 19 Law J. Rep. (n.s.) Exch. 343; 5 Exch. Rep. 409.

Under an order for winding up the affairs of a company under the Joint-Stock Companies Winding-up Act, 1848, certain costs had been occasioned to alleged contributories, in attending a meeting before the Master, which had become inoperative by the previous default of the official manager:—Held, that neither the Master nor the Court had jurisdiction to order the official manager personally to pay to such contributories the costs of their attendance. *In re Cambridge and Colchester Rail. Co., ex parte Marsh*, 19 Law J. Rep. (n.s.) Chanc. 161; 1 Mac. & G. 302; 1 Hall & Tw. 578.

An official manager appointed under the Winding-up Act, 1848, entered into an agreement with the executrix of a deceased shareholder to accept 2,000*l.* in lieu of a much larger sum claimed to be due in respect of the then present call already made, and together with a security for the contribution by her towards any future calls, to the extent of 1,000*l.*, as a compromise of all claims of the company on the executrix and her testator, of which agreement the Master certified his approval by a special report. The Court upon motion confirmed the report. *In re Nisterdale Iron Co., Hughes's case*, 1 De Gex & S. 606.

(g) *Distribution of the Funds.*

An order had been made to wind up a company, but no person had been placed on the list of contributories, and no creditor had made any claim. On the application of directors (who were the holders of 6,490 out of 7,325 shares) the consent of the official manager and original petitioner, and evidence that the remaining shares could not be heard of, and that the petitioners had paid, in respect of liabilities of the company, more than the amount of the assets in the hands of the official manager, the Court ordered that amount to be paid to the petitioners on their undertaking to account for it, and stayed all proceedings under the winding-up order. *In re Worcester, Tenbury and Ludlow Rail. Co.*, 3 DeGex & S. 189.

(h) *Actions and Suits against the Company or Contributories.*

On a motion to dissolve a special injunction which had been granted, without a bill having been filed, to restrain a creditor from proceeding against a company with a suit in the Lord Mayor's Court, which had been commenced previously to an order made, under the 11 & 12 Vict. c. 45, for winding up the affairs of the company:—Held, that the injunction must be dissolved, with costs; and that, notwithstanding an interim manager had been appointed since the application for the injunction. *In re India and Australia Mail Steam-Packet Co.*, 18 Law J. Rep. (n.s.) Chanc. 390; 17 Sim. 15.

An action at law against a member of a joint-stock company, for goods supplied to the company, was stayed by a Judge at chambers, at the instance

of the defendant, after an order had been made to wind up the company, until after proof of the debt should be made before the Master. The plaintiff at law then went before the Master, who disallowed the proof. The Court on motion gave the plaintiff at law leave to take or prosecute such proceedings at law as he might be advised. *In re Patent Elastic Pavement and Kamptulicon Co., Armstrong's case*, 3 De Gex & S. 140.

The Court has no jurisdiction to restrain a creditor of a joint-stock company from suing one of the members, on the ground that an order has been made for winding up the affairs of the company. *In re Dover and Deal Rail. Co.*, 17 Sim. 18.

(i) *Jurisdiction and Powers of the Master.*

(1) *Settling the List of Contributories.*

An order had been made under the Joint-Stock Companies Winding-up Act for winding up the affairs of a banking company. A notice was served upon a party, under the act, that the official manager proposed to insert his name as a contributory in respect of some shares as the representative of his brother, who had died, and no one had become his legal personal representative, but the dividends had been paid to the surviving brother:—Held, that under that notice, the Master had only jurisdiction to decide whether the party was a contributory in the character mentioned in the notice. *In re North of England Joint-Stock Banking Co., ex parte Glaholm*, 18 Law J. Rep. (n.s.) Chanc. 147; 1 De Gex & S. 583; 1 Hall & Tw. 121.

(2) *Production of Documents.*

The Master charged with the winding up of a company is not authorized to make orders on particular individuals for the production of papers, &c. *ex parte* or without notice to them. *In re Warwick and Worcester Rail. Co., ex parte Pell*, 19 Law J. Rep. (n.s.) Chanc. 164; 3 De Gex & S. 170.

(3) *Payment of Balances.*

The directors of a provisionally registered railway company paid to solicitors employed by the company a sum of money in respect of their bill of costs, which was not then delivered, and which, when delivered, fell short of the sum paid. The balance was claimed by the assignees of another solicitor, who had acted jointly with the former in respect of certain extra costs not included in the bill; and the first-mentioned solicitors also claimed a lien in respect of subsequent costs:—Held, irrespectively of these claims, that the balance was not in the hands of the solicitors as "agents or trustees" for the company, so as to give jurisdiction to the Master under the 66th section of the Winding-up Act of 1848, to direct it to be paid to the official manager. *In re Direct London and Exeter Rail. Co., Hollinsworth's case*, 3 De Gex & S. 102.

(4) *Examination of Witnesses.*

It was stated on behalf of an official manager that the assignees of a bankrupt contributory had made such payments in respect of shares held by the bankrupt as would render the assignees personally liable as contributories, and that this would appear by the accounts signed by the assignees and appearing upon the bankruptcy proceedings. The

Commissioner acting in the bankruptcy declined to permit the registrar to attend with the proceedings to verify this statement. The official manager then summoned before the Master the surviving assignee, who stated that he could not, without inspecting the proceedings, say whether he had signed such accounts; and that he believed that he had no right to inspect them for the purpose of enabling him to answer the question. His examination was adjourned, to enable him to apply for leave to inspect them; but on his again appearing he had not done so:—Held, that his answers were unsatisfactory,—and, *semble*, they rendered him liable to be committed under 12 & 13 Vict. c. 108, s. 19. *In re German Mining Co., Stone's case*, 3 De Gex & S. 120.

(5) *Other Matters.*

In the proceedings for winding up a company under the Joint-Stock Companies Winding-up Act, the Master made an order whereby he appointed A and B to be the official managers, and approved of Messrs. G as the solicitors, and directed Messrs. G to attend him, and ordered all persons who had any writings relating to the company to leave them at the office of Messrs. G. A motion to discharge this order, so far as it related to Messrs. G, on the ground that B had not concurred with A in the appointment of Messrs. G as solicitors, was granted.

The Master has authority, at any time after the commencement of the proceedings in his office, to discharge the petitioner from all further attendance in the matter.

At the hearing of a motion, M stated that he appeared as counsel for B, and S also stated that he appeared as counsel for B. B being present, and being asked by the Court whom he wished to appear as his counsel, and having stated that he wished S to be his counsel, the Court directed S alone to appear as B's counsel. *In re London and Manchester Direct Independent Rail. Co., ex parte Bass, ex parte Barber*, 18 Law J. Rep. (n.s.) Chanc. 245; 1 De Gex & S. 722, 726.

In 1845 a company was projected, and A became a shareholder. Shortly afterwards a sum of money was paid to A on behalf of the company. The company was ordered to be wound up, and A was placed in the list of contributories. In the Master's office the official manager claimed, as a debt due to the company from A, the sum which had been paid him in 1845. The Master, by his report, found that this sum and interest were due from A as a member and contributory, and ordered him to pay it:—Held, that (without entering into the merits of the question) the sum, if due from A, was not due from him as a contributory, and the Master's report was ordered to be discharged. *In re Tring, Reading and Basingstoke Rail. Co., ex parte Cox*, 19 Law J. Rep. (n.s.) Chanc. 167; 3 De Gex & S. 180.

(j) *Appeal and Confirmation of Report.*

A motion, by way of appeal from a decision of a Master made under the Joint-Stock Companies Winding-up Act, 1848, was made to one of the Vice Chancellors, and decided by him on the 7th of July. A notice of motion, by way of appeal from the Vice Chancellor's decision, was given on the 8th of August, after the passing of the 12 & 13 Vict. c. 108.

This motion was refused, by the Lord Chancellor, on the ground of the notice of motion having been given more than three weeks after the decision of the Vice Chancellor; and that the 33rd section of the 12 & 13 Vict. c. 108, limiting the time within which notice of motion for a rehearing must be given, applies to orders made under the Joint-Stock Companies Winding-up Act, 1848. A motion before the same Vice Chancellor to rehear the original motion, was refused. *In re North of England Joint-Stock Banking Co., Sanderson's case*, 19 Law J. Rep. (N.S.) Chanc. 122; 1 Mac. & G. 306; 1 Hall & Tw. 486.

The Master charged with the winding up of a company declined on two several occasions to insert the name of J P as a contributory either on his own account or in his representative character; and the Vice Chancellor, on two distinct appeals, confirmed these decisions of the Master. A motion was then made before the Lord Chancellor to discharge or vary the two orders of the Vice Chancellor, and that J P might be included in the list of contributories as a contributory, either in his own right or as personal representative, in respect of a certain number of shares, and either for the whole in one character, or for part in one character and part in another.—Held, upon a preliminary objection, that this was not an appeal motion within the provisions of the Joint-Stock Companies Winding-up Act, 1848. *In re St. George's Steam-Packet Co., ex parte Pimm*, 19 Law J. Rep. (N.S.) Chanc. 233; 1 Mac. & G. 291; 1 Hall & Tw. 358.

A report of the Master upon a reference to inquire whether a company ought to be wound up should be confirmed on an application to the Court by way of petition and not of motion. *In re Imperial Salt and Alkali Co.*, 19 Law J. Rep. (N.S.) Chanc. 393.

(k) *Contributories, who may be.*

(1) *Assignees.*

A bankrupt, at the time of his bankruptcy, held shares in a company afterwards ordered to be wound up. The Master placed his assignees in the list of contributories, in respect of these shares, with the addition of the words "as assignees:—" Held, that the Master had rightly so placed them. *In re Kollman's Railway Locomotive and Carriage Improvement Co., ex parte Kuper*, 19 Law J. Rep. (N.S.) Chanc. 165; 3 De Gex & S. 113.

The official assignee of a bankrupt shareholder of a company paid, out of the bankrupt's estate, calls becoming due on the shares after the bankruptcy, and the creditors' assignees in the usual course of business signed memoranda vouching the accuracy of the official assignees' accounts containing entries of the payments of the calls:—Held, that the surviving creditors' assignee had not thereby rendered himself liable to be placed on the list of contributories in his own right as member by survivorship. *In re German Mining Co., Stone's case*, 3 De Gex & S. 220.

(2) *Executors.*

By a deed of settlement of a banking company, executors of deceased shareholder had the option of becoming shareholders on giving a certain notice, or of selling the shares, and until the option was exercised, the dividends might be retained by the

company as a guarantee fund. In default of any person executing the deed in respect of such shares after six months' notice, the shares were liable to forfeiture. A shareholder in the company bequeathed his shares to his executor in trust to convert them into money. The executor sold some of the shares, but did not give the proper notice to make himself a shareholder as to the rest, and was nevertheless permitted to receive the dividends on them for five years, signing the receipts as executor only:—Held, that he was not a contributory without qualification. *In re North of England Banking Co., Armstrong's case*, 1 De Gex & S. 565.

The deed of settlement of the N. of E. Banking Company provided that the executor of a deceased shareholder should not be entitled to be a shareholder until he had gone through certain formalities set out in such deed. A died possessed of some shares in this company. B, who was A's executor, took no steps whatever in respect of the shares.—Held, that B was properly put on the list of contributories in the character of the executor of A. *In re North of England Joint-Stock Banking Co., Thomas's case*, 18 Law J. Rep. (N.S.) Chanc. 249; 1 De Gex & S. 579.

A, a shareholder in a company, died leaving B his executor. B did not comply with the formalities laid down by the deed of settlement as to executors becoming members of the company in respect of the shares of their testators, but received the dividends declared on the shares after the death of the testator:—Held, that B, either in his own or his representative character, must be held to have made a contract with the directors, and ought to be put on the list of contributories. *In re North of England Joint-Stock Banking Co., ex parte Gouthwaite*, 19 Law J. Rep. (N.S.) Chanc. 393; 3 De Gex & S. 258.

W R B was holder of 200l. shares in a company formed by a deed of settlement, which among other things contained provisions that the probate of the will of a deceased shareholder should be registered, and the executors should give notice of the testator's death and execute the deed. W R B died, and by his will appointed E B and M E B his executors; they proved his will, and afterwards paid two calls upon the shares, and attended various meetings, to which they were summoned as executors, but they attended no meeting after the payment of the last call. The company afterwards failed, and under an order for winding it up, the Master placed the executors on the list of contributories as "members of the company with qualifications," though it was contended that they ought not to have been placed upon the list at all; or, if placed on the list, that their liability as executors ought to be restricted to the debts owing by the company at the death of their testator. Upon a notice of motion asking that the liability might be restricted to the debts owing by the company at the death of the testator,—Held, that profits accruing between his death and the transfer of the shares must be paid according to agreement between transferor and transferee; that as the deed declared the shares to be personal estate, they formed part of the testator's assets, and that as no new liability had been created under the provisions of the deed, the testator's estate continued liable, and the

motion was refused, with costs. *In re Northern Coal Mining Co., ex parte Blakeley*, 19 Law J. Rep. (N.S.) Chanc. 566; 13 Beav. 133.

By a company's deed it was provided that every person who, being the executor of any deceased proprietor, should not, at the time of the shares becoming vested in him in such capacity, be a recognized proprietor in respect of any other shares, should, as to all duties, obligations, &c., upon or against him in respect of such shares, become a proprietor from the time of the shares becoming so vested in him, but, as to profits, &c. no such person should be considered a proprietor in respect of the same until he should have executed or acceded to the deed.—Held, that the receipt of dividends by the executor of a deceased proprietor did not create any personal liability in the executor. *In re St. George's Steam-Packet Co., ex parte Doyle*, 2 Hall & Tw. 221.

(3) *Infant Shareholder.*

Certain shares in a joint-stock banking company were purchased for the benefit, and transferred into the name, of an infant, by his grandmother, but the dividends were received by his father. The father executed a deed of covenant with the bank that the son should pay all instalments which might be required on the shares, and should keep all covenants and stipulations contained in the deed of settlement of the bank, and that he (the father) would indemnify the bank against all losses which they might incur by reason of the son being under twenty-one, or on account of the dividends paid to the father.—Held, that the father was liable as a contributory within the meaning of the Joint-Stock Companies Winding-up Act. *In re North of England Joint-Stock Banking Co., ex parte Reaveley*, 18 Law J. Rep. (N.S.) Chanc. 110; 1 De Gex & S. 550; 1 Hall & Tw. 118.

A party entitled to shares in a steam-packet company, transferred them to his son, who was then a minor. In the deed of settlement of the company it was provided that minors might vote by their guardians. It was admitted that the son had taken some free passages as a proprietor, and that, in the tickets given him for that purpose, he was described as "Master L." On coming of age, having done no act of acceptance of the shares after his majority, he repudiated them. The company was wound up under the Joint-Stock Companies Winding-up Act, 1848.—Held, that the father was liable as a contributory in respect of these shares. *In re St. George's Steam-Packet Co., Litchfield's case*, 19 Law J. Rep. (N.S.) Chanc. 124; 3 De Gex & S. 141.

(4) *Husband of Female Shareholder.*

A married woman became by such description a registered shareholder in a joint-stock banking company, having purchased shares with money arising from her separate estate. The husband occasionally received the dividends on the shares, but always signed the receipts as his wife's agent. Though not registered as a shareholder he attended some meetings, and once held the proxy of an absent shareholder, which according to the deed of settlement a shareholder could alone do, and he took part in the proceedings. Previously to the dissolution of the company, his name had been

substituted without his consent for that of his wife in the register.

Held, that he was not a "contributory," and his name was on motion ordered to be struck out of the list.

Semble—that liability to creditors of the company is not of itself sufficient to make a person a "contributory." *In re North of England Banking Co., Angas's case*, 1 De Gex & S. 560.

The deed of settlement of the N. of E. Banking Company provided that the husband of a female shareholder should not be entitled to be a shareholder until he had gone through certain formalities set out in such deed. A married B, a female shareholder. A did not comply with these formalities, but received the dividends from time to time declared on the shares, and signed the dividend warrants in this manner, "A pro B:—Held, that A was properly put on the list of contributories. *In re North of England Joint-Stock Banking Co., Burlington's case*, 18 Law J. Rep. (N.S.) Chanc. 250; 3 De Gex & S. 18.

The deed of settlement of the N. of E. Banking Company provided, that the husband of a female shareholder should not be entitled to be a shareholder until he had gone through certain formalities set out in such deed. A married B, a female shareholder, but took no steps whatever in respect of the shares, and never received any dividend:—Held, that A was properly put on the list of contributories.

In this case the name of B ought to be put on the list of contributories with that of A—*semble*. *In re North of England Joint-Stock Banking Co., Sadler's case*, 18 Law J. Rep. (N.S.) Chanc. 251; 3 De Gex & S. 36.

A, a feme sole, being entitled to shares in a company, married B. Nothing was done with the shares, which continued to be in the name of A. A died:—Held, that B was not liable as a contributory, under the Joint-Stock Companies Winding-up Act, 1848, in respect of losses or liabilities as to the shares before or after the coverture. *In re Vale of Neath, &c. Brewery Co., ex parte Kluht*, 19 Law J. Rep. (N.S.) Chanc. 385; 3 De Gex & S. 210.

By the provisions of the deed of settlement of a company, the husband of a female proprietor might, with the approbation of the directors, become a proprietor; but if he did not intend to become such, he was to sell within six months after his title accrued, or in default the shares were to be forfeited; but in case he should not obtain the approbation of the directors to become a proprietor within the six months, the directors were empowered and required, on the application of the husband, to purchase the shares at the market price for the benefit of the company. The husband of a female shareholder attended a meeting of the company, and proposed certain resolutions thereat, and afterwards applied to the directors to purchase his wife's shares upon certain terms. The transaction was completed within six months after the title of the husband accrued:—Held, that the transaction was valid within the terms of the deed, and that the husband's liability as a contributory was properly qualified by restricting it to the period preceding the sale. *In re Vale of Neath Brewery Co., ex*

parte White, 19 Law J. Rep. (N.S.) Chanc. 497; 3 De Gex & S. 157.

(5) *Trustees.*

A transferred forty shares in a company into the names of B and C, without the knowledge of B, on certain trusts. A died, having appointed B his executor, who proved the will, and then became acquainted with the circumstance. An application was made by D, an officer of the company, to B, to give up the forty shares, and to take forty other similar shares, to which B consented, and D sent B twenty-seven other shares, and cancelled the former shares. B took no other steps about the shares. An application to put B on the list of contributors either in his own or his representative character was refused. *In re St. George's Steam-Packet Co., Pim's case*, 18 Law J. Rep. (N.S.) Chanc. 258, 259; 3 De Gex & S. 11.

A, in right of her deceased husband, was entitled to six shares in a joint-stock banking company, and on her second marriage she assigned by deed all her interest in these shares to B, in trust for her separate use. B gave verbal notice to a clerk of the company of the execution of the deed, but no transfer of the shares was ever required by or made to him. B, for some years, received the dividends and signed the dividend warrant as "agent of A." A memorandum of the assignment was made in the books of the company without the privity of B; but his name was never returned to the Stamp Office as a shareholder until the stoppage of the bank:—Held, reversing the decision of the Court below, that the facts in evidence did not authorize the Master to place B on the list of contributors within the Joint-Stock Companies Winding-up Act; but leave was given to try the question of B's liability in an action at law. *In re North of England Joint-Stock Banking Co., Hall's case*, 19 Law J. Rep. (N.S.) Chanc. 69; 1 Mac. & G. 307; 1 Hall & Tw. 580.

(6) *Pledgee of Shares.*

A number of shares of 1*l.* each in a company were deposited with A, by way of security for money due to him. A having received notice that, by a resolution of the company, every ten shares of 1*l.* each had been converted into one share of 10*l.*, brought the shares to the company's office and received back the new shares in exchange. The company was wound up under the Joint-Stock Companies Winding-up Act, 1848:—Held, that A was liable in respect of the shares. *In re Patent Elastic Pavement and Kamptulicon Co.*, 19 Law J. Rep. (N.S.) Chanc. 123; 3 De Gex & S. 146.

(7) *Party indemnifying the Holder.*

[See (3) *Infant Shareholder.*]

A purchased shares in a joint-stock banking company with his own money, and had them transferred into the name of B, and directed B to stand possessed of them in trust for C and D, the infant children of A. B accepted the trust, received the dividends on the shares, and paid them into a bank to the general account of A. Some time after the transfer, A and B signed an instrument, whereby B declared that he was a trustee of the shares for C and D, and A indemnified B against

all losses which might be incurred by him on account of the shares:—Held, that A was not a contributory within the meaning of the Joint-Stock Companies Winding-up Act. *In re North of England Joint-Stock Banking Co., ex parte Fenwick*, 18 Law J. Rep. (N.S.) Chanc. 112; 1 De Gex & S. 557.

(8) *Allottee of Shares.*

Shares in a proposed company, to be carried on under a deed of settlement, were allotted to A upon his application, in respect of which he paid various instalments both before and after the date of the deed; but he never executed the deed, and, in consequence, his shares were declared forfeited, and were carried to the company's share account. A submitted to the forfeiture, and some years afterwards the affairs of the company were wound up under the Joint-Stock Companies Winding-up Acts:—Held, that A not having executed the deed was not strictly a shareholder, but being merely connected with the company by contract it was competent to the parties to put an end to the contract by mutual agreement; and this having been done, A was properly excluded from the list of contributors. *In re Kollmann's Railway Locomotive and Carriage Improvement Co., ex parte Beresford*, 19 Law J. Rep. (N.S.) Chanc. 332; 2 Mac. & G. 197; 2 Hall & Tw. 388; affirming s.c. 19 Law J. Rep. (N.S.) Chanc. 166; 3 De Gex & S. 175.

A applied for shares in a railway company. A month after the application he received a letter of allotment, in which were contained the words "not transferable," and a declaration that, if the deposit was not paid within a month, the allotment should be null and void. A never paid the deposit:—Held, that, by reason of this declaration in the letter of allotment, A was not a contributory.

Whether the words "not transferable" would have had that effect—*quære*. *In re Direct Birmingham, &c. Rail. Co., ex parte Copper*, 19 Law J. Rep. (N.S.) Chanc. 394.

An allottee who had paid his deposit on shares in a company which was afterwards completely registered, claimed to be excluded from the list of contributors, on the ground that a condition expressed on the scrip certificate that the capital should be 10,000*l.* in 4,000 shares had not been fulfilled, and that 2,600 shares only had been subscribed for,—Held, not a sufficient ground of exclusion. *In re Universal Salvage Co., Sharpus's case*, 3 De Gex & S. 49.

A having applied verbally for shares in a joint-stock company, and upon twenty scrip certificates being sent to him having acknowledged the receipt of them and paid the deposit, but having done no further act in relation to the company, is liable as a contributory, though he has not signed the deed. A party placed on a list of contributors is not necessarily liable thereby to all the losses and expenses of the company, but only to such as have been properly incurred by directors. *In re Universal Salvage Co., ex parte Mansfield*, 19 Law J. Rep. (N.S.) Chanc. 258; 2 Mac. & G. 57; 1 Hall & Tw. 593.

A publisher furnishing a provisionally registered company with goods, agreed with the chairman to be paid in shares, but so that he should incur no personal liability. Scrip certificates were sent to

him accordingly, and the company was afterwards completely registered. He sold the shares. On being required to sign the deed, he refused to do so, and took no further part in the affairs of the company.—Held that he was properly excluded from the list of contributories. *In re Universal Salvage Co., Woodfall's case*, 3 De Gex & S. 63.

It is not sufficient ground for excluding an allottee from the list of contributories to a provisionally registered railway company that the prospectus of the company contained incorrect and fraudulent statements, in reliance on which he applied for shares, or that the project was never carried into effect, unless it appear that the only other persons interested in the company were the persons who made the fraudulent statements. *In re Direct London and Exeter Rail. Co., Parbury's case*, 3 De Gex & S. 43.

An application for shares in a provisionally registered projected company was made on October 20, 1845. No answer was returned till December 15, when a letter of allotment was sent to the applicant, who took no notice of it. The circumstances of the projected company had considerably changed in the interval. On an appeal from the decision of the Master, placing the applicant on the list of contributories, an issue was directed to try whether the allotment was made *bona fide*; and a verdict having been found in the negative, the applicant's name was removed from the list.

Semble—that the circumstance of some persons being advertised as provisional directors without their consent is not sufficient ground (no fraudulent intent being proved) for removing from the list of contributories an allottee who was induced by the advertisement to apply for shares. *In re Direct Exeter, Plymouth and Devonport Rail. Co., Mathew's case*, 3 De Gex & S. 234.

(9) *Promoters and Provisional Committee.*

R allowed his name to be published as one of the provisional committee of a projected railway company, and attended two meetings of such committee, at which the only business transacted was the appointment of a managing committee; but he never took or contracted to take any shares in the company. After some expenses had been incurred by the managing committee, the scheme proved abortive:—Held, that R was not liable as a contributory.

The fact of being one of a provisional committee is not sufficient *per se* to make a person liable for the acts of such committee; he must, either expressly or impliedly, have assented to such acts. *In re Direct Exeter, Plymouth and Devonport Rail. Co., ex parte Roberts*, 19 Law J. Rep. (N.S.) Chanc. 368; 2 Mac. & G. 192; 3 De Gex & S. 205; 2 Hall & Tw. 391.

C allowed his name to be used as a provisional committee-man, but never acted as such, and never took the shares necessary for qualifying him to be on the committee, and had not signed the subscribers' agreement or parliamentary contract:—Held, reversing the order below, that C was not liable as a contributory. *In re Wolverhampton, Chester and Birkenhead Junction Rail. Co., ex parte Cottle*, 19 Law J. Rep. (N.S.) Chanc. 366; 2 Mac. & G. 185; 2 Hall & Tw. 382.

The mere fact of a person being a member of the

provisional committee of a joint-stock company does not make him liable as a "contributory" within the Winding-up Acts.

C consented to have his name inserted in the list of provisional committee-men of a proposed railway company, which was provisionally registered; and the name was accordingly inserted and advertised; he did not accept or apply for shares, or attend any meeting of the committee. The undertaking was afterwards abandoned:—Held, that C incurred no liability to contribute towards payment of the debts of the company, and was not a "contributory" within the Winding-up Acts, 1848 and 1849. *Norris v. Cottle*, 2 H. L. Cas. 647.

If a person whose name is on the provisional committee of a joint-stock company, provisionally registered, "accept" shares in the company, although he does not pay the deposits, he is a contributory within the Winding-up Acts.

U's name was on the list of the provisional committee contained in a published prospectus of a railway company, provisionally registered, and, in answer to a letter from the secretary, informing him that the committee of management had apportioned 100 shares in the company to each provisional committee-man, and desiring to be informed whether he would take them, he wrote a letter saying, "I accept the 100 shares allotted me." The secretary afterwards sent him a letter of allotment not "transferable," stating that the committee of management had allotted to him 100 shares, and requesting him to pay the deposits thereon into one of the company's banks on or before a certain day, "or the allotment would be null and void." U paid no deposits, and did no other act in connexion with the company. The undertaking, having failed for want of capital, was abandoned:—Held, that the first two letters formed a complete contract, exclusive of the third; and that U was a contributory within the Winding-up Acts, 1848 and 1849. *Hutton v. Upfill*, 2 H. L. Cas. 674.

B allowed his name to be used as one of the provisional committee of a projected railway company. A managing committee was afterwards appointed, and 100 shares were allotted to B, whereupon he wrote to the secretary, declining to accept the shares, and requiring his name to be withdrawn from the list of the provisional committee. This request was, however, not acted upon. After certain expenses had been incurred by the managing committee, the scheme proved abortive. B, never having previously interfered in the affairs of the company, attended certain meetings of the provisional committee for winding up the affairs of the company, and he joined in signing an agreement, whereby the parties signing agreed to pay a rateable proportion of the debts. Under resolutions passed at such meetings, B paid several sums of money. The company being ordered to be wound up,—Held, that, under the circumstances, B was a contributory.

A provisional committee was formed for carrying out a projected railway. After certain expenses had been incurred, the scheme proved abortive:—Held, that such an association was "a company" within the meaning of the Winding-up Acts, 1848, 1849. *In re Direct Exeter, Plymouth and Devonport Rail. Co., Ex parte Besley*, 19 Law J. Rep. (N.S.) Chanc. 362; 2 Mac. & G. 176; 3 De Gex & S. 224; 2

Hall & Tw. 375. See also *Hole's case*, 3 De Gex & S. 241.

A went to a meeting held for the purpose of getting up a railway, but left before business commenced, and refused to have anything to do with it. Some time after, A, under the threats of the secretary of the company, and a protest of non-liability, paid certain sums towards the expenses of the company. These circumstances were stated in the affidavit of A:—Held, that A was not a contributory. *In re Direct Exeter, Plymouth and Devonport Rail. Co., ex parte Hall*, 19 Law J. Rep. (N.S.) Chanc. 386; 3 De Gex & S. 214.

(10) Directors.

A banking company was projected in June 1836, and A was one of the promoters and directors. The bank commenced business on the 9th of September. On the 24th of September it was agreed between A and the other directors that A should retire from the company. On the 18th of October the first signature was affixed to the deed of settlement, which however was dated in August. By that deed it was declared that all the acts done by the directors previously to the execution of the deed should be ratified. On the 25th of October A's retirement from the company was advertised in the *Gazette*. In 1841 the company broke up, and was afterwards ordered to be wound up:—Held, that A was not a contributory. *In re Borough of St. Marylebone Joint-Stock Banking Co., ex parte Busk*, 19 Law J. Rep. (N.S.) Chanc. 391; 3 De Gex & S. 267.

(11) Transferor under invalid Transfer of Shares.

[See (3) *Infant Shareholder*.]

A shareholder in a steam-packet company transferred two shares to B in the books of the company. B did not execute the deed of transfer, and did not comply with any of the formalities required by the deed of settlement of the company as to the transfer of shares. By the rules of the company proprietors were entitled to free passages in the company's boats. In the course of three years B made sixteen free passages, and, on each occasion, represented himself as a proprietor, and signed his name in a ticket opposite to the words "proprietor's signature":—Held, that B was properly put on the list of contributories.

The books of a joint-stock company are evidence against a person representing himself to be a proprietor of the company. *In re St. George's Steam-Packet Co., Maguire's case*, 18 Law J. Rep. (N.S.) Chanc. 3; 3 De Gex & S. 31.

Where a shareholder in a company had taken all the proper steps within her power to assign her share, but the directors omitted to assent to or dissent from the sale, for a period exceeding two months, and until the company stopped payment:—Held, that her name had been properly placed upon the list of contributories without qualification. *In re St. George's Steam-Packet Co., Chartres' case*, 1 De Gex & S. 581.

In 1841 H, a proprietor of several shares in a joint-stock company, transferred sixteen of such shares to B. The purchase was negotiated by C, who paid the purchase-money. B neither executed nor acceded to the transfer, but repudiated the

transaction. The company, in ignorance of this repudiation, entered the transfer in their books, and thenceforth sent all notices of calls in respect of these shares to B at the residence of C. H died in 1846, leaving D his executor. In 1849 the company was the subject of the Winding-up Act:—Held, that the mode of transfer prescribed by the deed of settlement of the company not having been carried out by the want of the execution by the transferee, H's liability as a shareholder continued, and his executor was properly placed upon the list of contributories in respect of these shares.

Where the mode prescribed by the deed of settlement for the transfer of shares has not been carried out, no subsequent recognition of the title of the transferee by the directors will operate by way of waiver, as against the company, so as to release the transferor from his liabilities in respect of the shares. *In re St. George's Steam-Packet Co., ex parte Hennessy*, 19 Law J. Rep. (N.S.) Chanc. 353; 2 Mac. & G. 201; 3 De Gex & S. 191; 2 Hall & Tw. 395.

Shares in a joint-stock company were transferred into the name of W in the share ledger of the company, and were accepted and paid for by him, and he received dividends thereupon; but no formal transfer was made to him in the mode prescribed by the deed of settlement:—Held, that W was a shareholder as between himself and the other shareholders of the company. *In re Vale of Neath and South Wales Brewery Co., ex parte Walters*, 19 Law J. Rep. (N.S.) Chanc. 501; 3 De Gex & S. 149.

At an extraordinary general meeting of a joint-stock company, a resolution was passed by a majority of the shareholders then present, that the directors should be at liberty to purchase the shares of any member who should be desirous of withdrawing from the company. In pursuance of the resolution, A B, a shareholder, sold his shares to the directors. The company afterwards becoming embarrassed, an order was made under the Joint-Stock Companies Winding-up Act for winding up the affairs of the company:—Held, upon appeal, that as the objects of the resolution were not authorized by the deed of settlement, the sale was a nullity, and that A B was properly placed by the Master upon the list of contributories, without qualification. The shareholders, not present at the meeting, though cognizant of the transaction, held not to be bound on the ground of acquiescence. *In re Vale of Neath and South Wales Brewery Joint-Stock Co., ex parte Morgan*, 18 Law J. Rep. (N.S.) Chanc. 265; 1 De Gex & S. 750; 1 Mac. & G. 225; 1 Hall & Tw. 320.

At an extraordinary meeting of an unincorporated joint-stock company, resolutions were passed purporting to empower the directors, on behalf of the company, to buy up the shares of any holder wishing to retire, on the terms of the purchase-money being paid in debentures and of a further advance of the same amount being also made by the vendor on the same security.

On a purchase being effected on these terms by a director from a shareholder who was not aware that the director was not purchasing on his own account:—Held, that the shareholder was not affected with constructive notice to the contrary; and on his de-

posing that he had no actual notice, and there being no conflicting testimony, the Court directed the Master to review the list in which the shareholder was included as a contributory without qualification. *In re Vale of Neath and South Wales Brewery Co., Hellwey's case*, 1 De Gex & S. 777.

A shareholder in a brewery company sold his shares to one of the directors. His solicitor, through whom the sale was effected, had notice that the purchase was made by the director with a view of vesting the shares in the company, to whom the director transferred them on the same day on which they were transferred to him. The deed of settlement did not authorize the purchase on behalf of the company:—Held, that the shareholder was properly placed on the list of contributories although seven years had elapsed since the transfer, and it had remained unquestioned during the whole interval. *In re Vale of Neath and South Wales Brewery Co., Richmond's Executors' case*, 3 De Gex & S. 96.

A banking company was established in 1846. By one of the clauses of the deed of settlement the directors were empowered to act in such manner as would, in their opinion, best promote the welfare of the company, and, for that purpose, to make rules, bye-laws, and provisional regulations. A was an original director of the company, and held fifty shares in it. In 1838 an arrangement was entered into between A and the other directors, under which A was to retire from the direction and give up his shares to the company at par. The company broke up in 1841, and was ordered to be wound up:—Held, that the transaction of 1838 was not within the powers of the directors, and that A was a contributory in respect of the shares held by him. *In re Borough of St. Marylebone Joint-Stock Banking Co., ex parte Stanhope*, 19 Law J. Rep. (N.S.) Chanc. 389; 3 De Gex & S. 198.

Where by a deed of settlement of a company, the responsibility of transferors of shares is, as between them and the company, determined by the transfer, their possible liability to contribute *inter se*, in the event of demands of creditors being enforced against any of them, is not sufficient ground for placing a transferor upon the list of contributories in a case where no transferor is active in making or supporting an application for that purpose. *In re Royal Bank of Australia, Sutton's case*, 3 De Gex & S. 262.

Where a person had entered into an agreement to purchase shares in a company, which had been approved of by the company, and a specific performance of which could have been enforced against him, he was held liable to be placed on the list of contributories, although no complete or formal transfer of the shares according to the deed of settlement was made before the company stopped payment.

The 7 Geo. 4. c. 46. s. 13, directing executions on judgments against banking companies to issue against actual members in priority to members at the time of the contract, does not of itself, and independently of express stipulation, render a member liable to be placed on the list of contributories in respect of liabilities incurred before he became a member.

An appellant from a decision placing him on the

list of contributories need not bring before the Court a person who would be liable if he were not.

The 33rd clause of the Amendment Act 1849 is retrospective, and in effect, though not in terms, prevents a re-hearing before a Vice Chancellor as well as before the Lord Chancellor, after three weeks, although the three weeks had expired before the act came into operation. *In re North of England Joint-Stock Banking Co., Sanderson's case*, 3 De Gex & S. 66.

(12) *Transferee of Shares.*

Twenty-seven shares in a joint-stock trading company were assigned by two shareholders to a purchaser in 1842. Notice thereof was given to the secretary in 1843, and he made an entry of the transfers in pencil in the share ledger of the company. The company was dissolved in May 1847, and in August following, the secretary perfected in ink the entry which he had so made in pencil; but other formalities required by the company's deed of settlement to render transfers of shares valid were not complied with. The purchaser by letter in 1843 requested that the dividend on his shares should be paid to a specified individual; and a dividend, which was the only dividend then payable, was paid accordingly. Notices of meetings and of other proceedings usually sent to shareholders were regularly sent to the purchaser; and in reply to one of such notices in 1845, the purchaser wrote to the secretary concurring in a proposal then made to sell the company's place of business and therewith to pay its liabilities. That letter was recorded in the minutes of the meeting at which a resolution to the proposed effect was come to:—Held, that there was a complete agreement on the part of the purchaser to become a shareholder, and an acceptance of him as such by persons having the management of the affairs of the company, who were competent to act as they did; and that the purchaser's name was properly placed upon the list of contributories. *In re Vale of Neath and South Wales Brewery Co., Gordon's case*, 3 De Gex & S. 249.

Shares in a joint-stock company were transferred by the directors to W, a purchaser, irregularly, by entries in the company's book, and not by allotment or deed, as required by the company's deed of settlement. In respect of this transfer as a qualification, W became a director. At the expiration of half a year, and in October 1841, he became desirous to retire from being either director or shareholder; and at a meeting of the directors with W it was agreed that the shares should be taken back, and he was repaid the value of the shares by a promissory note, signed as for the company, by one director in favour of another and indorsed to W. The note was ultimately paid, and no transfer was regularly made or executed; W thenceforth ceased to act as director and to be treated as a shareholder:—Held, that the directors had no power to accept the shares back from W, and that W could not be presumed to be ignorant that they were without that power, and that his name was properly on the list of contributories. *Quære*—whether the Winding-up Acts 1848 and 1849 do not go beyond devising modes of enforcing liabilities previously existing, and have not created new

liabilities. *In re Vale of Neath and South Wales Brewery Co., Walters' second case*, 3 De Gex & S. 244.

One hundred shares were sold in one parcel by a broker for two vendors of fifty shares each in a joint-stock company. Five of the shares were transferred by deed by one of the vendors to the purchaser, and the purchase-money of the 100 shares was paid to the broker. The purchaser was accepted by the directors as the proprietor of the 100 shares, and his name was entered accordingly in the company's books:—Held, that the 100 shares formed the subject of one contract, and that the whole must be governed by the terms of the deed of transfer of the five shares.

Directors fraudulently inducing a person to become a purchaser of shares in a company, may be personally liable to him, but they cannot be considered as the agents of the body of shareholders to commit a fraud of this kind, nor is such a fraud a valid objection, the purchaser's name being on the list of contributories. *In re North of England Joint-Stock Banking Co., Dodgson's case*, 3 De Gex & S. 85.

(13) Persons acting as Shareholders.

H, the manager of a London joint-stock bank, in 1837 requested D, who lived in the country, to allow some shares in the company to stand in his name, for the purpose of being afterwards disposed of, with the understanding that D was to have no advantage and to be under no liability. D consented, and the shares were transferred to him. In 1841 H requested D to transfer the shares to H, and, by a deed then executed, D assigned the shares to H as manager of the bank, and H covenanted with a registered officer of the bank to pay the calls, observe the covenants, &c.—Held, that under these circumstances D was properly put on the list of contributories. *In re Borough of St. Marylebone Joint-Stock Banking Co., Davidson's case*, 18 Law J. Rep. (N.S.) Chanc. 254; 3 De Gex & S. 21.

A subscriber for shares in a company on the terms of receiving 8l. per cent. on his subscribed capital in lieu of profits, having received a dividend on that footing, cannot effectually resist being placed on the list of contributories, on the ground that the deed of settlement did not authorize the issue of such preference shares. *In re Vale of Neath and South Wales Brewery Co., Hitchcock's case*, 3 De Gex & S. 92.

(14) Former Members of the Company.

A former member of a joint-stock company, whose shares have been transferred within three years prior to the date of the order for the winding up of the company, is properly placed on the list of contributories to be settled by the Master under the 77th section of the act, 11 & 12 Vict. c. 45. *In re North of England Joint-Stock Banking Co., ex parte Hawthorn*, 18 Law J. Rep. (N.S.) Chanc. 179; 1 De Gex & S. 571; 1 Mac. & G. 49; 1 Hall & Tw. 225.

(1) Liability of Contributory.

(1) Extent of.

[See (k) Contributory, (2) Executors.]

The liability of a shareholder as a contributory

is to be confined to losses which occurred after the contract entered into by him to take the shares. *In re North of England Joint-Stock Banking Co., Sanderson's case*, 18 Law J. Rep. (N.S.) Chanc. 248; 3 De Gex & S. 66.

Upon the winding up of a company, A, a shareholder who had received the final dividend and signed an agreement to release the directors from all further claims, was placed by the Master among the contributories:—Held, upon motion to reverse the Master's decision, that A was still liable to further claims upon the company, and the motion was refused. *Ex parte Apps*, 18 Law J. Rep. (N.S.) Chanc. 409.

(2) Mode and Time of disputing Liability.

On a notice to a person that her name was inserted in the list as a contributory in a particular character, she attended before the Master, by her solicitor, to oppose the insertion of her name altogether:—Held, that she did not thereby waive any objection to the sufficiency of the notice, for the purpose of enabling the Master to decide that she was a contributory without qualification, and the Master who had so decided upon such a notice was directed to review his report.

Quære—Whether in such a case a new notice can be effectually given. *In re North of England Banking Co., Hutchinson's case*, 1 De Gex & S. 563.

Leave given to a person to dispute his liability to be placed on the list of contributories, after he had (acting under wrong advice as to the law) suffered the time appointed for that purpose by the Master to elapse. *In re Liverpool and Manchester Saw Mills and Timber Joint-Stock Co., Holt's case*, 3 De Gex & S. 99.

(m) Practice.

Form of petition, order and proceedings under act, 1 De Gex & S. 545. See also *In re Forth Marine Insurance Co.*, 1 De Gex, 335.

(1) Service and Advertisement of Petition.

A petition for winding up the affairs of a company was presented under the Joint-Stock Companies Winding-up Act, 1848, and served on one of the members of the company:—Held, that an affidavit of the service of the petition was necessary, although the member so served appeared by counsel at the hearing of the petition. *In re Tring, Reading and Basingstoke Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 242; 3 De Gex & S. 10.

Where service on a member is sufficient, the affidavit of service need only state that the person served is a member. *Ex parte Cooke, in re the Eastern Counties Junction and Southend Rail. Co.*, 3 De Gex & S. 148.

The affidavit of service of a petition to wind up a company under the Winding-up Acts must state or shew that the person on whom it has been served is a member, officer, or servant of the company; and it is not sufficient to state that he is a member of the provisional committee. *In re London and Dublin Approximation Rail. Co.*, 3 De Gex & S. 209.

Formal service of a petition for winding up a company on a secretary,—Held not requisite where the secretary was present when the presentation of the petition was agreed to, and appeared by counsel to

consent to it at the hearing. *In re Great Western Rail. Co. of Bengal*, 3 De Gex & S. 101.

Service of petition for winding up company on its solicitor not sufficient within 10th section of Act. *Ex parte Dale, in re Trent Valley and Chester and Holyhead Continuation Rail. Co.*, 3 De Gex & S. 11.

By an order made on a petition presented under the Joint-Stock Companies Winding-up Act, 1848, a company was ordered to be wound up, and an interim manager was afterwards appointed. A petition was presented for discharging this order:—Held, that the interim manager ought to be served with this petition. *In re Cambrian Grand Junction Rail. Co.*, 19 Law J. Rep. (n.s.) Chanc. 122; 3 De Gex & S. 139.

A petition for winding up a company was presented by a petitioner who was resident out of the jurisdiction:—Held, that he was liable to give security for costs, as in the case of the plaintiff in a suit resident out of the jurisdiction. *In re Royal Bank of Australia*, 19 Law J. Rep. (n.s.) Chanc. 163; 3 De Gex & S. 186.

Where a shareholder in a railway company had applied to the Bankruptcy Court for protection, and had entered into an arrangement with his creditors under the 7 & 8 Vict. c. 70,—Held, that he could not petition to have the company wound up without serving the petition upon the trustees under the deed of arrangement. *Ex parte Walter, in re Cameron's Co.*, 3 De Gex & S. 3.

An order under the Winding-up Act, 1848, made in the case of a provisionally registered railway company. If no office of the company can be found, the Court may make the winding-up order on the petition having been advertised according to the act, and upon a consent on the part of some member of the company. *In re Brighton, Lewes and Tunbridge Wells Direct Rail. Co.*, 1 De Gex & S. 604.

(2) *Dismissing the Petition.*

A petition for winding up a banking company established at Calcutta, with correspondents in London, which had suspended payment, and where a deed of arrangement had been executed in India, on the ground of an alleged improper carrying out of such deed in England, was dismissed. *In re Union Bank of Calcutta*, 19 Law J. Rep. (n.s.) Chanc. 388; 3 De Gex & S. 253.

A petition was presented to wind up and dissolve a railway company, incorporated by act of parliament. By a subsequent enactment, such railway companies were excepted out of the provisions of the Joint-Stock Companies Winding-up Act, under which the petition was presented. The petition was dismissed, without costs. *In re Direct London and Portsmouth Rail. Co.*, 19 Law J. Rep. (n.s.) Chanc. 163; 12 Beav. 269.

(3) *Service and making of the Order.*

Upon a petition to wind up a company under the Winding-up Acts, a preliminary inquiry was directed as to expediency of making the order, although the petition was unopposed. *In re Great Eastern and Western Rail. Co.*, 3 De Gex & S. 218.

Where a winding-up order had been obtained by a petitioner who abandoned it, upon a compromise

with the directors, before carrying it into the Master's office, the Court gave the prosecution of the order to a second petitioner; and on the death of such second petitioner, before he had taken any further step in the matter, the Court, upon an *ex parte* motion, gave the carriage of the order to another shareholder. *In re Larne, Belfast and Ballymena Rail. Co., ex parte Baker*, 3 De Gex & S. 242.

This Court will make the usual order for winding-up the affairs of a company on the petition of a plaintiff in a suit against the directors for a similar object, without requiring the petitioner to pay the costs of the suit, leaving the questions of the costs of the suit to be considered in the suit. *In re Bastenne Bitumen Co.*, 3 De Gex & S. 265.

The Master may, under section 46. of the act, direct substituted service to be made of any order. *Re Kollmann's Railway Locomotive, &c. Co., ex parte Ellis*, 19 Law J. Rep. (n.s.) Chanc. 166; 3 De Gex & S. 172.

(4) *Discharging the Order.*

The Court made an order directing the winding-up of a joint-stock company under the Winding-up Act, 1848, upon a petition sufficient in point of form, but omitting material circumstances within the petitioner's knowledge, which ought to have been brought to the notice of the Court. This objection was taken at the first meeting before the Master. Upon a petition presented promptly afterwards, the Court discharged the order for winding up with costs against the petitioner who had obtained the winding-up order. The Court refused to sustain the former order at the request of an independent contributory; but discharged it without prejudice to any application which might be made to wind up the company.

Quære—Whether, where an order for winding up is discharged on account of the omission of material circumstances in the petition, contributories can recover their costs of attending before the Master against the petitioner for winding up. *Ex parte Barnett, in re the Ipswich, Norwich and Yarmouth Rail. Co.*, 1 De Gex & S. 744.

On an appeal from the Master as to the insertion of a name on the list of contributories it must be assumed that the company is within the Winding-up Act. The proper mode of disputing that proposition is by an application to discharge the order for winding up the company. *In re Universal Salvage Co., Sharpe's case*, 3 De Gex & S. 49.

(n) *Costs. [See (f) Official Manager.]*

(G) EXECUTION AGAINST SHAREHOLDERS.

The plaintiff obtained judgment against a joint-stock company, and being unable to obtain satisfaction of his judgment against the property of the company, gave notice to a shareholder that application would be made to the Court or a Judge for leave to issue execution against him on the judgment. A summons for that purpose was taken out and dismissed before a Judge at chambers; and on application by the plaintiff to this Court,—Held, that the notice was exhausted by the application to a Judge at chambers, and that no second application could be made on the same notice. *Corder v.*

Universal Gas-Light Co., 17 Law J. Rep. (N.S.) C.P. 305; 6 Com. B. Rep. 190.

The returns of the names of shareholders under the 7 & 8 Vict. c. 110. are sufficient *prima facie* evidence that the parties named in them are shareholders, to justify the Court in issuing execution against them under the 7 & 8 Vict. c. 110. s. 68.

Notice under that section need not be personally served. *Turner v. Metropolitan Live Stock Co.*, 17 Law J. Rep. (N.S.) Exch. 264; 2 Exch. Rep. 567.

The provisions of the 68th section of the 7 & 8 Vict. c. 110, by which execution may be issued against the person or property of a shareholder in a joint-stock company, by leave of the Court or a Judge, without suggestion or *sci. fa.*, apply not only to actions at the suit of shareholders under the 67th section, but to actions at the suit of other parties. *Pearl v. Universal Salvage Co.*, 18 Law J. Rep. (N.S.) C.P. 23; 6 Com. B. Rep. 478.

Judgment was signed against a joint-stock company, registered under 7 & 8 Vict. c. 110. and a *fi. fa.* was issued against the goods of the company, and *nulla bona* returned. A rule *nisi* for leave to issue execution against D C, as a former shareholder, was discharged, with costs, for want of ten days' notice, under the 68th section of the statute. A second rule *nisi* for execution against D C, as a shareholder for the time being, was obtained on affidavits, which stated, among other things, that D C was a provisional director and signed the settlement deed, which contained a recital that the partners thereto had taken shares; that no transfer by D C had been registered; and that he had received due notice. The costs of the former rule had not been paid.

Held, first, that the Court would not stay proceedings till payment of the costs of the former rule, it not appearing that the party was unable to enforce his order for costs.

Secondly, that the affidavit sufficiently shewed D C to be a shareholder for the time being.

Thirdly, that although the former application was founded on matters substantially the same, the Court was not precluded from granting the second application, the notice being a new fact which had arisen since the former proceeding.

As to the form of the writ to be issued, see note (7), page 92. *Corder v. Universal Gas-Light Co.*, 18 Law J. Rep. (N.S.) C.P. 90; 6 Com. B. Rep. 554.

A rule for a *scire facias* to have execution under the 7 Geo. 4. c. 46, against the defendant as a member of a joint-stock company, was served on the father, sister, and son of the defendant at the defendant's residence:—Held, not to be good service. *Esdaile v. Smith*, 18 Law J. Rep. (N.S.) Exch. 120.

Judgment having been obtained against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, which had become insolvent, and the affairs of which had been ordered by the Court of Chancery to be wound up under the 11 & 12 Vict. c. 45, by an official manager:—Held, that a creditor was bound to avail himself of the provisions of the latter act for the satisfaction of his debt, and that he was not entitled to execution against a shareholder under the 7 & 8 Vict. c. 110, unless he shewed that the proceedings under the 11 & 12 Vict. c. 45. had been unavailing.

The 68th section of the 7 & 8 Vict. c. 110, which authorizes the issuing of execution without a suggestion or *scire facias*, applies to the case of a creditor who has obtained judgment against a joint-stock company, and seeks execution against a shareholder, but the Court will not grant such execution unless they are satisfied that the creditor has used due diligence to obtain satisfaction of his debt from the property of the company. *Thompson v. Universal Salvage Co.*, 18 Law J. Rep. (N.S.) Exch. 242; 3 Exch. Rep. 310.

A policy of insurance duly executed by three directors of an insurance company contained a provision that the policy should not be construed to render liable the proprietors of the company beyond the amount of their respective shares, but that the capital stock of the company should alone be liable to answer all claims in respect of the policy. The plaintiff having obtained judgment against the company,—Held, that by the terms of the policy the plaintiff was precluded from taking legal proceedings against the individual subscribers, and could not, therefore, issue execution against an individual shareholder, under 7 & 8 Vict. c. 110. s. 68. *Halkett v. Merchant Traders' Ship Loan and Insurance Association*, 19 Law J. Rep. (N.S.) Q.B. 59.

A policy of insurance duly executed by three directors of an insurance company contained a provision that the policy should not be construed to render proprietors liable beyond the amount of their respective shares, but that the capital stock of the company should alone be liable to answer all claims in respect of the policy:—Held, that the plaintiff, who had obtained the judgment against the company, was precluded by the terms of the policy from taking legal proceedings against individual subscribers, and therefore that he could not issue execution against an individual shareholder, under the 7 & 8 Vict. c. 110. s. 68, although due diligence had been used to enforce the judgment against the company. *Hassell v. Merchant Traders' Ship Loan and Insurance Association*, 19 Law J. Rep. (N.S.) Exch. 183; 4 Exch. Rep. 525.

In a *scire facias*, in order to prove that the defendant was a shareholder at the time the writ issued, a return made to the Stamp Office pursuant to 7 Geo. 4. c. 46. s. 4. some months previous, having been proved, in which his name was included, a similar return in the following year, but subsequent to the issuing of the writ, and also containing his name, was held to be admissible in evidence. *Bosanquet v. Shortridge*, 19 Law J. Rep. (N.S.) Exch. 221; 4 Exch. Rep. 699.

COMPENSATION.

[See LANDS CLAUSES CONSOLIDATION ACT (under which title all the compensation cases have been placed)—PROHIBITION.]

CONCEALMENT OF BIRTH.

Where a woman endeavoured with her par amour to conceal the birth, and he buried the body in a field, immediately after its birth, she remaining in bed,—Held, that she was guilty under the 9

Geo. 4. c. 31. s. 14, and he guilty of aiding and abetting her under the 31st section. *Regina v. Bird*, 2 Car. & K. 817.

CONFISCATION.

A, the proprietor of large ancestral and other estates in Benares, died, leaving a widow and four sons. Shortly after A's death, three of the brothers became implicated in a rebellion against the state. The fourth brother, then a minor, was not concerned in the rebellion. At the suppression of the rebellion, Government issued proclamations for the parties severally to appear and answer the charges against them, but they absconded; the Government thereupon, acting under the provisions of the Bengal Reg. XI. of 1796, confiscated the whole of their property, including the ancestral estates, formerly held by A:—Held, on appeal, that such confiscation was regular, and within the meaning of the Regulation, but that the act of Government which divested the three sons of their right and interest in the estates did not affect the right of the fourth son, who was entitled to his share in all the ancestral estates of A, taken by the Government under the forfeiture.

Held, also, that the forfeiture did not affect the rights of A's widow, and that she was entitled to maintenance out of the whole of the estate that was ancestral. *Mussumat Golab Koomwar v. the Collector of Benares*, 4 Moore, In. App. 246.

CONSPIRACY.

Indictment for a conspiracy to cause certain persons to be elected councillors of the borough of Bolton, in Lancashire, by fraud, viz., by procuring certain other persons, who were not burgesses of the said borough, and whose names were not in the burgess list, to personate voters for the said borough, and to vote for the election of the persons first above mentioned:—Held, not to be a subject of consideration for the Judges. *Regina v. Haslam*, 1 Den. C.C. 73.

A count in an indictment which charges the defendant with conspiring, &c. to cheat and defraud A B of his monies is good.

It is no ground for a new trial that the jury have found a verdict for the Crown on several counts of an indictment, some of which are bad, as it cannot be intended that judgment will be given on the bad counts.

On the trial of an indictment for a conspiracy to defraud A B of bills of exchange and money, by fraudulent representations, &c., it appeared that A B was induced, by the means stated in the indictment, to accept certain bills, and it appeared that, at the time the bills were so accepted by him, a warrant of attorney was given by one of the defendants as a security to A B against his liability on the bills:—Held, that such warrant of attorney was admissible without a stamp, as there was no allegation in the indictment to the proof of which it was necessary, nor was it in any way the subject of the charge.

An indictment for a conspiracy to defraud A B of bills of exchange is supported by proof that bills

were drawn by the defendants, and brought to A B for signature, though it was well known by all parties that he had no funds of his own to meet them when due. *Regina v. Gompertz*, 16 Law J. Rep. (N.S.) Q.B. 121; 9 Q.B. Rep. 824.

Where the evidence in support of an indictment for a conspiracy shews the object of the conspiracy to be in itself felonious, and that a felony was committed in carrying it out, the defendants are not entitled to an acquittal on the ground that the misdemeanour is merged in the felony; nor is it any ground for arresting the judgment that on the face of the indictment itself the object of the conspiracy amounts to a felony, the gist of the offence charged being the conspiracy.

An indictment charged that A, B and C being in the employ of C L, a dyer, conspired to use his vats and dye, &c., in dyeing wool, &c., not belonging to themselves, and not entrusted to them by C L for that purpose, and to get profit to themselves, and to deprive C L of the use of his vats, dye, &c., and, in pursuance of such conspiracy, the defendants without the leave of C L received materials, which they dyed with the vats and dye of C L for their own profit. It was proved that the defendants used the dye, &c. of C L for dyeing goods for various persons for their own profit:—Held, first, that the defendants were not entitled to an acquittal on the ground that, on the facts proved, a felonious taking of the dye was made out, and that the misdemeanour, therefore, merged in the felony. Secondly, that the indictment was not bad in arrest of judgment. *Regina v. Bulton*, 18 Law J. Rep. (N.S.) M.C. 19; 11 Q.B. Rep. 929.

CONSTABLE.

[See POLICE—SLANDER.]

CONTEMPT.

[See COSTS, IN EQUITY, Taxation of—PRACTICE, IN EQUITY.]

An injunction was granted against A, restraining him (but not expressing his servants and agents) from cutting timber. B, A's agent, with knowledge of the injunction, cut the timber:—Held, that B might be committed for the contempt, but not for breach of the injunction. *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180, 181.

The sum of 13s. 8d. is still the proper amount payable to clear a contempt on an attachment executed. *Brown v. Lee*, 11 Beav. 379.

A, while attending in the Court of Bankruptcy on a petition of his own, was taken into custody for contempt, for not paying some costs, which he had been ordered to pay by a decree made in a cause in which he was a defendant. An application for his discharge, to the Vice Chancellor, in whose department the cause was, on the ground of privilege, was refused. *Plomer v. Macdonald*, 16 Law J. Rep. (N.S.) Bankr. 14.

One of the defendants in a suit indicted the plaintiff for perjury and conspiracy. At the trial at Nisi Prius, verdicts of not guilty were taken by consent, and all matters in dispute were agreed to be referred to arbitration. The order of reference was made a rule of the Court of Queen's Bench.

The plaintiff, before the award was made, and without leave of the Court of Queen's Bench, revoked his submission to arbitration, proceeded with the suit, and obtained an order in Chancery for the issue of a commission to examine witnesses:—Held, on motion, by the defendant who had preferred the indictments, to restrain the execution of the commission, and to stay further proceedings pending the reference to arbitration, that he might be at liberty to proceed at law as he should be advised against the plaintiff for his alleged contempt of the Court of Queen's Bench, and that the commission should not be executed in the mean time. *Hardy v. Dartnell*, 18 Law J. Rep. (n.s.) Chanc. 467.

CONTRACT.

[For Admissibility of Evidence to explain or vary, see EVIDENCE. And see REVENUE—FRAUDS, STATUTE OF—INDEMNITY—LEASE—NEWSPAPER—SPECIFIC PERFORMANCE—TROVER—VENDOR AND PURCHASER.]

- (A) WHAT AMOUNTS TO.
- (B) WHEN VALID OR ILLEGAL.
 - (a) *Contrary to Statute or public Morals.*
 - (b) *Restraint of Trade.*
 - (c) *When one of contracting Parties a Lunatic.*
 - (d) *Between Guardian and Ward.*
 - (e) *Fraudulent on Parliament or the Public.*
 - (f) *Mutuality.* [See (b).]
- (C) ACCEPTANCE OF OFFER.
- (D) CONSTRUCTION OF.
 - (a) *In general.*
 - (b) *Particular Words.*
 - (1) *"Terms Cash."*
 - (2) *"Abstract of Conveyance."*
 - (3) *"Bought and sold."*
 - (c) *Time of Performance.*
 - (d) *Entirety.*
 - (e) *Executory and continuing.*
 - (f) *When Time the Essence of the Contract.*
 - (g) *Condition Precedent.*
 - (h) *When for the Judge and when for the Jury.*
- (E) RESCISSION AND REPUDIATION.
- (F) VARYING AND ALTERING.
- (G) BREACH AND DAMAGES.
- (H) STAMP. [See (D) (f).]
- (I) PENALTY. [See (B) (b).]

(A) WHAT AMOUNTS TO.

By one of the letters stated to constitute the agreement, the plaintiff's agent offered the defendant a house at a certain sum, but suggested that the defendant had better offer to give a larger premium, and take the fixtures at a valuation. The defendant wrote in reply, that he had no objection to give 50*l.* more of premium. The plaintiff's agent then wrote a letter to the defendant, stating that he had received the defendant's letter offering 50*l.* more of premium—making 300*l.* premium, and accepting the defendant's offer. The defendant's solicitor subsequently recognized the defendant's agreement as contained in his letter:—Held, that the plaintiff had proved an agreement on the part of the defendant to give

300*l.* premium. *Skinner v. M'Douall*, 17 Law J. Rep. (n.s.) Chanc. 347; 2 De Gex & S. 265.

Memorandum of agreement signed by both parties for sale and purchase of pictures, &c. in a leasehold house, and for the purchaser to take an assignment of the vendor's interest in the premises,—Held, to be a contract, on the part of the purchaser, to take an assignment of the lease of the premises. *Smith v. Capron*, 19 Law J. Rep. (n.s.) Chanc. 322.

[See COMPANY (A).]

(B) WHEN VALID OR ILLEGAL.

(a) *Contrary to Statute or public Morals.*

Plaintiff sought to recover the sum of 50*l.* on an agreement, which was set out in the declaration. It recited that the plaintiff had for a long time carried on business as a law-stationer, and also had been a sub-distributor of stamps, and collector of assessed taxes, and "that, in consideration of 300*l.*, payable by instalments, the plaintiff agreed to sell, and the defendant agreed to purchase, the business of a law-stationer, theretofore carried on by the plaintiff; and it was thereby further agreed between them, that the plaintiff should not, after the 1st of March then next, carry on the business of a law-stationer, or collect any of the assessed taxes, &c., but that the plaintiff would use his utmost endeavours to introduce the defendant to the said business and offices," &c.:—Held, that the agreement was for the sale of an office within the 5 & 6 Edw. 6. c. 16, and that the declaration was therefore bad. *Hopkins v. Prescott*, 16 Law J. Rep. (n.s.) C.P. 259; 4 Com. B. Rep. 578.

An agreement entered into for the purpose of enabling a person to sell beer and spirits without a licence is illegal, a licence being required for the protection of public morals.

Semble—that an agreement for a contravention of revenue laws only is also illegal. *Ritchie v. Smith*, 18 Law J. Rep. (n.s.) C.P. 9; 6 Com. B. Rep. 462.

(b) *Restraint of Trade.*

A made an agreement with the plaintiffs to serve them at all times, during the term of seven years, as a crown glass maker, and that he would not, during the said term, work for any other person, at any other glass house or other place of business, without the licence of the plaintiffs; that during any depression of trade he should be paid a moiety of his wages; that if he should be sick, the plaintiffs should be at liberty to employ any other persons in his stead, without paying him any wages; that the plaintiffs should pay him certain wages as long as he should continue and be employed as a crown glass maker, and 8*l.* per annum, in lieu of house rent and firing; and that they should have the option of dismissing him from their service on giving him a month's wages or a month's notice:—Held, that this contract shewed an undertaking on the part of the plaintiffs to employ A; that it contained a good consideration; and that it was not void on the alleged ground of its being in restraint of trade. *Pilkington v. Scott*, 15 Law J. Rep. (n.s.) Exch. 329; 15 Mee. & W. 657.

The plaintiff agreed with T P in writing, among other things, that T P should for seven years serve the plaintiff and his partner or partners for the time

being, or such of them as should carry on the trade of a glass and alkali manufacturer, then carried on by the plaintiff; that T P should not absent himself from such service without the licence of such persons so carrying on the business, nor serve other persons during the term; that the plaintiff should, during the time T P continued employed, pay him 24s. per week for 1,200 tables, and other rates for extra tables, and when tables were not wanted should find him other work, so that he should not earn less than 24s. per week, except when a furnace was out, when he should have 21s. per week; and in case that T P should become incapacitated to perform, or should fail to perform such work, or if the plaintiff or his partner, &c. should discontinue the business during the seven years, then that they should be able to employ other persons, and should not be bound to pay anything to T P:—Held, that this agreement was not void, either for want of mutuality, or as being in restraint of trade. *Hartley v. Cummings*, 17 Law J. Rep. (N.S.) C.P. 84; 5 Com. B. Rep. 247.

The declaration was founded on a breach by the defendant of an agreement whereby, in consideration that the plaintiff, a surgeon at M, would engage the defendant as his assistant, the defendant promised not to practise at any time at M or within seven miles of it, under a penalty of 500l.; and it was averred that the plaintiff did engage the defendant:—Held, that the undertaking to engage the defendant, though no time of service was specified, was a good consideration for the defendant's promise, and that the agreement was not void as being in restraint of trade.

Held, also, that in such an agreement, the sum, though called a "penalty," is recoverable as liquidated damages. *Sainter v. Ferguson*, 18 Law J. Rep. (N.S.) C.P. 217; 7 Com. B. Rep. 716.

(c) *When one of contracting Parties a Lunatic.*

An executed contract entered into *bonâ fide* and in the ordinary course of business is not void by reason of one of the parties having been at the time of such contract of unsound mind where such unsoundness was not known to the other party.

Therefore, where a lunatic purchased of an assurance society and paid for two annuities for his life, the society at the time having no knowledge of his lunacy, and the purchase being a transaction in the ordinary course of human life, fair and of good faith on the part of the society, and in the usual course of their business:—Held, affirming the judgment of the Court of Exchequer (18 Law J. Rep. (N.S.) Exch. 68; 2 Exch. Rep. 487), that the purchase-money could not be recovered from the society by the personal representatives of the deceased lunatic. *Molton v. Camroux*, 18 Law J. Rep. (N.S.) Exch. 356; 4 Exch. Rep. 17.

(d) *Between Guardian and Ward.*

An orphan, who had for many years resided with her uncle and aunt, gave a promissory note, two months after she attained twenty-one, at the request of her uncle, to secure any balance which might from time to time be due from him to his bankers. She continued to reside with him nearly four years longer, when she married. Shortly afterwards the bankers sought to enforce the security:—Held, that the transaction was originally invalid, and that

it could not be sustained on the ground of acquiescence.

Where pecuniary transactions take place between parent and child, or guardian and ward, immediately after the child or ward attains twenty-one, whereby the parent or guardian is benefited, but the interest of the ward is not in any way promoted, the presumption that the child is subject to undue influence must be rebutted by evidence to shew that the child acts spontaneously, and with full knowledge of the nature of the transaction. *Archer v. Hudson*, 15 Law J. Rep. (N.S.) Chanc. 21.

(e) *Fraudulent on Parliament or the Public.*

The Shrewsbury and Birmingham Railway Company opposed a bill brought into Parliament by the London and North-Western Railway Company, seeking to authorize a lease to that company of a scheme in progress by the Shropshire Union Railway Company, whereupon an agreement in writing was come to between the companies, that in consideration of the withdrawal of the opposition by the Shrewsbury and Birmingham Railway Company, an account should be kept of the profits received from the traffic on the lines of the Shrewsbury and Birmingham Railway and Shropshire Union Railway, and that the profits to be received in respect of the traffic should be divided between them, in certain proportions. By reason of the withdrawal of the opposition, the bill was passed:—Held, that the agreement was not a fraud on Parliament or illegal.

Held, also, that an agreement entered into by two companies, by which one of those companies agreed that it would not prejudice, or, by any indirect and circuitous course, interfere with the traffic passing on the direct line of the other company, was not illegal. *Shrewsbury and Birmingham Rail. Co. v. London and North-Western Rail. Co.*, 2 Mac. & G. 324; 2 Hall & Tw. 257.

(f) *Mutuality.* [See (b) *Restraint of Trade*]

(C) ACCEPTANCE OF OFFER.

A letter offering a contract does not bind the party to whom it is addressed to return an answer by the very next post after its delivery, or to lose the benefit of the contract; an answer, posted on the day of receiving the offer, is sufficient.

A contract is accepted by the posting of a letter declaring its acceptance.

A person putting into the post a letter declaring his acceptance of a contract offered, has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. *Dunlop v. Higgins*, 1 H. L. Cas. 381.

[See *Duke v. Andrews*, title COMPANY (A) (b) (1).]

(D) CONSTRUCTION OF.

(a) *In general.*

The following memorandum was given by S to the plaintiff:—"In consideration of W T (the plaintiff) discounting for me a bill of exchange for 80l., payable six months after date, I have this day deposited with him, as a collateral security for the due and punctual payment of the aforesaid bill, the lease of my house, and have also assigned to him the whole of the fixtures, as per inventory, in and about the said house; and in the event of the said bill being dishonoured and remaining unpaid for

seven days, I agree forthwith to execute unto the said W T a mortgage of all my estate and interest in the said lease for repayment of the principal and interest, such mortgage to contain the usual power of immediate sale, together with the several fixtures in and about the said premises as per inventory, such lease and fixtures to be sold by auction or otherwise, and after deducting the amount of the mortgage and expenses, the balance to be paid over to me. But should the said W T wish to sell the fixtures by auction or otherwise, I undertake to allow him to do so on the said premises, without being liable to any action of trespass or otherwise. And I further undertake to pay all arrears of rent, &c., within three calendar months less fourteen days after it becomes due, and in default of my so doing, I authorize the said W T to sell the said lease and fixtures on the premises by auction or otherwise, without my first executing a mortgage of the same, and to apply the proceeds thereof to the payment of the said bill and expenses, and after the same shall have been satisfied to pay the balance to me:—Held, to operate as an absolute assignment of the fixtures to the plaintiff.

In an action of trespass by the plaintiff against the assignee of S, who had sold the fixtures by auction separate from the lease of the house, the proper damages were held to be the value of the fixtures while they remained affixed to the freehold. *Thompson v. Pettit*, 16 Law J. Rep. (n.s.) Q.B. 162; 10 Q.B. Rep. 101.

Where the contract for the execution of certain work was for payment on completion, and after having been proceeded in to some extent, the plaintiff refused to go on without security, and the Judge having left it to the jury to say what the terms of the contract were, as to be collected from the correspondence between the parties, they found for the defendant, the Court would not interfere with the finding and refused a new trial. *Pontifex v. Wilkinson*, 2 Com. B. Rep. 349.

By an agreement under seal, the plaintiff undertook to supply a gas company, for a period of three years, with all such pipes as should, from time to time, during the said period, be required by the company, at certain rates specified in the agreement. The company ordered large quantities of pipes, and when the contract expired had in stock many thousand yards of pipes, which the plaintiff had supplied, and for which he sought to recover the difference in price between the current value and the price paid according to the contract:—Held, that the contract could not be limited to orders for pipes required for use at the time of the orders; but that the plaintiff was bound to supply all pipes ordered by the company for works which they were carrying on and authorized to undertake by their act of parliament. *Whitehouse v. Liverpool Gas Co.*, 17 Law J. Rep. (n.s.) C.P. 237; 5 Com. B. Rep. 798.

Where by the terms of an agreement, dated the 25th of May, the defendant agreed to purchase certain growing crops of the plaintiff, the price to be paid on the 5th of June, the valuation to be made by the 3rd of June by two persons, one named by each party by the 31st of May; and in case either party neglected or refused to nominate a referee within the time appointed, the referee of the other party alone to make a final decision,—Held,

that the word "nominate" meant not only the choice of a referee, but the communication of the appointment to the other party; and that an appointment by the plaintiff of a referee on the 31st of May, and communication of that appointment to the defendant by letter, which reached him on the 1st of June, did not entitle the plaintiff to proceed *ex parte* within the meaning of the agreement. *Tew v. Harris*, 17 Law J. Rep. (n.s.) Q.B. 1; 11 Q.B. Rep. 7.

A, being on the eve of insolvency, made a *bond fide* verbal assignment of all his goods to the plaintiff, in trust, for the payment of his debts, and to hold the surplus for relations who had advanced money to him. An order was given by the plaintiff, with A's consent, for sending the goods to an auctioneer's for sale, from time to time, and several portions were accordingly parted with by A, and sold:—Held, that the successive deliveries were made under a mere licence to sell the goods from time to time, and that the property in the whole did not pass to the plaintiff. *Normansell v. Creft*, 17 Law J. Rep. (n.s.) Q.B. 297.

Declaration stated that plaintiff was the attorney of a certain railway company; that it was intended to apply for an act for the incorporation of the same, and that in consideration that the managing committee of the said railway would, by the permission and at the instance of plaintiff, retain defendant as attorney about performing certain business for the company, in preparing books of reference, serving notices on the landowners, and doing the conveying business consequent upon the act of parliament being obtained, if such act should be so obtained, he, defendant, promised to allow plaintiff one-third part of the profits of the said business. Averment, that the said managing committee did, with permission and at the instance of plaintiff, retain defendant as attorney in and about the performing certain work and business for the said company, in preparing books of reference, serving notices on landowners, and were ready and willing to retain defendant in and about the conveying business consequent upon the said intended act of parliament being obtained, if the said act had been obtained. Breach, non-payment of the third part of the profits:—Held, that the declaration was bad, the meaning of the contract being, that the work to be done, and not the retainer, was to be contingent upon the passing of the act of parliament. *Serrell v. Allen*, 17 Law J. Rep. (n.s.) Exch. 246.

B sold a farm to R, and by agreement between them E was to estimate and certify (amongst other things) the sum to be paid to B for the labour of ploughing and sowing certain parts of the farm. E certified that a sum was to be allowed for three ploughings of the same land, and a further sum for working and burning stroyle:—Held, that all expenses incidental to the preparation of the land for sowing were included in the terms of the agreement. *Branscombe v. Roucliffe*, 18 Law J. Rep. (n.s.) C.P. 38; 6 Com. B. Rep. 523.

A mercantile contract pointing out a mode of performance, and stipulating for the manner of payment in the event of that mode being adopted, is not to be construed narrowly so as to prevent a party performing it, in a way different from that specified, from maintaining an action on it. The plaintiffs agreed to buy 250 tons of meal from the

defendants, to be shipped at Cronstadt at the first open water, allowing a fair time for the arrival of the vessel out; the sellers, if required, to take up freight for the buyers; to be paid by the buyers' acceptances for one-third of the price, at three months from the date of the contract, the rest at three months from the date of the bill of lading; but should the vessel not arrive before a certain time, then to be paid in another manner specified. Another contract for 350 tons, on the same terms, was entered into soon after the former. The plaintiffs sent out three ships for the two purchases, one of which loaded 166 tons in reasonable time; the others, through the neglect of the defendants, were not loaded in a reasonable time:—Held, that the plaintiffs were entitled to recover for the non-fulfilment of the contract by the defendants, although they had not sent out one ship for the 250 tons and one ship for the 350 tons. *Reade v. Meniaeff*, 18 Law J. Rep. (N.S.) C.P. 145; 7 Com. B. Rep. 152.

In assumpsit for the breach of two contracts for the shipment of two several quantities of meal, the declaration stated, that, "after the making of the said contracts, and before the performance of them or of any part thereof, it was agreed that they should operate as one contract for the amount of the said two quantities of meal:—"Held, that this allegation was not sustained by proof that the buyers had sent out three vessels, the first of which was insufficient for the quantity mentioned in the first contract, and that they had received a separate bill of lading of the cargo brought home by that vessel, and accepted a bill for the stipulated proportion of that cargo. The Judge refused to amend the declaration by striking out "or of any part thereof," and the Court would not interfere. *Meniaeff v. Reade*, 7 Com. B. Rep. 139.

A declaration stated the promise of the defendant to be, that "if he received seven days' notice requiring the appearance of one J M W at a place to be in the said notice named, he would produce the said J M W":—Held, that the declaration need not aver notice in writing. *Thompson v. Ayling*, 19 Law J. Rep. (N.S.) Exch. 55; 4 Exch. Rep. 614.

R F agreed to let, and J S to hire, land and premises at a fixed surface rent for the purpose of brickmaking. J S was to pay 3s. per 1,000 for the bricks, and to make at least 4,000,000 a year or pay rent equal thereto, and was not to excavate beyond the depth of eight feet without special licence. A railway company having taken the land, J S made a claim for compensation, which was submitted to arbitration. Both parties requested the umpire to decide what estate J S had in the premises. The umpire stated the facts, set out the agreement, and adjudged that J S was tenant from year to year only:—Held, that the umpire was right in the construction of the agreement.

Quære—Whether the Court would have had any jurisdiction to set aside the award if the umpire had been wrong.

Held, also, that the umpire was right in refusing to admit evidence to shew that by the custom of the trade of brickmaking, brick land is always let for a longer period than from year to year. *In re Stroud*, 19 Law J. Rep. (N.S.) C.P. 117; 8 Com. B. Rep. 502.

A father having, upon the marriage of his

daughter, agreed to give her a portion of 100,000l., transferred one-third part thereof in stock to the four trustees of the marriage settlement, and gave them his bond for transfer of the remainder in like stock upon his death, the latter stock to be held by them on trust for the daughter's separate use for life, and after her death for the children of the marriage, as the husband and she should jointly appoint. The father afterwards by his will gave to two of the trustees a moiety of the residue of his personal estate, in trust for the daughter's separate use for life, remainder for her children generally as she should by deed or will appoint:—Held, that the moiety of the residue given by the will was in satisfaction of the sum of stock secured by the bond, notwithstanding the differences of the trusts; and, it being found to be for the benefit of the daughter and her children, if any she should have, to take under the will, she was bound to elect so to take. *Lady Thynne v. the Earl of Glengall and The Earl of Glengall v. Lady Thynne*, 2 H. L. Cas. 131.

C & Co. and H & Co. were merchants at Calcutta. H & Co. sold to C & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H & Co., and submitted it to H for his approval, when H having objected to a particular word remaining, the broker took the sold note to C, and informed him of H's objection. C struck his pen through the word objected to by H, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H & Co. The broker delivered to C & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H & Co. against C & Co. for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion, that the sold note alone formed the contract, and found for the plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending C's alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. *Cowie v. Remfry*, 5 Moore, P.C. 232; 3 Moore, In. App. 448.

In assumpsit for the price of, and the setting up of, a "fourteen horse power steam-engine," "the last instalment to be paid two months after its completion," it appeared that the degree of power in the engine delivered was not equal to the power mentioned in the contract; and improvements and alterations were made by plaintiff from time to time, till the action was brought:—Held, first, that common counts would lie; secondly, that the term "completion" did not apply to the mere making of improvements and alterations; thirdly, that the degree of power of the engine was a material part of the contract. *Parsons v. Saxter*, 2 Car. & K. 266.

A railway company about to sever the plaintiff's land, agreed to purchase the necessary portions of land, subject to the making such roads, ways, and slips for cattle as might be necessary:—Held, to mean such roads, &c. as were necessary and proper for convenient communication between the severed

portions of the land, and a reference was directed to ascertain what were proper. A specific performance was also decreed. *Sanderson v. the Cocker-mouth and Workington Rail. Co.*, 11 Beav. 497.

Acts or communications of the parties after an agreement may be evidence of facts existing at the time of the agreement, material to its construction, but not to determine its meaning. *Monro v. Taylor*, 8 Hare, 56.

An agreement was entered into between a lessor and a lessee, that the lessee should pay to the lessor a certain sum, and be discharged from all further liability under the lease, upon his assigning his interest therein to the lessor. The lease had been previously mortgaged, and the lessor was aware of that fact:—Held, that he was not entitled to require that the lessee should procure the parties interested under the mortgage to join in assigning the lease, or to do more than assign his own interest in it.

It appeared from a witness in the cause, but the matter was not in issue, that prior to the agreement in question the lease had been sold by the mortgagee under a power of sale. The Court directed inquiries to the Master for the purpose of ascertaining whether there were other parties besides the plaintiff and the defendant who had any interest in the lease. *Phelps v. Prothero*, 17 Law J. Rep. (N.S.) Chanc. 404; 2 De Gex & S. 274.

A railway act provided for the indemnity of the rector of a parish in respect of his right to tithes of 2s. 9d. in the pound on buildings pulled down, by enacting that the company should pay him tithes in respect of houses removed, according to the last assessment thereof, to Lady-day preceding, equal to the loss sustained by the want of occupiers, owing to the removal, until new houses should be erected of such annual value that the tithes payable thereon should be equal to the tithes payable on the buildings removed, such payments to diminish in proportion to the yearly sums actually payable for tithes on the new buildings. On some of the houses pulled down, the tithes of 2s. 9d. in the pound were paid on their full value; on others they had been paid by agreement between the rector and occupier on a less value; and on others the tithes had been wholly or in part remitted:—Held, that the rector was not entitled to tithes from the company according to the value at which the property removed was assessed to the poor-rate, but according to the annual value at which it had been last fixed by agreement; and where no agreement was proved, the sum last collected as tithes should be taken to represent 2s. 9d. in the pound on the annual value. *Letts v. London and Blackwall Rail. Co.*, 5 Hare, 605.

An act of parliament recited three other acts, one only of which had relation to an agreement entered into between the plaintiffs and the defendants. By the 1st section, on the completion of the works of the three lines of railways by the recited acts authorized to be made, so as to be opened for public traffic, or at such other period as might be agreed upon, the Shropshire Union Railway Company were empowered to grant to the London and North-Western Railway Company a lease in perpetuity of the undertaking. By the 11th section of the same act, it was enacted, that, as each line of railway should be completed the same should be worked

and used by the London and North-Western Railway Company; and for the purposes of such working the London and North-Western Railway Company were to exercise the powers before given by the act to the Shropshire Union Railway Company in relation to every such completed railway. Other sections of the act spoke of the "lease of the said railways," and the "making of such lease":—Held, that according to the true construction of the act, there was no postponement of the rights of the parties to the benefit of the provisions of the lease, until the whole of the three lines had been completed. *Shrewsbury and Birmingham Rail. Co. v. London and North-Western Rail. Co.*, 2 Hall & Tw. 257; 2 Mac. & G. 324.

To a declaration by the payee against the maker of a promissory note, the defendant pleaded that after the note had become due it was agreed between the plaintiff, the defendant, and one A B, that the said A B should, at the request of the plaintiff, pay to the plaintiff in trust for E B, 200*l.*, for her sole use and benefit, or the sum of 25*l.* per annum, so long as the sum of 200*l.* should remain unpaid, and that the rights and causes of action of the plaintiff upon and in respect of the said note should be suspended, so long as the said A B should continue to pay the said sum of 25*l.*; averment, that the said A B had paid the said sum, &c. Upon issue joined to a replication traversing such payment by A B, a verdict was found, and judgment afterwards given for the defendant. On error brought to reverse such judgment,—Held, that the above plea was bad in substance, the legal effect of the agreement therein set out being not to suspend the plaintiff's right of action upon the note, but only to subject him to an action, if he sued contrary to the terms of the agreement. *Ford v. Beech*, 17 Law J. Rep. (N.S.) Q.B. 114; 11 Q.B. Rep. 852.

Held, in equity, that the agreement must be construed as a contract by A B to provide for E B an annuity of 20*l.*, or the gross sum of 200*l.* as a substitute for the note; and by the payee that the note should thenceforth be only a security for the performance of such contract; and not as an agreement under which the original right of the payee against the maker would revive on any failure of the quarterly payments by A B.

That A B was entitled to the specific performance of the agreement in equity, not on the ground of the circuity of action which the rule of law occasioned, but on the ground that the Court, by modifying its decree, could give all parties the benefit of the agreement, which could not be done at law. *Beech v. Ford*, 7 Hare, 208.

(b) Particular Words.

(1) "Terms Cash."

A letter, setting forth the terms of a contract contained in another letter between the same parties, is evidence to go to the jury of the original contract.

Where the words "terms, cash" are inserted in a contract, payment on delivery is not a condition precedent.

Where a thing is to be done in a reasonable time, the reasonableness of the time is a question wholly for the jury. *Nelson v. Patrick*, 2 Car. & K. 641.

Defendant had sold to plaintiffs cement in casks

and bags for a certain sum, the defendant to allow the plaintiffs 3s. 6d. for each cask and 2s. 6d. for each bag which should be returned, *terms, cash*. In an action upon this contract, for the price of the casks and bags, the defendant pleaded that the plaintiffs did not duly pay the defendant for the cement, according to the terms in the declaration mentioned. It appeared that the plaintiffs had not paid for part of the cement on delivery, nor until after an action had been brought for it:—Held, that the words “terms, cash” had been sufficiently complied with to entitle the plaintiffs to recover in this action and upon this issue.

The plaintiffs averred and the defendant traversed a readiness and offer to return the casks and bags:—Held, that the averment was severable, and that the plaintiffs were not bound to prove a readiness to return all the casks and bags. *Nelson v. Patrick*, 16 Law J. Rep. (N.S.) C.P. 98; 3 Com. B. Rep. 772.

(2) “Abstract of Conveyance.”

The plaintiff negotiated for the exchange of certain advowsons between the defendant and B, and the defendant contracted to pay him 100*l.* for commission, “one-third down, and the remaining two-thirds when the abstract of conveyance is drawn out.” The defendant’s abstract of title was delivered to B, but nothing further was done in the matter, in consequence of B declining to proceed with the exchange. In an action for the recovery of the balance alleged to be due to him for commission,—Held, that the plaintiff could not recover; as the event had not happened for which the commission was to be paid. *Alder v. Boyle*, 16 Law J. Rep. (N.S.) C.P. 232; 4 Com. B. Rep. 635.

(3) “Bought and sold.”

The declaration stated that the plaintiff bargained with the defendant to buy from him and then bought, and the defendant agreed to sell and then sold to the plaintiff 28,000 Spanish active stock on certain bonds, at the rate of 26*l.* 5*s.* for every 100*l.* of the said stock, and promised the plaintiff to deliver the said bonds. Breach, non-delivery:—Held, that the words “bought” and “sold” in the declaration were to be construed with reference to the subject-matter, and in this case did not mean the actual sale of specific bonds; but merely a contract for sale which would be performed by the delivery of any goods of the same description.

When Exchequer bills, bonds, scrip, Spanish stock, and securities of that kind, which pass by delivery merely, become the subject of a contract, there is no difference between a contract to buy and a contract of actual sale, as the transfer rests not so much on contract as on delivery.

Such a contract is not a sale of goods, &c. within the 17th section of the Statute of Frauds. *Heseltine v. Siggers*, 18 Law J. Rep. (N.S.) Exch. 166; 1 Exch. Rep. 856.

(c) Time of Performance.

By a deed it was provided that certain specified works should be done by the plaintiff for 418*l.*, but that the defendant should be at liberty to order additional work, or to diminish that specified, and that payments or deductions were to be made or allowed accordingly. That if the specified work were not

completed by the 23rd of October, the plaintiff should pay 1*l.* per day used over and beyond that day, as liquidated damages; provided that if the defendant should require additional works the plaintiff should be allowed such extra time beyond the 23rd of October as was necessary for completing the same. In an action brought to recover the contract price, and also a sum of money as the fair value of extra work ordered by the defendant, it was held that the stipulation for payment of 1*l.* per day extended to the time unnecessarily used after October 23, and that the defendant was entitled to set off against the plaintiff’s demand so much money as had become due under that stipulation.

The declaration, after stating the effect of the deed, alleged that the defendant ordered extra work to be done, and that but for such extra work the plaintiff would have completed the original work on the 23rd of October, and that the plaintiff did, within thirty-one days, complete the whole work, which space of time, beyond October 23, was necessary for doing the said extra work. The plea commenced—As to the sum of 22*l.*, parcel of the debt in the declaration mentioned, &c., and as to so much of the count as relates to a certain space of time, &c., and alleged a set-off of 22*l.* as damages for twenty-two days unnecessarily expended on the extra work:—Held, to be good in form. *Legge v. Harlock*, 18 Law J. Rep. (N.S.) Q.B. 45; 12 Q.B. Rep. 1015.

The contract laid in the declaration was “five tons of linseed cake to be delivered within a reasonable time in that behalf.” The contract proved was, “I can take five tons of linseed cake, but it must be put on board directly.” Answer, “I shall ship you five tons to-morrow”:—Held, that the proof did not support the declaration. *Duncan v. Topham*, 18 Law J. Rep. (N.S.) C.P. 310; 8 Com. B. Rep. 225.

(d) Entire or divisible.

The defendant having applied to the plaintiffs to sell him some fleeces, and agreed at the same time to supply the plaintiffs with certain coarse woollen cloths called “noils,” the following bought-note was delivered:—“Bought of Messrs. W F A (the plaintiffs) thirty packs of Cheviot fleeces, &c., and agreed (*i.e.* the plaintiffs agreed) to take the under-mentioned noils; also agreed to draw for 250*l.* on account at three months. Sixteen packs, No. 5, noils, &c.”:—Held, that this was one entire contract, and that the plaintiffs could not maintain an action against the defendant for not delivering the noils, without averring that they had delivered or offered to deliver the fleeces to the defendant. *Atkinson v. Smith*, 15 Law J. Rep. (N.S.) Exch. 59; 14 Mee. & W. 695.

A bankrupt took certain premises under a lease, which provided, that any greenhouse erected by him should belong to him, and not to his lessor. He afterwards transferred to the defendant, by a verbal contract, the lease in question, a greenhouse erected by him, together with the furniture and plants therein, of all which the defendant took possession:—Held, in an action by the plaintiffs as assignees of the bankrupt to recover the price thereof, that they were entitled to recover the value of the furniture and plants, but not of the greenhouse, as the contract was entire, and no valid

assignment of the lease had been made to the defendant. *Sleddon v. Cruikshank*, 16 Law J. Rep. (N.S.) Exch. 61; 16 Mee. & W. 71.

The defendant agreed to supply the plaintiff with 150 tons weight of iron girders, at a certain price per ton, and according to plans to be furnished by the plaintiff. Plans were furnished within a reasonable time from the date of the agreement, and at the same time fourteen tons weight of girders were ordered. Four months after the date of the agreement the fourteen tons were demanded; and other plans were furnished, and orders given for sixty tons more girders. The defendant then repudiated the contract:—Held, that the contract was entire; and that as the plaintiff had not furnished plans for the whole 150 tons within a reasonable time from the date of the agreement, he could not recover for the non-delivery of the fourteen tons for which plans had been furnished within a reasonable time from such date. *Kingdom v. Cox*, 17 Law J. Rep. (N.S.) C.P. 155; 5 Com. B. Rep. 522.

(e) *Executory and continuing.*

In debt by the assignees of a bankrupt insurance association for premiums on certain policies the defendants pleaded as to 2,613*l.* 7*s.* 1*d.* parcel, &c., that after the accrual of the cause of action and before the bankruptcy it was agreed between the parties that divers policies which had been effected by the defendants with the insurance association and were then existing, should be cancelled and delivered up to the association, and thereupon the association should be exonerated and discharged from the said policies, and the premiums thereon payable or paid by the defendant or a rateable proportion thereof, after deducting so much as would be fairly payable in respect of risks already incurred, should be allowed in account to the defendants and set off against the monies due, and the defendants thereupon be acquitted, exonerated, and discharged from the payment of so much as the premiums so to be allowed should amount to. The plea then stated that the amount of the premiums so to be allowed was a sum, to wit, of 2,613*l.* 7*s.* 1*d.*, and that the policies were delivered up and cancelled, and the defendants thereupon became acquitted and discharged of the said sum. The plaintiffs replied by traversing that the amount alleged was allowed to the defendants:—Held, that the plea was bad in substance, for that the agreement was only executory, and no allowance in account was shewn to have taken place. *Graham v. Gibson*, 19 Law J. Rep. (N.S.) Exch. 204; 4 Exch. Rep. 768.

A declaration in assumpsit stated that in consideration of the plaintiff's agreeing to stay proceedings in an action against B, the defendant promised to pay the amount, upon a certain event. Averment, that the plaintiff did stay proceedings; that the event happened, but that defendant did not pay. At the trial, the plaintiff proved the following agreement, in writing:—"In consideration of the plaintiff's having agreed to stay proceedings against B, I hereby undertake to pay the sum," &c.:—Held, that the contract was an executory contract, a continuing agreement to stay proceedings, and therefore that there was no variance. *Tanner v. Moore*, 15 Law J. Rep. (N.S.) Q.B. 391; 9 Q.B. Rep. 1.

A B was seised of an estate, copyhold of inheri-

tance, held by the Bishop of Durham, who was lord of the manor in right of his see. These estates were subject to a settlement made by A B on his marriage, and the legal estate was vested in trustees. A B, who was tenant for life under the settlement, without power to grant leases, agreed to grant a lease of a way-leave for sixty-three years. A B died before any lease was executed, having, by his will, made his wife, who was tenant for life in remainder of the settled estates, his residuary legatee. She instituted a suit for the administration of her husband's estate, and, by virtue of a licence from the lord of the manor, under the sanction of the Court, she joined with the trustees in granting a lease of the way-leave for twenty-one years. The licence of the lord of the manor was recited, and it was also further recited, that two further leases of twenty-one years were to be granted, to make up the sixty-three years stipulated for by the agreement. The parties then divided the estate and the rent for the way-leave into parts, and sold them in separate lots. In the particulars of sale it was expressed that the estate was sold subject to the way-leave, and that such leave of way was subject to a renewal upon the expiration of the lease. The purchaser of the estate, upon the expiration of the lease, without consulting the purchaser of the 182*l.* rent for the way-leave over the estates, entered into a new agreement with the lessee of the way for its continuance for a term of sixty-three years from the expiration of the said lease, with further privileges, at an increased rent of 252*l.*, and he contracted with the lessee that he should, under his power in the first agreement, determine the first agreement. After the execution of this second agreement, the purchaser of the estate insisted, that the first agreement was satisfied by the grant of the first lease, and if not, that it determined by the second agreement, and he claimed the whole of the rent of 252*l.* independent of the purchaser of the rent of 182*l.*, which was secured by the first agreement:—Held, that the first agreement was a continuing agreement, for the residue of the sixty-three years, and that it was not satisfied by the lease granted; that the purchaser of the estate could not contract to defeat the purchaser of the 182*l.* rent, and a decree was made that the plaintiffs were entitled to the rent purchased for so much of two further terms of twenty-one years as might be granted, if the lessee should so long continue to use the way. *Wood v. Londonderry (Marquis)*, 16 Law J. Rep. (N.S.) Chanc. 460; 10 Beav. 465.

(f) *When Time the Essence of the Contract.*

It was agreed in writing, between the plaintiff and the defendants, that certain growing crops of the plaintiff should be taken by the defendants at a valuation made by certain valuers, on the 1st of April 1844, and the amount secured by the defendants' promissory note; but that such valuation should be examined and revised on the 1st of August then next ensuing; and that the parties should be bound by any alteration then made in it. The valuers on the 1st of April estimated 41*l.* 0*s.* 8*d.* to be due to the plaintiff for the crops (after certain deductions), and the defendants, accordingly, gave their promissory note for that amount. The valuers revised their valuation on the 2nd of August 1844,

and, according to their revised valuation, the sum due to the plaintiff was only 3*l.* 5*s.*:—Held, that the time fixed for the revision of the valuation was of the essence of the contract, and that the plaintiff was entitled to the full amount of the note, though it was proved that nothing had occurred between the 1st and 2nd of August to affect the value of the crops.

The following memorandum, signed by the plaintiff, was offered in evidence:—

	£.	s.	d.
"Total value of wheat growing, &c.94	10	8
Rent due to Mr. A.	53	10	0

Balance due to Mrs. M. £41 0 8
and secured by the joint and several note of G P and S P. This note is to be subject to the revised valuation of Messrs. C and D, and will be more or less than 41*l.* 0*s.* 8*d.* according as they value the corn. The note was given up to me this 20th of August 1844,"—Held, (*dubitante Wightman, J.*) that, the agreement to which the memorandum referred being already in evidence, the memorandum itself was admissible without a stamp. *Marshall v. Powell*, 16 Law J. Rep. (N.S.) Q.B. 5; 9 Q.B. Rep. 779.

Where by the terms of the contract for making steam-boilers and delivery on approval by C at the defendant's works, when the plaintiff's liability was to cease, it was expressly stipulated that the engines should be completed within two months,—Held, that time was of the essence of the contract, and that an action might be maintained for the non-delivery within that time. *Wimshurst v. Deeley*, 2 Com. B. Rep. 253.

A patentee agreed to give one-fourth share of the patent to B in consideration of 50*l.* then paid, and of 150*l.* to be paid in several sums at various times, and of a sum of 300*l.* to be paid by a particular day, to be applied in taking out foreign patents. The 300*l.* was not paid, and the foreign patents were, consequently, not obtained:—Held, that time was the essence of the contract, and that the patentee was entitled to rescind it, notwithstanding he had accepted payment of the other sums at other times than those which were fixed by the agreement. *Payne v. Banner*, 15 Law J. Rep. (N.S.) Chanc. 227.

(g) Condition Precedent.

A declaration stated, that in consideration that the plaintiff would accept, &c., the defendant agreed to supply iron girders, of the sizes to be shewn in drawings provided by the plaintiff, and to use the defendant's best endeavours to deliver fifty tons on or before the 31st of January, and fifty tons more on or before, &c., provided the drawings for the first fifty tons were sent to the defendant within a certain time, to wit, three days, and for the remainder within three weeks. The declaration then averred, that the plaintiff *did, within a reasonable time, duly and according to the said agreement, deliver drawings, yet that the defendant did not within a reasonable time, nor at all, supply the plaintiff.* Plea, that the plaintiff did not *within the time agreed upon duly and according to the said agreement deliver drawings, &c.*:—Held, *bad*, on demurrer, as the proviso for the delivery of the drawings within a certain time was not a condition prece-

dent to the plaintiff's right to recover; and the defendant ought, therefore, to have traversed the delivery within a reasonable time. *Kingdom v. Cox*, 15 Law J. Rep. (N.S.) C.P. 95; 2 Com. B. Rep. 661.

A declaration stated in the first count that "it was agreed between the plaintiffs and the defendant, that in consideration that the plaintiffs would proceed to trial with an action against W at the first sittings at Nisi Prius, the defendant did then guarantee to save the plaintiffs harmless against all costs connected with the said action against W, whether the same should be decided in favour of the plaintiffs or of W, and that the defendant would pay the same costs whenever requested so to do by the plaintiffs;" that the action was tried at the first sittings, &c., and a verdict found for the plaintiffs; that this verdict was afterwards set aside by the Court, and a new trial ordered upon payment of costs; that the action was again set down for trial, and before it could come on to be tried the record was withdrawn at the request of the defendant, and that the plaintiffs had sustained 100*l.* costs in and about the said action, which the defendant refused to pay according to the agreement. Demurrer and joinder:—Held, that the declaration was good; that it was not necessary for the plaintiffs to go on with the action against W to final judgment, in order to enable them to ask for costs, and that the agreement was satisfied by a trial of the action at the first sittings at Nisi Prius. *Wilson v. Bevan*, 18 Law J. Rep. (N.S.) C.P. 244; 7 Com. B. Rep. 673.

A declaration stated a special agreement between the plaintiff and the defendants, by which it was, amongst other things, agreed that, for the services of the plaintiff for three years the defendant would "give yearly, free, to the plaintiff during the said three years, twenty tons of coals to be put free on board ship at C. for the use of the plaintiff;" and then alleged as a part of the breach complained of, that the defendants had not yearly, or at any time during the three years, given or delivered to the plaintiff any coals at C or elsewhere:—Held, upon demurrer, that either the naming of a ship, or readiness and willingness to do so, was a condition precedent to the plaintiff's right to recover, and, there being no averment of either in the declaration, that the breach was insufficient. *Armitage v. Insole*, 19 Law J. Rep. (N.S.) Q.B. 202.

The plaintiffs, trustees of a marriage settlement, comprising certain land which was required by the defendants, the managing committee of a projected railway company, for which a bill was then pending in parliament, agreed that in consideration of 11,700*l.* to be paid the plaintiffs by the said railway company, the said railway should pass through the said land, and if the bill should pass in the present or next session of parliament, the company should, within six months after the passing of the bill, pay to the plaintiffs the said purchase-money, and in consideration thereof should have conveyed to them nineteen acres of the said land; the whole of the agreement to be null and void unless sanctioned by the Court of Chancery in a cause of *Lawrence v. Porcher*, and so much of the agreement as the Court required should be inserted in the act:—Held, that the obtaining, by the plaintiffs, the sanction of the

Court of Chancery to the agreement within six months of the passing of the bill was a condition precedent to the payment of the money by the defendants. *Porcher v. Gardner*, 19 Law J. Rep. (N.S.) C.P. 63; 8 Com. B. Rep. 461.

(h) *When for the Judge and when for the Jury.*

The construction of a contract, and the meaning of particular words used in it, is for the Judge, except in cases where there is evidence that a particular word was used in a sense peculiar to a particular trade or business, or that its meaning depends on the usage of a particular place.

Where it was agreed that the plaintiff, an auctioneer, should receive a certain amount of commission in case a sale of a certain estate should be effected "within two months" of a given day,—Held, that "months" *prima facie* meant lunar months, and that the subsequent conduct of the parties was not to be looked at to shew that it meant calendar months.

Quære—Whether evidence was admissible to shew that, according to the usage of auctioneers, "month" was considered as meaning calendar month. *Simpson v. Margeson*, 17 Law J. Rep. (N.S.) Q.B. 81; 11 Q.B. Rep. 23.

The plaintiff, by a written agreement, undertook to do work to some houses of the defendant in South Street and Southampton Street. It was proved at the trial that the defendant had no houses in Southampton Street. The Judge asked the jury, whether the parties meant to describe houses in South Street only, and whether the insertion of the word "and" in the agreement was a mistake:—Held, that the Judge should have construed the agreement himself, and not have left it to the jury to say whether there was a mistake. *Hutchin v. Groom*, 17 Law J. Rep. (N.S.) C.P. 145; 5 Com. B. Rep. 515.

(E) RESCISSION AND REPUDIATION.

A & Co., brokers in the city of London, were authorized by B, at two several times, to purchase for him 3,000 tons of iron. A & Co. shortly afterwards delivered to B "bought notes," which expressed that they had bought the iron for him at the prices and upon the terms therein named, and specified their charges for brokerage and commission, but which did not name any person as the seller. B thereupon paid to A & Co. the brokerage, &c., and made the deposits according to the terms of the bought notes. The plaintiffs being about to advance money to B, upon the security of the bought notes, inquired of A & Co. whether they might safely rely upon the fulfilment of the contracts; and A & Co. thereupon indorsed on the contracts a memorandum, that in consideration of the payment of their brokerage, &c., they personally guaranteed the performance of the contracts. The advance was made, and the bought notes deposited, by way of mortgage, with the plaintiffs; A & Co. undertaking to hold the iron and deposits for the benefit of the plaintiffs. A considerable fall afterwards took place in the price of iron; and the plaintiffs, having discovered that there were no other sellers but A & Co., filed their bill against A & Co. and B to have the contracts cancelled, and for a return of the deposits:—Held, that A & Co.,

having failed to prove that the plaintiffs knew the real facts at the time of their advance to B, must be taken to have represented to them that B's interest in the contracts was such as the documents represented it; and that the decree must be for a return of the deposits, with interest and costs.

B entered into a valid legal contract with A & Co., and paid a deposit, and then assigned all his interest in the contract to the plaintiffs, by way of mortgage. A fraud on the part of A & Co. was discovered subsequently to the assignment, which would have enabled B to rescind the contract, and recover the deposit. A bill by the plaintiffs against A & Co. and B, to rescind the contract, and recover the deposit, is not liable to objection on the ground of champerty. *Wilson v. Short*, 17 Law J. Rep. (N.S.) Chanc. 289; 6 Hare, 366.

The declaration set forth an executory contract, by which the defendant was, on the arrival of a vessel at Belfast, to become the purchaser of a third of her cargo at a stipulated price, which was to be paid by the defendant to the plaintiff, at a certain time after delivery of the cargo to the defendant at Belfast. It then alleged that the defendant, before the arrival of the ship at Belfast, discharged the plaintiff from delivering the cargo, and then and thenceforth wholly refused to perform the agreement. The third plea, as to so much of the breach as related to the discharging the plaintiff from delivering the cargo, traversed the discharge. The fourth plea, which was as to so much of the breach as related to the defendant's having, before the arrival of the vessel at Belfast, discharged the plaintiff and refused to perform the contract, stated that before the arrival of the vessel the defendant had retracted his discharge and refusal. The fifth plea, as to the residue of the breach, traversed the plaintiff's readiness and willingness to deliver the cargo:—Held, that the defendant was not bound to answer an inquiry, made by the plaintiff before the arrival of the ship, as to whether the defendant intended to fulfil the contract.

Held also, that a refusal by the defendant to perform the contract, made before the arrival of the ship, was not in itself a breach of the contract; but that a refusal at any time, unretracted up to the time of the arrival of the vessel, was evidence of a continuing refusal down to and inclusive of the time when the defendant was bound to receive the cargo, and that such a continuing refusal was a breach of the contract.

Held also, that such a refusal, before arrival, was a waiver, at the time, of the delivery of the cargo, and if unretracted, dispensed with the actual delivery of the cargo after arrival.

Held also, that the defendant, by insisting that the cargo should be delivered to him at Belfast, but upon terms other than those of the contract, did not withdraw his refusal, or retract his waiver discharging the plaintiff from delivering the cargo then under the contract.

Held also, that a finding on the fifth plea for the defendant, the finding on the other issues being for the plaintiff, did not entitle the defendant to judgment, for if the "residue" to which that plea was pleaded was that part of the breach not covered by the third or fourth pleas, it amounted to nothing; for the third plea answered all the breach; and if

it meant the residue not answered by the fourth plea it was immaterial, since it only amounted to a finding that the plaintiff was not ready and willing to deliver after the time when the delivery had been excused. *Ripley v. McClure*, 18 Law J. Rep. (N.S.) Exch. 419; 4 Exch. Rep. 345.

(F) VARYING AND ALTERING.

Certain assignable instruments called "old pier bonds" were known in the market as bearing interest at 5% per cent., and all of them bore that interest, except a small number in the plaintiff's possession. These upon the face bore the usual rate of interest; but by a memorandum written upon the bonds, the obligee consented to receive 4% per cent. interest only. The plaintiff upon being applied to to sell "old pier bonds," agreed to sell at par, no mention of the rate of interest which they carried being made on either side. The defendant's agent received the bonds, drew out an assignment, which was signed by the plaintiff, and kept the bonds two days before discovering that they bore only 4% per cent. interest, and he then refused to complete the purchase. Upon assumpsit for non-payment for the bonds, the jury at the trial found "that the defendant's bargain was for bonds at 5% per cent., but that the plaintiff intended to sell bonds at 4% per cent., and that there was no fraud:"—Held, that the bargain for "old pier bonds" implied that the bonds were to carry 5% per cent., and that the defendant had not accepted the bonds in question in satisfaction of the bargain.

The memorandum indorsed upon the bonds was not under seal, but it was written before the bonds were executed, and dated at the same time as the bonds, and signed by the parties:—Held, that it was part of the bonds, though there was no proof when it was signed. *Keele v. Wheeler*, 13 Law J. Rep. (N.S.) C.P. 170; 8 Sc. N.R. 323.

A material alteration of a sold note by the buyer, without the privity of the seller, avoids the contract.

An alteration in a material part of a written contract, without the consent of both parties, is a material alteration which avoids the contract, although it may not have altered the duty of the party sought to be charged.

A plea stated that a material alteration had been made in the contract declared on, and proceeded to specify the alteration under a *videlicet*, and at the trial, a different alteration, which was also material, was proved, and no objection was taken on the ground of variance:—Held, that the plaintiff could not take advantage of the variance in shewing cause against a rule *nisi* for leave to enter a verdict for the defendants.

Semble—that it was not necessary under such a plea to prove the specific alteration alleged; and that, at all events, the Judge could have amended the plea at the trial. *Mollett v. Wackerbarth*, 17 Law J. Rep. (N.S.) C.P. 47; 5 Com. B. Rep. 181.

In a building contract, entered into with the guardians of the poor of a union, a clause was inserted that deviations or additions might be required, but were not to be paid for unless ordered in writing. Additional work had been done with the knowledge of the guardians, but without any other orders than verbal directions of the architect. The guardians having refused to pay for those extra

works, and a bill being filed to recover the balance due to the builder, a general demurrer for want of equity was allowed. *Kirk v. the Bromley Union*, 17 Law J. Rep. (N.S.) Chanc. 127; reversing the decision of the Court below, 16 *Ibid.* 114.

[See Evidence.]

(G) BREACH AND DAMAGES.

A party who by his own act disables himself from fulfilling his contract, makes himself thereby at once liable for a breach of it, and dispenses with the necessity of any request that he will perform it by the party with whom the contract is made.

Declaration that D agreed with L to assign to L all his (D's) interest in certain premises belonging to D, on payment by L to D, within seven years, of 140*l.* General averment of performance by L of all things on his part to be performed. Breach, that D, during the seven years, wrongfully and without L's consent assigned all his interest in the premises to W:—Held, on special demurrer, that the declaration was sufficient, though it contained no averment that L had tendered the 140*l.*, or that he had requested D to assign, or that he was ready and willing to accept an assignment, as the assignment to W was a breach of D's contract, which at once gave a right of action to L, and which dispensed with all conditions precedent on his part. *Lovelock v. Franklin*, 15 Law J. Rep. (N.S.) Q.B. 146; 8 Q.B. Rep. 371.

The plaintiff having recovered judgment against W F, the defendant promised that if the plaintiff would forbear to issue execution against W F, she would, on or before a certain day, erect a house, and cause a lease of the same to be granted to the plaintiff; and the plaintiff promised that such lease, when granted, should be in full satisfaction of the judgment. In an action against the defendant for not erecting the house and causing the lease to be granted,—Held, that the measure of damages was the value of the lease, and not the difference between the value of the judgment and the value of the lease. *Strutt v. Farlar*, 16 Law J. Rep. (N.S.) Exch. 84; 16 Mee. & W. 249.

A plaintiff took possession of premises under an agreement between him and the defendant, by which certain premises were demised to the plaintiff for two years certain, with liberty at his own expense to make such improvements as he chose, with the option of purchasing upon giving notice to defendant at the end of or during the said term, "it being understood that defendant was possessed of the said premises for his own life and that of Mrs. M, and the survivor of them." Plaintiff laid out a large sum on the premises, and then gave notice of his intention to purchase; the defendant could not make the title he represented, whereupon plaintiff brought an action of assumpsit for breach of the agreement, and sought to recover as damages the amount expended in improvements:—Held, that plaintiff was entitled to recover as damages the value of the lease at the time the notice to purchase was given, and that the value of the improvements was not to be considered in estimating them. *Worthington v. Warrington*, 18 Law J. Rep. (N.S.) C.P. 350; 8 Com. B. Rep. 134.

To assumpsit for breach of a contract to grant the plaintiff a good and valid lease, the defendant

pleaded payment into court, and no damages *ultra*.—Held, that the plaintiff might recover damages beyond his expenses for the loss he had sustained by reason of the non-performance of the contract.

Held, also, that evidence to shew that the plaintiff knew the defendant had no title was inadmissible under the plea of payment into court, which admitted the contract. *Robinson v. Harman*, 18 Law J. Rep. (N.S.) Exch. 202; 1 Exch. Rep. 850.

A, being lessee of premises under a lease for twenty-one years, determinable at the end of seven or fourteen years, gave notice to quit at the end of seven years, but did not yield up possession pursuant to such notice. Disputes having arisen, A gave C, who was entitled to the residue of the term, an undertaking that in consideration of his granting a new lease to B, he would "deliver up to C the said lease."—Held, that the delivery of the lease to C, with the seal cut off, was a breach of the undertaking, although the seal was also delivered at the same time. *Richardson v. Barnes*, 18 Law J. Rep. (N.S.) Exch. 468; 4 Exch. Rep. 128.

In an action for damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed. *Dunlop v. Higgins*, 1 H. L. Cas. 381.

An auctioneer entered into an agreement on behalf of A to sell certain premises to B, without having communicated to A that B was in treaty for such premises. A had himself previously sold the premises to another party, and therefore could not fulfil the contract so made with B, whereupon B sued A for non-fulfilment of his contract:—Held, that, under these circumstances, B was not entitled to recover damages for the loss of his bargain. *Tyrer v. King*, 2 Car. & K. 149.

(H) STAMP.

[What memoranda do not require a stamp, see (D) CONSTRUCTION. (f) *When Time the Essence of the Contract.*]

CONTRIBUTION.

[See ADMINISTRATION OF ESTATE, Marshalling Assets.]

A banking company advanced a sum of money to a club, and afterwards brought an action against M, one of the members, for the whole debt. He made an arrangement with the bank for stopping the action, according to the terms whereof he gave to the bank security for their debt, and they undertook to bring other actions against other members of the club, who were to be named by him. The bank, by the direction of M, commenced an action against another member of the club, G, who entered into communication with M's solicitor, and paid to him a sum of money, which was applied in part satisfaction of the debt due to the bank, and if such payment had not been made, the bank, who were pressing for payment, would have entered up judgment against M:—Held, that after the contribution

by G, he ought not to be proceeded against for the benefit of M, and that the bank had, by their arrangement with M, become affected by the equities which existed between him and G, and that G was entitled to an injunction to restrain the bank from proceeding with their action against him. *Gillespie v. Barnwell*, 17 Law J. Rep. (N.S.) Chanc. 279.

The owner of estates in Berkshire and Oxfordshire covenanted on his marriage to convey to trustees such part of them as should be of the annual value of 900*l.* to the use of himself for life, with remainder to the use and intent that his wife should receive for her jointure 800*l.*, to be charged on the same hereditaments. The settlor not having made any settlement in pursuance of the covenant, by his will, confirming the settlement, devised his estates in Berkshire and Oxfordshire to his wife for life. He afterwards, by deed, revoked his will, as to the estates in Oxfordshire, which descended to his heir-at-law. The jointress insisted that she was entitled to the Berkshire estate for life, free from any contribution towards the jointure, and that the Oxfordshire estates were exclusively liable to satisfy the covenant:—Held, that the two estates were liable to contribute rateably to the satisfaction of the covenant. *Eyre v. Green*, 2 Coll. C.C. 527.

By the terms of the resolutions, on the formation of a company for the purpose of founding a colony, certain trustees had the controul of an expedition to explore the district, and it was resolved that the expense of the expedition should not exceed a given sum, and that subscribers were not to be liable beyond that amount. On the arrival in the country of the persons forming the expedition, they were seized and thrown into prison, and in consequence the project failed, and the loss greatly exceeded the fixed limit:—Held, that the trustees could not call on the subscribers for contribution beyond that amount. *Gillan v. Morrison*, 1 De Gex & S. 421.

CONUSANCE.

It is not an invariable rule that the affidavit annexed to a claim of conusance shall not be answered by counter affidavits. And where the University of Cambridge claimed conusance in the case of B and C, in an action of trespass, and the affidavits stated them to be servants of the University, called proctor's men, such counter-affidavit alleging that they were constables appointed under the statute 6 Geo. 4. c. 97, and that the action was brought against them in respect of acts done by them in execution of their said office, was held to be a sufficient answer.

Held, also, that it was no objection to the affidavits in support of the claim that they were sworn before the partner of the attorney appointed by the University. *Turner v. Bates*, 10 Q.B. Rep. 292.

CONVERSION AND RECONVERSION.

[See DEVISE; Trust for Sale—LEGACY; Specific and Demonstrative; Residue.]

Testator bequeathed all his personal estate to trustees, and directed them to convert it into money and to pay the interest to certain persons for their

ives, then to invest the principal in the purchase of lands; it being also understood that where his money or personal estate might be lying on undoubted real or personal security, such securities might be only renewed in the names of the trustees. The testator's personal estate consisted in part of long annuities:—Held, that the *cestuis que trust* for life of the personally were not entitled to receive the long annuities, but that they must be converted into consols. *Preston v. Melville*, 15 Sim. 35.

A testator devised and bequeathed the residue of his estate and effects, consisting of freehold and personal property, to trustees, upon trust to call in all accounts due to him, and in case there should not be sufficient to satisfy the annuity thereafter given to his wife, then upon trust to sell all his real and personal estate, and out of the income of the produce thereof, and the rents of his real estates until the same should be sold, to pay his wife an annuity of 300*l.* per annum. The rents of the estates were not sufficient to satisfy the annuity, but no part of the real property was sold till after the death of the widow, at which period a considerable sum was due for arrears of the annuity:—Held, that the trust for sale arose immediately upon its being ascertained that the rents were not sufficient for the annuity; that, consequently, there was a direction for the conversion of the real estate, and that the residue must bear the character of personal property. *Ward v. Arch*, 16 Law J. Rep. (n.s.) Chanc. 66; 15 Sim. 389.

A testatrix bequeathed the residue of her property to trustees, upon trust, for the maintenance of her daughter during her life, and directed that the whole of the income should be expended in keeping up an exclusive establishment for the comfort and happiness of her daughter. Part of the residuary estate consisted of leasehold houses, the lease of which would expire in 1856:—Held, that the leaseholds must be sold, and the income applied for the benefit of the tenant for life. *Chambers v. Chambers*, 15 Law J. Rep. (n.s.) Chanc. 318; 15 Sim. 183.

A testator, after certain specific bequests, gave as follows: "*the rents and profits, dividends and interest of all the residue of my said property, including my money out at interest and in the public funds, I give to my wife and her assigns during her life; and, after her decease, I give the whole of such residue to be divided equally among my nephews*" (naming them). The residue consisted of leasehold property, consols, long annuities, &c.; but, at the time of his death, the testator was not possessed of any freehold or copyhold property:—Held, that the words, "*rents and profits, dividends and interest,*" were merely an enumeration of the particulars of income, and did not, of themselves, shew that an enjoyment in specie was intended, and that consequently the rule as to conversion must prevail. *Pickup v. Atkinson*, 15 Law J. Rep. (n.s.) Chanc. 213; 4 Hare, 624.

Testator directed all his property, except ready money or monies in the funds, to be converted into money, and the clear monies arising from such conversion to be invested in the names of the executors in 3*l.* per cent. consols, or other Government securities in England:—Held, that Greek bonds, though guaranteed by this country, were not com-

prehended in the word "*funds,*" and that they ought to be converted. *Burnie v. Gelling*, 2 Coll. C.C. 324.

E, by his will, in the first place, directed payment of his debts out of his personal estate. The will then contained a gift of E's real and personal estate to trustees, upon trust, to convert the same, and apply the proceeds, first, in satisfaction of the expenses of the sale, and then in payment of his debts and divers legacies to individuals and charitable institutions, and for other the general purposes mentioned in his will;—sometimes treating his estate as real and personal estate, and at other times as personal estate:—Held, that there was no conversion out and out; and that so much of the fund as arose from real estate resulted to the heir-at-law, and so much as was derived from chattels real resulted to the next-of-kin of the testator; and that only such part of the testator's estate as consisted of pure personalty could be applied in satisfaction of the charity legacies.

It does not follow, because a testator at the commencement of his will has directed payment of his debts out of his personal estate, that he intended to controul a subsequent direction to his executors to pay them out of a common fund of a mixed character.

Semble—Executors, notwithstanding a clause in the will giving them a power of selection of charitable gifts, cannot apply any part of the estate to other purposes than those pointed out by the testator in his will. *Hopkinson v. Ellis*, 16 Law J. Rep. (n.s.) Chanc. 59; 10 Beav. 169.

A direction in a will to sell particular parts of the personal estate is not of much weight on the question of the conversion of the residue; for the rule as to conversion does not proceed on the presumed existence of a definite intention that the property shall be converted, but on the expressed intention that the legatees shall enjoy the property in succession. *Cafe v. Bent*, 5 Hare, 34.

A testator directed his residuary real estate, and such part of his personal estate as was saleable, to be sold by his trustees with all convenient speed, but left the mode and time of sale, and of adjusting his accounts, in the discretion of the trustees; and until such sale and adjustment, the rents and income of the real and personal estate remaining unsold to be paid to the same persons, and in the manner directed with respect to the income of the estate when invested. He then gave the produce of his real and personal estate to his two daughters for their lives, with remainder over, and recommended each of his daughters to pay 25*l.* a year out of her moiety, for the education, &c. of his nephew, until he attained twenty-one:—Held, (there being no improper delay in the conversion,) that the daughters were entitled to the income actually produced by the residuary estate during the interval before the sale or realization of the whole estate, and the investment thereof according to the trusts; but that they were not entitled during that interval to interest on such parts of the residuary estate as were unproductive.

The two sums of 25*l.* were only to be allowed during the lives of the daughters, and were not a charge on their life interests during the minority of the nephew. *Mackie v. Mackie*, 5 Hare, 70.

Where a term of years is bequeathed to A for life, with remainder over to B, and A having joined with the executors in selling and assigning the term to a purchaser for a sum of stock, survives the duration of the term, A, and not B, is entitled to the stock, though the latter was not a party to the sale.

If B (not being a party to the conversion) sues for a portion of the purchase-money in the lifetime of A, whether the Court will do more than secure the fund, or whether it will apportion it,—*quære*. *Phillips v. Sargent*, 7 Hare, 33.

E G by deed conveyed all his real and personal estate (subject as to part of the real estate to a mortgage in fee from E G to a mortgagee then in possession) to trustees in trust to sell for the benefit of his creditors, and to pay the surplus to himself, his executors, administrators and assigns. The trustees did not sell the mortgaged premises, nor complete the trusts for the creditors. E G filed a bill for redemption of the mortgaged estates, to which the trustees were not parties, nor was any mention made of the trust deed, but the suit did not proceed beyond the answers. E G died intestate, and the devisee of his heir-at-law filed a bill for redemption of the same estates, and claimed the benefit of E G's suit:—Held, that the plaintiff was not entitled to redeem, because the real estate of E G had been converted by the deed of trust into personalty, and had not been subsequently reconverted, nor had that deed been revoked by E G.

Observations on revocation by author of deed for benefit of creditors. *Griffith v. Lunell, Griffith v. Ricketts*, 19 Law J. Rep. (N.S.) Chanc. 100; 7 Hare, 299.

Where a testator by will gave his estate, including copyholds of inheritance, leaseholds, merchandise, money in the funds, and cash, to his children and grandchildren, in twenty aliquot shares, and directed some of such shares to be invested in the government funds for the infant legatees, and requested his executors on his death to get his property together and divide it; it was held that the will must be taken to direct a sale and conversion of the copyhold estate. *Mower v. Orr*, 7 Hare, 475.

Testator gave real and personal estate to trustees upon trust to apply the rents, &c. for the benefit of his two daughters, with a direction on the youngest attaining twenty-one to divide the whole into two equal moieties, of which the testator gave one moiety to his two daughters equally, and directed the other to be placed upon government or real securities, and the dividends and interest thereof to be paid to the daughters for their lives, and upon their death the said monies and effects to be divided amongst their children:—Held, that there was no conversion by the will of the moiety of real estate devised to the daughters on the youngest attaining twenty-one. *Cornick v. Pearce*, 7 Hare, 477.

Testatrix gave her executors power to dispose of her freehold estates so that they might be converted into money, and directed that the net money should form part of her personal estate. The executors sold the real estates. The personal estate being sufficient to pay debts and legacies, the heir-at-law and not the next-of-kin held entitled to the money produced by the sale. *Flint v. Warren*, 16 Sim. 124.

A testator, by his will, gave his residuary personal estate to trustees, upon trust, with all con-

venient speed, to collect, get in, or dispose of the same, or to continue the same in or upon any of the parliamentary stocks, or on real securities, or to alter or vary the same, as should be found expedient, and to pay the interest and dividends thereof to his son for life, and after his decease to pay and transfer the stocks, funds, and securities upon which the same should be invested amongst his son's children equally. A considerable part of the testator's estate, consisting of London Dock and Bank stock, and Sewers bonds, was allowed by the trustees (who were the testator's executors) to remain unconverted for several years after the testator's death, and eventually a loss accrued to the estate from the sale of the Bank stock and Sewers bonds, but a gain arose from the sale of the London Dock stock; certain turnpike-road bonds, part of the testator's residuary estate, were never converted by the trustees at all. The payment of the amount due on the Sewers bonds was secured by the rates and assessments, which the Commissioners were authorized by acts of parliament to levy, and the payment of the amount due in respect of the turnpike road bonds was secured on the toll-houses and tolls payable thereat:—Held, that neither the Sewers bonds nor the road bonds were real securities within the meaning of the testator's will; that the loss which arose on the sale of the Sewers bonds and Bank stock could not be set off against the gain that arose from the sale of the London Dock stock, and that the tenant for life was entitled to 3*l*. per cent. per annum, and no more, which would have been the amount payable to him if the conversion had been made within one year from the testator's death. *Robinson v. Robinson*, 18 Law J. Rep. (N.S.) Chanc. 73; 11 Beav. 371.

A and B had conflicting claims to a freehold estate. A proposed that the estate should be sold as soon as possible, and the produce divided between them; and that until the sale a receiver should be appointed to divide the rents in the same proportions. This was accepted by B. Before the sale, which was postponed, A died intestate:—Held, that the property had been converted into personalty, and that A's next-of-kin, and not his heir, were entitled.

In such cases the effect of the act is to be considered, and not the intention, as affecting the real and personal representatives. *Hardey v. Hawkshaw*, 12 Beav. 552.

Testator devised real estate to trustees, on trust, to sell and pay off incumbrances, and to stand possessed of the residue as part of his personal estate. He gave his personal estate to the same persons, in trust, to convert, and with the produce thereof, and of the sales of his real estate, to pay debts and legacies, and to pay the residue to whom he should give the same by codicil. He made no gift of the residue:—Held, first, that the incumbrances were payable out of the real estate; secondly, that the debts and legacies were payable *pari passu* out of the mixed fund, composed of the produce of the realty and personalty; and thirdly, that of the surplus the part arising from realty belonged to the heir, and that from the personalty to the next-of-kin. *Shallcross v. Wright*, 12 Beav. 505.

CONVICTION.

[See REVENUE.]

- (A) INFORMATION.
 - (a) *By and before whom.*
 - (b) *When it does not shew an Offence.*
- (B) FORM OF CONVICTION.
 - (a) *Negating Exceptions.*
 - (b) *Statutory Form.*
 - (c) *Not setting out Evidence.*
- (C) DISTRIBUTION OF PENALTY.
- (D) COSTS OF CONVICTION.
- (E) WARRANT TO ENFORCE.

(A) INFORMATION.

(a) *By and before whom.*

The plaintiff was convicted by the defendant, a magistrate, under 7 & 8 Geo. 4. c. 29, for stealing an ash tree, the property of M. The information, upon which the conviction took place, was made by one R, before D, another magistrate, who summoned the plaintiff. By the conviction the plaintiff was ordered to forfeit and pay, over and above the value of the tree stolen, the sum of 5s., and for the value of the tree 1s., and also to pay 1l. 4s. 6d. for costs, to be paid on or before the 19th of March next, and in default of payment of the said sums, to be imprisoned in the house of correction, at &c., "and there kept to hard labour for one month, unless the said sums shall be sooner paid." It was then ordered that the 5s. should be paid to the overseer, that the 1s. should be paid to M the party aggrieved, and that the 1l. 4s. 6d. should be immediately paid to R, the complainant. An action for false imprisonment having been brought against the defendant,—Held, first, that the conviction was not bad by reason of its not having taken place upon the information of the party aggrieved, nor from its having taken place before a magistrate who did not receive the original information; and, lastly, that it was not invalidated by the mode of adjudicating the costs. *Tarry v. Newman*, 15 Law J. Rep. (N.S.) M.C. 160; 15 Mee. & W. 645.

By statute 52 Geo. 3. c. 93. sched. L, rule 13, power is given to any two Commissioners of Taxes, or one Justice of the peace, &c. being also a commissioner, on complaint &c. to summon any person accused of any offence against that act to appear "before him, or them," and on appearance of the person accused, or in default of his appearance, according to such summons, to proceed and determine the matter in a summary way, and upon proof, &c. to give judgment for the penalty, &c.:—Held, that a conviction by four commissioners upon a summons issued by one (not being a Justice) was bad within the act: and that the proceeding was not rendered valid by the General Conviction Act, 3 Geo. 4. c. 23. s. 2. *Regina v. Griffin*, 15 Law J. Rep. (N.S.) M.C. 120; 9 Q.B. Rep. 155.

(b) *When it does not shew an Offence.*

A conviction, under the 4 Geo. 4. c. 34. s. 3, set out an information made by the agent of D, the master, that T, the servant, had contracted with D to serve him for eleven months as a miner; that T afterwards entered into the service, and did after-

wards, before the term of his said contract was completed, absent himself from his said service, and did thereby then and there neglect to fulfil the same, contrary to the form of the statute, &c. The conviction proceeded to state, that it appearing to the Justice that T was guilty of the offence charged upon him in the said information, the Justice did thereby convict him of the offence aforesaid:—Held, that the information was bad, for omitting to state that the absence of T was without lawful excuse, and that the conviction was, consequently, bad also. *In re Turner*, 15 Law J. Rep. (N.S.) M.C. 140; 9 Q.B. Rep. 80.

(B) FORM OF CONVICTION.

(a) *Negating Exceptions.*

Stat. 8 & 9 Vict. c. 87. s. 2. enacts, that if any foreign vessel shall be found to have been within one league of the coast of the United Kingdom, having on board certain articles, the said articles and the vessel shall be forfeited. Sect. 4. enacts, that "nothing herein contained shall extend to render any vessel liable to forfeiture, if really bound from one foreign port to another, and pursuing such voyage, wind and weather permitting." By section 50, every person, not being a subject of her Majesty, who shall be found on board any vessel liable to forfeiture within one league of the coast of the United Kingdom, is made liable to summary conviction and imprisonment:—Held, by *Coleridge, J.* and *Erle, J.* (*Lord Denman, C.J. dubitante*) that a commitment under the 50th section describing the offence in the words of the 2nd section, was sufficient, without negating the exception in the 4th section.

Held, also, that a conviction in other respects sufficient is not vitiated by the detainer of the defendant for an unreasonable time before the hearing of the information against him. *In re Van Boven*, 16 Law J. Rep. (N.S.) M.C. 4; 9 Q.B. Rep. 669.

(b) *Statutory Form.*

It is not necessary, in a conviction under the 39 Geo. 3. c. 79. s. 15, that the information should be in the name of the Attorney or Solicitor General.

A conviction following the form given in that statute was held sufficient, though the name of the informer (to whom by the statute half the penalty imposed is payable) nowhere appeared therein. *Regina v. Johnson*, 15 Law J. Rep. (N.S.) M.C. 7; 8 Q.B. Rep. 102.

(c) *Not setting out Evidence.*

The return to a writ of *habeas corpus* stated, that the prisoner was in custody under a warrant of commitment, which the return set out, and which, after stating that complaint had been made against J H for absenting himself from service, that the parties had appeared before the Justices, and that witnesses had been examined, proceeded thus—"We do hereby adjudge the complaint to be true, and we do therefore convict the said J H of the said offence," and then directed his committal:—Held, that this instrument was a conviction under the statute 4 Geo. 4. c. 34, as well as a warrant of commitment, and that, as a conviction, it was bad for setting out the evidence. *In re Hammond*, 15 Law J. Rep. (N.S.) M.C. 137; 9 Q.B. Rep. 92.

(C) DISTRIBUTION OF PENALTY.

The statute 17 Geo. 3. c. 56, so far as regards the distribution of the penalties thereby imposed, is repealed by the statute 58 Geo. 3. c. 51.

A conviction, under the 17 Geo. 3. c. 56. s. 10, for having in possession materials suspected to be purloined or embezzled, purported to be made upon the information upon oath of the informer and other witnesses, and concluded by directing the penalty to be paid, applied and distributed as the law directs, according to the form and directions of the statute in such case made and provided:—Held, first, that as the application of the penalty was fixed by law, and the Justices had, therefore, no discretionary power as to its distribution, the conviction rightly awarded it to be applied as the law directs; secondly, that the offence under the 17 Geo. 3. c. 56. s. 10, consists in the party not giving a satisfactory explanation before the Justices, of how he came by the goods suspected to be purloined, and therefore, that the conviction need not state to whom the goods belonged, or the value of them.

Held, also, that the conviction need not state that the party knew the goods to have been purloined: nor that the informer or witnesses were sworn in the presence of the accused; nor that the accused, when before the magistrates, had not applied for time to produce the parties from whom he had received the goods.

Held, also, that it is sufficient, if the conviction substantially follow the form given in the statute; and it is no objection that it states the information to have been given on the oath of the informer and other witnesses, or that it purports to have taken place in a township, or that the information on which the search warrant was granted states only that the informer hath cause to suspect, &c.

Quære—Whether the validity of a conviction, the right to remove which by certiorari is taken away by statute, can be questioned on motion for a *habeas corpus*, the commitment not being before the Court. *In re Boothroyd*, 15 Law J. Rep. (N.S.) M.C. 57; 15 Mee. & W. 1.

(D) COSTS OF CONVICTION.

By the 29 Car. 2. c. 7. a Justice is empowered, in case of a penalty not being paid, to levy it by distress of the offender's goods, or in default of distress to place him in the stocks for two hours, unless the penalty is sooner paid. The 11 & 12 Vict. c. 43. s. 18. enacts, that costs specified in convictions shall be recoverable in the same manner and under the same warrants as any penalty adjudged to be paid by such conviction is recoverable:—Held, that such conviction under the former act which adjudged the offender to pay 5s. penalty and 11s. costs, and if not paid to be levied by distress, and, in default of sufficient distress, adjudged him to be set in the stocks for two hours, unless the said several sums and all costs and charges of the distress be sooner paid, could not be supported. *Regina v. Barton*, 18 Law J. Rep. (N.S.) M.C. 56; 13 Q.B. Rep. 389.

The declaration contained two counts, one for assaulting and imprisoning the plaintiff, and the other for seizing his goods. The defendants were

Justices, and had convicted the plaintiff under 6 & 7 Vict. c. 68. for illegally performing stage plays. The conviction (which had been quashed by the Sessions) contained no adjudication of costs, but the warrant of distress (which was not made returnable at any time certain) recited the conviction as adjudging costs, besides the penalty. The 19th section of the 6 & 7 Vict. c. 68. provides, that in default of payment of any penalty, together with the costs, the same may be levied by distress, and for the want of a sufficient distress that the offender may be imprisoned. After the adjudication by the defendants, and before any distress warrant issued, the plaintiff was, by a verbal order of the defendants, detained in custody for the purpose of enforcing payment of the penalty, and afterwards the penalty and costs were levied by distress of his goods.

Held, that the imprisonment was not authorized by the 5 Geo. 4. c. 18, as it was not for the purpose of ascertaining whether the plaintiff had any goods whereon the distress could be levied, and as the warrant named no day for its return.

Quære—Whether a verbal order to detain, under the 5 Geo. 4. c. 18, is valid.

Held, also, that the 6 & 7 Vict. c. 68. s. 19. did not authorize a distress for costs, when they were not adjudged by the conviction.

Held, also, that there being an excess of jurisdiction by the defendants, an action of trespass might be maintained against them under the 11 & 12 Vict. c. 44. s. 2. *Leary v. Patrick*, 19 Law J. Rep. (N.S.) M.C. 211; 15 Q.B. Rep. 266.

[See (A) Information.]

(E) WARRANT TO ENFORCE.

Where Justices convicted a party, but refused to take any steps to enforce the conviction, under an idea that they would thereby render themselves liable to a penalty under the Habeas Corpus Act, this Court, in its discretion, refused a mandamus to the Justices to compel them to issue a warrant of commitment or of distress upon the conviction. *Ex parte Thomas*, 16 Law J. Rep. (N.S.) M.C. 57.

A mandamus to issue a warrant of commitment on a conviction refused. *In re Williams*, 9 Q.B. Rep. 976.

COPYHOLD.

[See EVIDENCE—LAND-TAX.]

(A) CUSTOM.

- (a) *To take Stone.*
- (b) *To devise.*
- (c) *Heriot Custom.*

(B) SURRENDER AND ADMITTANCE.

- (a) *Trustees.*
- (b) *Company.*
- (c) *Heir of Copyholder.*
- (d) *Feme Covert.*
- (e) *Fines, Fees, and Stamps.*
- (f) *Evidence.*

(C) SEIZURE QUOUSQUE.

- (D) RIGHT OF LORD TO COMPENSATION [See (C) Seizure quousque].

(A) CUSTOM.

(a) To take Stone.

Suit by a copyholder against a tenant of lands within the manor to restrain taking stone from lands in his occupation. The defendant by his answer alleged that it was and had been a common practice in the manor to remove the stone which lay immediately under the surface for the benefit of cultivation. At the hearing, the Court decreed a perpetual injunction, the defendant declining to try his right to take the stone at law. *Cuddon v. Morley*, 7 Hare, 202.

(b) To devise.

No presumption will be made against the right of a party to devise his copyhold estate. And, therefore, where it was stated, in a special case, that before the statute 7 Will. 4. & 1 Vict. c. 26, there was, in a particular manor, "no instance of" a devise, by a customary tenant, of any messuages, &c. in the manor, but that it had frequently happened that when a party was desirous of disposing of his customary messuages after his death, he surrendered the same to a third person, declaring the trusts of the equitable estate by a separate instrument:—Held, first, that this did not amount to an express statement of the want of a custom to devise or surrender to the use of a will, and the Court would not conclude against the existence of such a custom; secondly, that it did not amount to a statement of custom to devise in any particular manner (at all events, as applicable to the legal estate); and, therefore, that a devise of customary messuages, &c., made before the passing of the statute in question, was valid. *Doe d. Dand v. Thomson*, 15 Law J. Rep. (n.s.) Q.B. 88; 7 Q.B. Rep. 897.

(c) Heriot Custom.

A heriot may be due by custom on the death of a tenant of free lands of a manor held in fee simple.

In order to prove such a custom, evidence of presentments and payment of heriots in respect of other lands in the same manor was admitted. *Damerell v. Protheroe*, 16 Law J. Rep. (n.s.) Q.B. 170; 10 Q.B. Rep. 20.

To support the proof of a custom for the lord of a manor to take only one heriot from a tenant whatever the number of his holdings might be, a paper purporting to be a copy of an old decree of the Court of Chancery in a suit between a copyholder and the lord, produced by a witness who succeeded his brother as lord of the manor, and who stated that he had found it amongst his brother's papers, is admissible in evidence as against a subsequent lord, evidence having been given of an ineffectual search for the original. *Price v. Woodhouse*, 18 Law J. Rep. (n.s.) Exch. 271; 3 Exch. Rep. 616.

(B) SURRENDER AND ADMITTANCE.

(a) Trustees.

Copyholds were surrendered to the use of a will, whereby they were devised to trustees for a term of years, with a proviso for cesser, and subject thereto to A for life, remainder to his first and other sons in tail. On the death of the testator, the trustees of the term were admitted and a fine paid. The trusts

of the term became satisfied, and A had a son who became tenant in tail in remainder.

By a private act of parliament certain new trustees, therein named, were enabled to sell the copyholds, with power to them "by any surrender by them, according to the custom of the manor, and in the same manner as if such trustees were the copyhold tenants of the same, to surrender the copyholds so to be sold to the use of the purchaser in fee, to be holden at the will of the lord, according to the custom," &c. freed and discharged from the limitations of the will.

The trustees themselves took no estate under the act. By an express clause the rights of all persons except those interested under the will were saved. The new trustees sold the copyholds, and tendered a formal surrender to the use of the purchaser in fee, which the steward of the manor refused to accept, on the ground that the trustees required to be first admitted tenants of the manor, and that according to the custom of the manor the estate tail could only be barred by a surrender, on which a separate fine was payable to the lord.

Held, that the lord was bound to accept the surrender by the trustees, which operated to bar the tenant for life and remainder-man, who had been admitted by virtue of the admission of the trustees of the term. *Regina v. the Manor of Weedon Beck*, 18 Law J. Rep. (n.s.) Q.B. 289.

(b) Company.

By an act of parliament, under which an incorporated company had power to purchase land for the formation of a canal, persons having property upon the line of the canal were to convey any right, title, or interest in such property to the company, by a conveyance in the form pointed out by the act which was adapted only to the case of freeholds. A copyholder in fee conveyed, under the act, his interest in certain lands to the company. Upon the death of the copyholder, without having surrendered, the lord of the manor refused to admit his heir or the canal company:—Held, that the customary heir of the copyholder ought to be admitted by the lord to the copyhold premises, and that such heir, when admitted, was to hold as trustee for the company, who were to pay the fines and fees upon the admission. *The Grand Junction Canal Co. v. Dimes*, 16 Law J. Rep. (n.s.) Chanc. 148; 15 Sim. 402; affirmed 17 Law J. Rep. (n.s.) Chanc. 206.

(c) Heir of Copyholder.

Where copyhold lands descendible from ancestor to heir, according to the custom, are held for the joint lives of the lord and the tenant for the time being, and the copyholder is admitted to hold to him (not saying "and his heirs") for the joint lives of himself and the lord, according to the custom, &c.,—Held, that the heir of the copyholder cannot maintain ejectment before admittance. *Doe d. Dand v. Thompson*, 18 Law J. Rep. (n.s.) Q.B. 326.

(d) Feme Covert.

A woman seised of copyholds executed a surrender jointly with her husband to such uses as her husband should appoint, and in default of appoint-

ment, to him in fee, but no admittance was entered under the surrender. The husband then executed a conveyance of the copyholds to a purchaser, but still no admittance was entered. The plaintiff, who claimed under the purchaser, filed a bill to restrain an action of ejectment by the copyhold heir of the wife, and to compel a surrender to complete his title:—Held, that the husband of the copyholder had no power to make perfect that title which he, as a volunteer, and without consideration, took imperfectly, and no person claiming under him could ask that his defective title should be made complete; and the bill was dismissed, with costs. *Sowerby v. Gutteridge*, 18 Law J. Rep. (N.S.) Chanc. 9.

(e) *Fines, Fees, and Stamps.*

Copyhold land was devised to A for life, remainder to five persons, as tenants in common; A was admitted. After his death, the five, having contracted to sell to B, severally surrendered to the use of B in fee, which surrender was accepted by the lord:—Held, that B, on claiming admittance, must pay five fees, and that the admittance would require five stamps. *Regina v. Eton College*, 8 Q.B. Rep. 526.

Testator devised certain copyhold tenements to his son W M for life, remainder to the children of W M as tenants in common in tail, remainder as to one moiety to his daughter P, for life, remainder to her children as tenants in common in tail, and as to the other moiety to his daughter S, for life, remainder to her children as tenants in common in tail. W M was admitted, and died in 1844, without issue, P and S having previously died, leaving issue. After the death of W M, the only child of P and the four children of S surrendered to T B, by the description of "all that piece or parcel of land late in the occupation of W M":—Held, that, on the admittance of T B, five different fines, and five sets of fees, and five stamp duties were payable. *Regina v. the Manor of Everdon*, 16 Law J. Rep. (N.S.) Q.B. 18.

Debt by a steward of a manor for fees. An act of parliament for inclosing the parish of S directed the Commissioners to allot the uninclosed lands in S amongst the owners thereof in proportion to their rights and interests in the same; that the allotted lands should be held by the allottees under the same tenures, rents, and customs, and services as the lands in respect of which they were allotted would have been in case the act had not been passed; that where the allotted lands were held under different titles or for different estates, the Commissioners should distinguish the lands held for each of such estates and titles, and set out the allotments accordingly. The Commissioners allotted to A, who was the owner of sixteen separate copyhold tenements in the uninclosed lands in S, five pieces of land, consisting in the whole of forty-nine acres, but did not distinguish in respect of which of the sixteen tenements they had so allotted them. A afterwards surrendered to the defendant the fifth allotment made to him, consisting of five acres, and the defendant was admitted to the same. Before the passing of the Inclosure Act, when any person was admitted in severalty to a part of a copyhold tenement held of the manor, the steward

was entitled upon admission to the same amount of fees as if such person had been admitted to the whole of such tenement:—Held, in an action by the plaintiff, as steward of the manor, to recover sixteen fees in respect of the defendant's admission to the fifth allotment, that that allotment must be considered to consist of a part of each of the sixteen tenements in the uninclosed lands, and that, therefore, the plaintiff was entitled to sixteen fees in respect thereof. *Evans v. Upsher*, 16 Law J. Rep. (N.S.) Exch. 185; 16 Mee. & W. 675.

(f) *Evidence.*

In order to prove the admittance to a copyhold tenement, an entry was produced of an admittance which purported to be at a special court baron for the manor. Evidence was given that customary tenants attended the court:—Held, that the admission must be taken to be at a customary court baron, and therefore regular. *Doe d. Evans v. Walker*, 19 Law J. Rep. (N.S.) Q.B. 293; 15 Q.B. Rep. 28.

(C) SEIZURE QUOUSQUE.

By the Grand Junction Canal Act (33 Geo. 3. c. lxxx.) a form of conveyance is provided, by which, in consideration of a sum of money, the owner of land grants and releases all his right, title and interest to the company, *habendum* to the company for ever, by virtue and according to the true intent and meaning of the act, which form of conveyance it is enacted shall be valid and effectual. J S being seised of copyhold land of the manor of R, conveyed it by deed in the statutory form to the company, the lord of the manor not being a party to the deed:—Held, that the conveyance only transferred all that J S could himself transfer without the lord, but that it left the lord's rights untouched. Held also, that copyhold land, though not expressly named, was included in the Canal Act.

The land having been formed into the canal, J S died, leaving an infant heir, and having devised his copyholds to devisees in trust, who were, in pursuance of the will, admitted tenants of all the land, except so much as formed part of the canal. After proclamations made for the party entitled as tenant to come in and be admitted, the lord seised *quousque*, and brought ejectment, and afterwards an action for the mesne profits against the company:—Held, that the lord was entitled to treat the company as trespassers after the death of J S, and was not compellable or entitled to receive compensation under the Canal Act. Held, also, that (the infant heir, and not the devisees, taking the legal estate) the common law right of the lord to seize *quousque* was not taken away by 11 Geo. 4. & 1 Will. 4. c. 65.

The special verdict in the action for mesne profits found, that the proclamations for the party entitled to come in and be admitted were made at three courts not found to be consecutive courts; the first and third of which were stated to be general courts baron, but the second was simply called a court baron; that at the last court a warrant issued to the bailiff to seize the land into the hands of the lord, and that the bailiff did accordingly, in pursuance of the warrant, seize the lands into the hands of the lord until a tenant should come and be

admitted; and that an action of ejectment was afterwards brought, in which judgment was obtained, and a writ of possession executed:—Held, that the seizure *quousque* was valid, although the warrant authorized an absolute seizure, no warrant being necessary; and as the act was done by the bailiff or agent, and for the benefit of the lord, who was at liberty to adopt it.—Held, also, that the absence of a finding that the proclamations were made at consecutive general courts baron did not affect the plaintiff's right to judgment, as the judgment in ejectment gave him a good title by estoppel, against which the jury were at liberty to find the truth, which they had not done. *Dimes v. the Grand Junction Canal Co.*, 16 Law J. Rep. (N.S.) Q.B. 107; 9 Q.B. Rep. 469.

(D) RIGHT OF LORD TO COMPENSATION.

[On Statutory Change of Tenure; see (C) Seizure *quousque*.]

COPYRIGHT.

(A) COPYRIGHT OF BOOKS AND OTHER PUBLICATIONS.

(a) *Title to the Copyright.*

(b) *Actions and Suits for Infringement of Copyright.*

(1) *Joinder of Parties.*

(2) *Pleading and Evidence.*

(3) *Costs.*

(B) MUSICAL COMPOSITIONS AND DRAMATIC ENTERTAINMENTS.

(C) COPYRIGHT OF DESIGNS.

The law as to protection of works in the colonies amended by 10 & 11 Vict. c. 95; 25 Law J. Stat. 267.

(A) COPYRIGHT OF BOOKS AND OTHER PUBLICATIONS.

(a) *Title to the Copyright.*

An *alien amy*, the author of a work first published in England, has a copyright in it whether it be composed in this country or abroad.

A contemporaneous publication abroad does not defeat the copyright here.

A special case stated that the copyright was sold by letter to the plaintiff, and that such a sale was valid by the law of the country where it was made:—Held, that the plaintiff was an "assign" of the author, under the 5 & 6 Vict. c. 45. ss. 2, 3, and as such entitled to copyright. *Cocks v. Purday*, 17 Law J. Rep. (N.S.) C.P. 273; 5 Com. B. Rep. 860.

The assignee of a foreign author of a work published in England, without having been before published abroad, has a copyright in this country.

In an action for infringing the copyright in an opera, the defendant, in order to prove a publication abroad before June 1831, offered in evidence the statement of a witness that he had seen in print at Milan many parts of the opera prior to that date:—Held, that this evidence was inadmissible without accounting for the non-production of the original printed document.

The statement of a witness that he had heard, before June 1831, persons in society sing parts of an opera at a piano, with printed music before them, is no evidence that the contents of this printed music corresponded with the opera in question. *Boosey v. Davidson*, 18 Law J. Rep. (N.S.) Q.B. 174; 13 Q.B. Rep. 257.

An assignment of the copyright of a song, under statute 8 Anne, c. 18. s. 1, in order to entitle the assignee to maintain an action for a piracy, must be by an instrument in writing, attested by two witnesses. *Davidson v. Bohn*, 18 Law J. Rep. (N.S.) C.P. 14; 6 Com. B. Rep. 456.

A person who writes words to an old air, and procures an accompaniment, and publishes them together, is entitled to copyright in the whole work, and may describe his title accordingly in a declaration.

B wrote words to an old air, and got his friend H to compose an accompaniment; and B agreed in writing with L to execute a proper assignment of the whole work to him or any persons he might name. B accordingly executed a deed of assignment to L & C, the plaintiffs. The defendant published a copy of the whole work. An action having been brought for the infringement of the copyright, the defendant gave notice of objections to the plaintiffs' title under 5 & 6 Vict. c. 45. s. 16, in which he stated that the plaintiffs were not the owners of the copyright, but did not state who were:—Held, first, that B had copyright in the whole work; secondly, that the defendant was not entitled under his notice to object that no assignment of the accompaniment from H to the plaintiffs had been proved, even although the objection arose on the plaintiffs' case; and, thirdly, that the agreement to assign was executory, and did not operate as an assignment so as to render the subsequent deed of assignment inoperative. *Leader v. Purday*, 18 Law J. Rep. (N.S.) C.P. 97; 7 Com. B. Rep. 4.

A foreign author, residing and composing his work abroad, sending it to this country and first publishing it here, does not acquire any copyright in England. And a British subject who purchases of such foreign author such right as the latter had in his own country does not stand in a better situation in this country than the foreign author. Assuming, however, a foreign author and his assigns to be by law entitled to copyright in this country, where he means to publish contemporaneously in England and abroad, neither he nor his assigns are disentitled to copyright by reason of the publication having taken place abroad at an earlier hour on the same day than a corresponding publication took place in this country. *Boosey v. Purday*, 18 Law J. Rep. (N.S.) Exch. 378; 4 Exch. Rep. 145.

Upon motion for an injunction to restrain the sale of a periodical containing articles copied from the plaintiffs' Gazette, it was held that the plaintiffs had not made out such a title to the copyright in the articles as was required by the statute 5 & 6 Vict. c. 45, since it appeared that although the editor was paid for supplying the articles and other contributions upon the terms that all copyright in the Gazette and in all literary matters supplied thereto should belong to the plaintiffs, yet it was not stated that the contributors had been actually paid for their contributions. Injunction refused,

with liberty to the plaintiffs to bring an action. *Brown v. Cooke*, 16 Law J. Rep. (N.S.) Chanc. 140.

The plaintiff obtained an injunction to restrain the defendants from printing and publishing an article or essay as a separate or distinct work or otherwise than as a part of a work called the *Encyclopædia Metropolitana*. The plaintiff stated that the article was written solely for the *Encyclopædia*, that no agreement had been executed between him and the publishers, and that he did not intend to give any additional right beyond that of publishing the article in the *Encyclopædia*. A motion to dissolve, on the ground that the plaintiff had parted with all his right in the article, and that, in the absence of any agreement to the contrary, it was the custom of the trade that articles furnished to publications of this nature might be reprinted in a separate form,—was refused, with costs. *Bishop of Hereford v. Griffin*, 17 Law J. Rep. (N.S.) Chanc. 210; 16 Sim. 190.

A bill filed by A against C stated that A and B had together made various etchings for their own amusement, and without any view to publication, and that C had improperly and surreptitiously obtained impressions of those etchings, and had printed and advertised for sale a catalogue of the etchings. Upon affidavits in support of the bill, an injunction was granted to restrain C from publishing the catalogue. C put in an answer, in which he stated that he believed that the impressions had not been improperly obtained, but did not suggest any mode in which they could have been properly obtained. Upon a motion by C, after answer, for dissolving the injunction, it was ordered that the injunction should be continued. *Prince Albert v. Strange*, 18 Law J. Rep. (N.S.) Chanc. 120; 1 Mac. & G. 25; 1 Hall & Tw. 1.

(b) *Actions and Suits for Infringement of Copyright.*

(1) *Joinder of Parties.*

The bill stated that one of the plaintiffs had composed a book, and that all the plaintiffs had caused the book to be printed and published for their joint benefit, and the said book had been duly registered by the plaintiffs as proprietors of the copyright thereof at Stationers' Hall, and the copyright had ever since remained in the plaintiffs, for their joint benefit. The bill also alleged that the defendants had published a book, in which numerous passages were copied from the plaintiffs' book, and it prayed an injunction to restrain the sale of the defendants' book:—Held, upon motion, for the injunction, that under the Copyright Act, 5 & 6 Vict. c. 45, the plaintiffs had a joint right to sue.

Held, also, upon comparison of the two books, that in the defendants' book there had been such copying from the plaintiffs' book as would entitle them to the injunction. *Stevens v. Wildy*, 19 Law J. Rep. (N.S.) Chanc. 190.

(2) *Pleading and Evidence.*

In an action for the infringement of a copyright, the plaintiff will not be allowed a count on the statute 5 & 6 Vict. c. 45, in conjunction with a count for the infringement of the same copyright at common law.

DIGEST, 1845—1850.

Under a count on the above statute for infringing a copyright, setting forth the requisitions of the statute, and concluding *contra formam statuti*, the plaintiff may set up his common law right if he fail to bring himself within the operation of the statute. *Boosey v. Tolkien*, 17 Law J. Rep. (N.S.) C.P. 137; 5 Dowl. & L. P.C. 549; 5 Com. B. Rep. 476.

In an action on the case for an infringement of the copyright of a certain book, the defendant pleaded several pleas, denying that the plaintiff was the proprietor of the copyright; that there was any copyright subsisting; that the books were first published in England; and that the copies complained of were unlawfully printed:—Held, on application by the plaintiff to have the notice of objections, delivered with the defendant's pleas under the 5 & 6 Vict. c. 45, s. 16, amended, that the alleged first publication having taken place abroad, and so far back as the year 1831, it was sufficient for the defendant to state the year of the first publication, and that it was not necessary that he should specify the day or month. But that he was bound to state the name of the party whom he alleged to be the proprietor or first publisher, the title of the work, the place where, and time when, the first publication took place.

Held, also, that he was not entitled to object that "some person whose name is to the defendant unknown, and not the plaintiff, was the proprietor of the said copyright." Nor "that the plaintiff was not himself the author." Nor "that the work was not first printed or published in the 'British dominions.'" Nor that the plaintiff never acquired any title by assignment or otherwise, to the copyright. Nor that there was no valid assignment, &c. Nor "that there is no copyright in a work first published out of the British dominions, under such circumstances as the books in question were published."

But that he might object that A, B, if any one, and not the plaintiff, was the proprietor; and that at the time of committing the alleged grievances no copyright in the work was subsisting. *Boosey v. Davidson*, 4 Dowl. & L. P.C. 147.

(3) *Costs.*

The costs of a suit to protect a copyright will follow the result of an action at law, to try the validity of the copyright, although the mode of defence in the action directed at law may have been improper.

Where upon a bill filed to restrain the alleged infringement of a copyright, the bill was retained, with liberty for the plaintiff to try the title by an action at law, and the action was brought and failed, it is of course that the bill should be dismissed with costs. *Chappell v. Purday*, 16 Law J. Rep. (N.S.) Chanc. 261; 2 Ph. 227.

(B) *MUSICAL COMPOSITIONS AND DRAMATIC ENTERTAINMENTS.*

The plaintiff was the original composer of the music of a song of a narrative character, which he sang publicly for profit, and accompanied it by gesture and expression. The defendant announced by handbills the performance of, and subsequently performed, the plaintiff's song at Crosby Hall, a

place licensed for music and dancing under 25 Geo. 2. c. 36.

In an action for penalties under the 5 & 6 Vict. c. 45,—Held, first, that the plaintiff's song was a musical composition within the 20th section of that act. Secondly, that Crosby Hall was a place of dramatic entertainment within the 3 Will. 4. c. 15. Thirdly, that the allegation in the declaration in the terms of the statute, that the plaintiff had the "sole liberty of representing a certain musical composition," was a sufficient statement of the plaintiff's right. Fourthly, that it was not necessary that the plaintiff, who was the assignee of the copyright of the words, should be registered under section 14. before bringing the action. *Russell v. Smith*, 17 Law J. Rep. (n.s.) Q.B. 225; 12 Q.B. Rep. 217.

A person who lets for hire by the evening a place of dramatic entertainment for the public performance of songs and music, and provides the hirer, who performs songs and music which he has not liberty to perform, with lights, benches, &c., is not liable to pay damages to the author for causing or permitting to be represented or performed a musical composition without the author's written consent.

Under the 3 & 4 Will. 4. c. 15. s. 2. such person only is liable to an action who by himself or his agent actually takes part in a representation which is a violation of copyright. *Russell v. Briant*, 19 Law J. Rep. (n.s.) C.P. 33; 8 Com. B. Rep. 836.

(C) COPYRIGHT OF DESIGNS.

The acts relating to the copyright of designs extended and amended by 13 & 14 Vict. c. 104; 28 Law J. Stat. 315.

The publication of a book of designs by the owner of the copyright, under 5 & 6 Vict. c. 100, does not give any right to the purchaser of such book to apply the designs to articles for the purpose of sale without the permission of the proprietor.

The copies of a duly registered design published in a book for sale need not have any registration mark attached to them. *Branchardiere v. Elvery*, 18 Law J. Rep. (n.s.) Exch. 381; 4 Exch. Rep. 380.

The protection given by 6 & 7 Vict. c. 65. to any new or original design for any article of manufacture having reference to some purpose of utility so far as such design shall be for the shape or configuration of such article, "is not clearly applicable to the design of a 'protector label,'" which consisted in making in the label an eyelet hole and lining it with a ring of metal, through which a string attaching the label to packages passed. The Court refused to grant an injunction before the hearing against an infringement of such a design.

Quære—The meaning of "shape or configuration" in the act. *Margetson v. Wright*, 2 De Gex & S. 420.

Whether, in the condition of copyright mentioned in section 4. of the Designs Copyright Act (5 & 6 Vict. c. 100.) that the design has, before publication, been registered, the term publication is limited to publication after the design has been embodied and introduced into some fabric—*quære*. *Dalglish v. Jarvie*, 2 Mac. & G. 231; 2 Hall & Tw. 437.

Under the 5 & 6 Vict. c. 100. the proprietor of a design protected by the act is entitled to an injunction restraining not merely the sale but the manufacture of any article to which the design is applied during the period of protection.

Form of order on compromise staying all proceedings except on breach of an injunction. *Macrae v. Holdsworth*, 2 De Gex & S. 496.

CORN.

Duties on the importation of corn regulated by 9 Vict. c. 22; 24 Law J. Stat. 62.

CORONER.

A coroner's inquisition on paper only, instead of parchment (but not having been quashed), is admissible in evidence, not as an inquisition proving the statements therein contained, but to shew that an inquiry into the subject-matter of it did in fact take place. *Regina v. Gregory*, 15 Law J. Rep. (n.s.) M.C. 38; 8 Q.B. Rep. 508.

A coroner's inquisition finding a person *felo de se* will be quashed if written on paper; it should be written on parchment. *Regina v. Whalley*, 19 Law J. Rep. (n.s.) Q.B. 14; 7 Dowl. & L. P.C. 317.

The Quarter Sessions has a discretion as to allowing the fees payable to coroners under 25 Geo. 2. c. 29, in case of inquisitions duly taken, and the Court of Queen's Bench will not controul that discretion.

A coroner is entitled to be reimbursed the necessary expenses of holding inquests (such as fees to medical men, payments to the jurors, and for hire of rooms, &c.) which he is compelled to discharge by 7 Will. 4. & 1 Vict. c. 68, the power of examining him on oath given to the Quarter Sessions by sections 3 of that statute, being only with regard to these expenses having been actually incurred, and not to the propriety of holding the inquest. *Regina v. the Justices of Carmarthenshire*, 16 Law J. Rep. (n.s.) M.C. 167; 10 Q.B. Rep. 796.

Certain freeholders of the county of S presented a petition to the Lord Chancellor praying that a writ issued for the election of a coroner might be set aside, or its execution stayed until after a meeting of the Quarter Sessions, at which the magistrates of the county intended to propose a division of the office. The Lord Chancellor, in the absence of any authority in support of the application, refused to interfere. *In re the Coronership of Salop*, 1 Mac. & G. 377.

CORPORATION.

[See COMPANY—MUNICIPAL CORPORATION.]

COSTS, AT LAW.

[INDEMNITY FOR, see BANKRUPTCY.]

- (A) IN GENERAL.
 - (a) *Motions, Rules, and other Proceedings.*
 - (b) *Costs in the Cause.*
 - (c) *Costs on Indictment after Removal by Certiorari.*
 - (d) *After Reversal of Judgment by Court of Error.*
- (B) PLAINTIFF'S RIGHT TO.
 - (a) *Costs of the Day.*
 - (b) *Costs of Issues of Fact after Judgment on Demurrer.*
 - (c) *In Action on a Judgment under 43 Geo. 3. c. 46.*
 - (d) *Under 4 Anne, c. 16.*
 - (e) *Deprivation of by Small Debts Acts.* [See also (I) Suggestion on the Roll.]
- (C) DEFENDANT'S RIGHT TO.
 - (a) *Costs of the Day for not proceeding to Trial.*
 - (b) *Costs of the Cause.*
 - (c) *Under 43 Geo. 3. c. 46.*
 - (d) *After Verdict on Plea of Coverture.*
 - (e) *Costs of Nonsuit.*
 - (f) *After Amendment.*
- (D) SECURITY FOR COSTS.
 - (a) *Where Money paid into Court in Lieu of Bail.*
 - (b) *By Mortgagee of Plaintiff's Claims.*
 - (c) *By Insolvent.*
 - (d) *By Attorney of insolvent Plaintiff.*
 - (e) *By Representatives of Plaintiff in error.*
- (E) TAXATION OF COSTS.
 - (a) *Notice of.*
 - (b) *Rate of.*
 - (c) *Order for Payment.*
 - (d) *As between Attorney and Client.*
 - (e) *Witnesses and Documents.*
 - (f) *Reviewal of.*
- (F) PAYMENT OF, HOW ENFORCED.
 - (a) *By Attachment.*
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- (G) CERTIFICATE.
- (H) SETTING OFF COSTS.
- (I) SUGGESTION ON THE ROLL.
 - (a) *Motion for Leave to enter.*
 - (1) *In general.*
 - (2) *After Judgment.*
 - (3) *Judgment by Default.*
 - (4) *What Cases are within the Jurisdiction of inferior Courts.*
 - (5) *Pauper Plaintiff.*
 - (6) *Action on Judgment for Debt under 20L.*
 - (7) *Affidavits.*
 - (b) *After Notice not to trespass.*

(A) IN GENERAL.

[See SALE, Bill of Sale.]

(a) *Motions, Rules, and other Proceedings.*

Where, the defendant having changed the venue, the plaintiff has brought it back upon the ordinary

undertaking, the Court will, upon the application of the plaintiff, discharge that rule upon payment of the costs; and if the rule *nisi* for discharging that rule be drawn up on the terms of paying to the defendant the costs of and occasioned by the rule to change the venue, as well as of the application, the Court will not grant the defendant the costs of shewing cause. *Robinson v. Crewdson*, 15 Law J. Rep. (N.S.) C.P. 152.

A party who shews cause successfully in the first instance against a motion for a rule which, if granted, would cause delay to the plaintiff, and so operate to his prejudice, will be allowed the costs of coming to oppose the application. *Rennie v. Beresford*, 15 Law J. Rep. (N.S.) Exch. 78; 15 Mee. & W. 78; 3 Dowl. & L. P.C. 464.

Where, after verdict, the parties, at the suggestion of the Court, agreed to state a special case, and the plaintiff accordingly drew and delivered to the defendant a case which was rendered abortive by the defendant's default,—Held, that the plaintiff, who had the general costs of the cause, was not entitled to any costs of the abortive special case. *Foley v. Botfield*, 16 Law J. Rep. (N.S.) Exch. 3; 16 Mee. & W. 65; 4 Dowl. & L. P.C. 328.

The resolution of Trinity term, 3 Vict., declaring the costs of the application to be consequential on making a Judge's order a rule of court, applies where the party sought to be charged is an infant. *Beames v. Farley*, 5 Com. B. Rep. 178.

A defendant may plead his discharge under the Insolvent Debtors Act, *puis darrein continuance*, on payment of costs, without an affidavit that the matter arose within eight days next before the pleading thereof. *Dunn v. Loftus*, 8 Com. B. Rep. 76; 7 Dowl. & L. P.C. 158.

Where, in trespass, there were several issues, one of them on a plea of *lib. ten.*, and the Judge at the trial improperly rejected evidence applicable to that issue only, the Court discharged a rule for a new trial, after a verdict for the defendant on several issues, on his consenting to the verdict being entered for the plaintiff on that issue; and gave no costs of the rule to either party. *Hughes v. Hughes*, 15 Mee. & W. 701.

Where a rule *nisi* has been obtained for a new trial, or to enter a verdict for the defendant, unless the plaintiff consents to reduce the verdict, and the rule is thereupon discharged, each party pays his own costs of the rule. *Thompson v. Bailey*, 4 Exch. Rep. 86.

Where an order for leave to amend is "upon payment of costs," the payment of those costs is a condition precedent.

Therefore, where, after demurrer, an order was made, that upon payment of costs the plaintiff should be at liberty to amend his declaration; and the plaintiff did amend, and delivered his amended declaration; but did not tender the amount of the costs as ascertained by the Master's *allocatur*, — Held, that an interlocutory judgment, signed by him for want of a plea, was irregular.

Where an order for leave to amend is made upon payment of costs, and the costs are taxed and ascertained by the Master's *allocatur*, the party in order to avail himself of leave to amend must tender the full amount of *allocatur*, and not a less sum; although he may be prepared to shew that a mistake

has been made in allowing certain items. *Levy v. Drew*, 5 Dowl. & L. P.C. 307.

[See *QUO WARRANTO*.]

(b) *Costs in the Cause.*

Where a town cause is made a remanet, the costs so occasioned are costs in the cause, and need not be paid by a party who obtains a rule for a new trial on payment of costs. *Bentley v. Carver*, 15 Law J. Rep. (n.s.) C.P. 173; 2 Com. B. Rep. 817.

A new trial had been granted without mention of costs, and shortly before the cause was to be again tried, an order was made to stay further proceedings on payment of 20*l.* damages, and all such costs already incurred as plaintiff would have been entitled to if he had gone to a second trial and obtained a verdict. The Master allowed, on taxation, the costs of the briefs delivered, and the fees paid to counsel on the first trial, and the costs of the subpoenas, and of the copies and service thereof upon the witnesses at the first trial. No briefs had been delivered or witnesses subpoenaed for the second trial at the time the order was made:—Held, that the fees to counsel and the costs of serving the subpoenas were wrongly allowed, as those costs alone which would be available at the second trial ought to have been allowed as costs in the cause. *Lambert v. Lyddon*, 16 Law J. Rep. (n.s.) Q.B. 34; 4 Dowl. & L. P.C. 400.

(c) *Costs on Indictment after Removal by Certiorari.*

The Court will not discharge a side bar rule for costs of a prosecution obtained by a party grieved, on the ground that such party is only one of several, who have subscribed together to conduct the prosecution. *Regina v. Williams*, 15 Law J. Rep. (n.s.) Q.B. 98, n.; 6 Q.B. Rep. 273.

The Court will not inquire into any aid which a prosecutor may have received from other parties to enable him to defray expenses of prosecution. *Regina v. Dobson*, 15 Law J. Rep. (n.s.) Q.B. 376; 9 Q.B. Rep. 302.

(d) *After Reversal of Judgment by Court of Error.*

[*Evans v. Collins*, 5 Law J. Dig. 209; 2 Dowl. & L. P.C. 989.]

(B) PLAINTIFF'S RIGHT TO.

(a) *Costs of the Day.*

A plaintiff is not entitled to move for costs of the day, unless he is present when the cause is called on. *Newton v. Chaplin*, 7 Com. B. Rep. 774.

(b) *Costs of Issues of Fact after Judgment on Demurrer.*

In *assumpsit* on a special agreement and pleas of the general issue, and a special plea going to the whole cause of action, to which the plaintiff demurred, and a verdict was found for the plaintiff, with 1*s.* damages, the defendant afterwards obtained judgment on the demurrer:—Held, that the plaintiff was entitled to the costs of the trial of the issue of fact. *Clarke v. Allatt*, 4 Com. B. Rep. 335.

(c) *In Action on a Judgment under 43 Geo. 3. c. 46.*

On the motion for costs on a judgment,—in debt upon a judgment, upon a plea of *nul tiel record*,

the reason must be shewn for adopting that course, and is indispensable under 43 Geo. 3. c. 46. *Revell v. Wetherell*, 3 Com. B. Rep. 321.

(d) *Under 4 Anne, c. 16.*

To an action for trespasses in three closes, A, B, and C, in one count, the defendant pleaded a public way over all three, and other pleas of justification; the plaintiff traversed all the pleas except so much of the plea of public way as related to close C, as to which he new assigned trespasses *extra viam*. The jury found for the defendant on the plea of public way over closes A and B, and for the plaintiff on not guilty to the new assignment, with a farthing damages: the other pleas were all found for the plaintiff. There was no certificate under the 3 & 4 Vict. c. 24:—Held, that the trespasses in the three closes were divisible causes of action; and that the plaintiff was entitled under the 4 & 5 Anne, c. 16. ss. 4. and 5. to the costs of the issues found for him as to closes A and B, on which he had failed; but that under the 3 & 4 Vict. c. 24. he was entitled to no costs in respect to close C, on which he had succeeded, but had recovered less than 40*s.* damages. So that the effect of the 3 & 4 Vict. c. 24. combined with the 4 & 5 Anne, c. 16. ss. 4. and 5. as construed by decided cases is, that the plaintiff is in a better condition by bringing an action in which he fails altogether, than by bringing a frivolous one in which he succeeds. The defendant when he succeeds is punished by the one statute if he improperly plead pleas which he cannot support, and the plaintiff when he succeeds is punished by the other statute if he brings a frivolous action. *Sharland v. Loaring*, 17 Law J. Rep. (n.s.) Exch. 32; 1 Exch. Rep. 375; 5 Dowl. & L. P.C. 178.

In an action of *assumpsit*, pending on demurrers to the pleas, the plaintiff took the issues in fact down to trial, and obtained a verdict with contingent damages. On the argument of the demurrers, the Court held the declaration to be insufficient:—Held, that as no issue in fact had been found for the defendant, the plaintiff was not entitled to deduct the costs of the trial from the defendant's costs on the demurrers, overruling *Bird v. Higginson*. *Partridge v. Gardner*, 18 Law J. Rep. (n.s.) Exch. 415; 4 Exch. Rep. 303.

Case by the reversioner. The first count stated an injury to the surface of the land; the second count alleged an injury to the foundations of a house. The defendant pleaded not guilty, a plea traversing the reversion, and the Statute of Limitations. He also pleaded, to the first count, a justification under a mining lease. To this plea there was a replication, demurrer thereto, and judgment for the defendant. There was also a plea to the second count, from which the jury were, by consent, discharged from giving a verdict. There was also a new assignment and plea of not guilty. The verdict was as follows, on not guilty, as to part of the first count, for the plaintiff, with damages, and as to the residue of the first, and as to the second, for the defendant; on the plea to the first and second counts traversing the reversion, and on the plea of the Statute of Limitations, for the plaintiff. On the plea to the new assignment, the verdict was for the defendant:—Held, that as, with regard to the second count

and part of the first count, the case was one of double pleading, the plaintiff was entitled, under the 4 & 5 Anne, c. 16, to his costs as to the second count and that part of the first on which he had succeeded, including not merely the costs of the pleadings, but a portion of the expenses of briefs and witnesses. *Howell v. Rodbard*, 19 Law J. Rep. (N.S.) Exch. 350 ; 4 Exch. Rep. 309.

(e) *Deprivation of by Small Debts Acts.*

Plaintiff sued out a writ, indorsed, as claiming 6*l.* 15*s.* for debt and 1*l.* 15*s.* for costs. In pursuance of a Judge's order, particulars were delivered, among which was an item of 18*s.* Defendant, who lived within the jurisdiction of a court of requests, admitted that sum to be due, and took out a summons to stay all proceedings, without costs, upon payment of 18*s.* Plaintiff attended before a Judge, and claimed more, whereupon no order was made. Defendant then pleaded non assumpsit except as to 18*s.*, and paid that sum into court. Plaintiff took out the 18*s.*, entered a *nolle prosequi*, and taxed his costs:—Held, that the plaintiff was not entitled to costs, as the proceedings should have been in the inferior court. *Fletcher v. Tanner*, 16 Law J. Rep. (N.S.) C.P. 137 ; 3 Com. B. Rep. 963.

[See (I) Suggestion on the Roll.]

(C) DEFENDANT'S RIGHT TO.

(a) *Costs of the Day for not proceeding to Trial.*

Where issue in fact is joined upon a writ of *error coram nobis*, and notice of trial is given by the plaintiff in error, and not countermanded, the defendant in error may have a rule absolute in the first instance for the costs of the day for not proceeding to trial pursuant to the notice. *Greville v. Chapman*, or *Sparding*, 15 Law J. Rep. (N.S.) Q.B. 41 ; 3 Dowl. & L. P.C. 336.

Where the plaintiff declined to proceed to the trial of a feigned issue under the 6 & 7 Will. 4. c. 71, the Court having so narrowed the issue as to render it inexpedient for the plaintiff to proceed, and had allowed two assizes to pass by without going to trial, although, *semble*, the defendant cannot have judgment as in case of a nonsuit, he may move for the costs of the action under section 46, and the Court will act on the general rule in favour of the successful party, unless there be special circumstances to induce a departure from it. *Tomlinson v. Boughey*, 2 Com. B. Rep. 844.

A cause being called on for trial after the jury were sworn, it was discovered that the record was defective in not containing a *similiter* to one of the plaintiff's replications, or any award of the *venire*, and in consequence of the defendants withholding their consent to an amendment of the record in these respects, the Judge discharged the jury:—Held, that the defendants were not entitled to the costs of the day. *Sleeman v. the Copper Miners Company*, 17 Law J. Rep. (N.S.) Q.B. 113 ; 5 Dowl. & L. P.C. 451.

The plaintiff having entered his cause for trial on the first day of the assizes, before it was reached in its order, called the principal witness, who was clerk to the defendant, an attorney, upon his subpoena, and upon his not appearing and the Judge's clerk stating that the cause could be re-entered,

withdrew the record. Presently afterwards he wished to re-enter it, but, upon the defendant objecting, the Judge ruled that it could not be re-entered after ten o'clock. The witness having arrived, the plaintiff offered to try the cause in its original place, or that it should stand at the bottom of the list. The defendant refused to consent, and the cause was not tried:—Held, that the defendant was not entitled to the costs of the day, for that it was his own default that prevented the cause being tried. *Pope v. Fleming*, 19 Law J. Rep. (N.S.) Exch. 268 ; 5 Exch. Rep. 249.

[See (I), (a), (5) *Pauper*.]

(b) *Costs of the Cause.*

To an action of trespass the defendants pleaded four pleas, of which the third was bad. The cause stood for trial at the Summer Assizes in 1844, and was made a remanet. Before the next assizes the defendants amended by substituting another plea in room of the third, and paid the costs of the amendment. The cause was tried at those assizes, when a verdict was returned for the defendants on the substituted plea, and for the plaintiff on the three others:—Held, that the defendants were entitled to the general costs of the cause, but that the plaintiff was entitled to the costs of the remanet. *Waller v. Blacklock*, 15 Law J. Rep. (N.S.) Exch. 333 ; 15 Mee. & W. 715 ; 4 Dowl. & L. P.C. 4.

In an action for slander where the declaration contained three counts, the defendant pleaded the general issue to the whole, and a special plea of justification to each count ; the plaintiff recovered a verdict on the general issue on the third count, and on all the special issues, and the defendant got a verdict on the general issues on the first and second counts. The judgment for the plaintiff on the third count was arrested. The Master taxed the general costs of the cause for the defendant. On a motion for a review of the taxation, held, that the defendant was entitled, under the rules of Hilary term 2 Will. 4. and Hilary term 4 Will. 4, only to the costs of the issues found for him, and not to the general costs of the cause. *James v. Brook*, 16 Law J. Rep. (N.S.) Q.B. 168 ; 4 Dowl. & L. P.C. 577.

Defendant pleaded non assumpsit to all but 12*l.* To 11*l.* parcel of the 12*l.* payment and acceptance in satisfaction, after action brought. To the residue, payment of 1*l.* into court. The plaintiff traversed the payment of the 11*l.* and took the 1*l.* out of court. It appeared by the evidence that the amount due to the plaintiff, at the commencement of the suit, did not exceed 12*l.*, and that 11*l.* was paid after action brought, and accepted by the defendant in satisfaction of that amount:—Held, that the plaintiff after the payment of the 1*l.* was not entitled to proceed for costs, in respect of the 11*l.* ; but that the defendant was entitled to have the verdict entered for him, and to the general costs of the action. *Horner v. Denham*, 17 Law J. Rep. (N.S.) Q.B. 29 ; 12 Q.B. Rep. 813, n.

A declaration contained four counts. The defendant pleaded the general issue to the whole declaration, and special pleas to each count. The verdict was for the defendant on the general issue to the first, third, and fourth counts, and on all the other issues for the plaintiff. Judgment on the

second count (upon which the plaintiff succeeded,) was arrested:—Held, that the defendant was entitled to the general costs of the cause.

The case of *James v. Brook* overruled. *Elderton v. Emmens*, 17 Law J. Rep. (n.s.) C.P. 277; 5 Dowl. & L. P.C. 489; 4 Com. B. Rep. 498.

A defendant who pays money into court generally upon the whole declaration, is entitled to his general costs of the cause if he obtain a rule for judgment as in case of a nonsuit. *M'Lean v. Phillips*, 18 Law J. Rep. (n.s.) C.P. 248; 7 Com. B. Rep. 817.

Where, after writ issued, the defendant applies to a Judge to stay proceedings on payment of a certain sum and costs, and the plaintiff refuses to accept the sum offered, alleging that more is due, but at the trial recovers no more, he is entitled to full costs unless the amount offered has been paid into court. *Clark v. Dann*, 3 Dowl. & L. P.C. 513.

(c) Under 43 Geo. 3. c. 46.

The statute 43 Geo. 3. c. 46. does not apply to an arrest under the 1 & 2 Vict. c. 110.

Where therefore a defendant had been arrested under that statute for a debt of 71*l.*, which sum, together with the sum of 20*l.* for costs, he had paid into court in lieu of putting in special bail, and the plaintiff recovered only 6*l.* damages, and the Court were of opinion that there was no reasonable or probable cause for arresting the defendant for so large a sum,—Held, nevertheless, that the defendant was not entitled to costs, under the 43 Geo. 3. c. 46. *Ricketts v. Noble*, 18 Law J. Rep. (n.s.) Exch. 201; 3 Exch. Rep. 521.

(d) After Verdict on Plea of Coverture.

On a plea in bar, by a married woman, of her coverture, and a verdict in her favour thereupon, she is entitled to costs. *Findley v. Farquharson*, 15 Law J. Rep. (n.s.) C.P. 262; 4 Dowl. & L. P.C. 185; 3 Com. B. Rep. 347.

(e) Costs of Nonsuit.

The 7 & 8 Vict. c. 96. s. 57. enacts, that no person shall be taken in execution upon any judgment in any action, wherein the sum recovered shall not exceed the sum of 20*l.*, exclusive of costs.

In an action, wherein the plaintiff was nonsuited, the defendant made up the judgment roll, and entered thereon the award of a *ca. sa.* for the amount of the taxed costs; the plaintiff brought a writ of error and assigned as error the entry of the *ca. sa.* on the record:—Held, that the ground of error assigned was not frivolous.

Semble—A plaintiff cannot be taken in execution for costs. *Newton v. Conyngham*, 17 Law J. Rep. (n.s.) C.P. 200; 5 Dowl. & L. P.C. 762; 5 Com. B. Rep. 749.

(f) After Amendment.

After a general demurrer to a declaration, and leave to amend upon the usual terms, the amount of the costs must depend upon the course the defendant elects to adopt, as to demurring or pleading over to the amended declaration.

Where, after the argument of a general demurrer to a declaration, the plaintiff, having obtained leave for that purpose upon the usual terms, amended

a defect in his declaration then suggested, and not pointed out during the argument, and the defendant thereupon elected to abandon the demurrer and plead over,—Held, that the defendant was entitled to have his full costs of pleading over taxed, and that the tender of the ordinary costs of amendment, 13*s.* 4*d.*, was not sufficient. *Metcalfe v. Booth*, 18 Law J. Rep. (n.s.) Q.B. 247; 7 Dowl. & L. P.C. 15.

(D) SECURITY FOR COSTS.

[*Doe d. the Earl of Egremont v. Stephens*, 5 Law J. Dig. 213; 2 Dowl. & L. P.C. 993.]

(a) Where Money paid into Court in Lieu of Bail.

An action was commenced in the Lord Mayor's Court, and goods attached. The cause was removed into the Court of Queen's Bench, and the defendant paid into court a sum of money in lieu of bail. He then obtained an order for the plaintiff, who lived in Scotland, to give security for costs, with the usual stay of proceedings:—Held, that after a long delay, the defendant was entitled to a rule, calling on the plaintiff to put in the security within a limited time, and, on his default, to have the money paid out of court. *Tassie v. Kennedy*, 17 Law J. Rep. (n.s.) Q.B. 215; 5 Dowl. & L. P.C. 587.

(b) By Mortgagee of Plaintiff's Claims.

Where a cause had been referred to arbitration, and the plaintiff had assigned by way of mortgage, but not absolutely, his interest in all his claims upon the defendants to a third party, who had attended the reference expressly on the ground that he was interested in the action as assignee of the plaintiff's claims on the defendants, the Court refused a rule to shew cause why such third party should not give security for costs to the defendants. *Parker v. Great Western Rail. Co.*, 19 Law J. Rep. (n.s.) C.P. 355.

(c) By Insolvent.

Security for costs must be given by a party in insolvent circumstances, who sues for the benefit of creditors to whom he has assigned his property in trust for the benefit of the body of his creditors. *Perkins v. Adcock*, 15 Law J. Rep. (n.s.) Exch. 7; 14 Mee. & W. 808; 3 Dowl. & L. P.C. 270.

It is no ground for requiring security that the plaintiffs have compounded with their creditors, and the circumstance of one being resident abroad carries the case no further. *Thomel v. Roelants*, 2 Com. B. Rep. 290.

The Court required a plaintiff who had taken the benefit of the Insolvent Act, and who sued as trustee for one also in insolvent circumstances, to give further security for costs, than that of the person for whose benefit he sued. *Mais v. M'Namara*, 1 L. M. & P. 296.

(d) By Attorney of Insolvent Plaintiff.

A cause was referred to arbitration in November 1846. Several meetings were held, and several enlargements of time for making the award were made, and the last meeting was held on the 13th of December 1847. By order of a Judge, on the 3rd of January 1848, the time was enlarged until the 1st of January 1849. The last appointment was

for the 24th of May 1848, but no meeting then took place. A vesting order under the Insolvent Act was made as to the plaintiff's property on the 14th of August 1849. On the 18th of December 1849, a Judge's order enlarging the time until Trinity term 1850, was obtained on behalf of the plaintiff. On an application by the defendant, the attorney for the plaintiff was ordered to give security for costs, it not being clear upon the affidavits that the proceedings were not for his benefit. Held, also, that the application was not too late. *Gell v. Curzon*, 19 Law J. Rep. (n.s.) Exch. 225; 4 Exch. Rep. 813.

(e) *By Representatives of Plaintiff in error.*

Where plaintiff in error died after joinder in error, proceedings were stayed until security for costs was given to the defendant in error, as plaintiff had died insolvent, and his attorney was going on for his own benefit. *Haygarth v. Wilkinson*, 12 Q.B. Rep. 851.

(E) TAXATION OF COSTS.

(a) *Notice of.*

The omission to give notice of taxation is not such an irregularity as entitles the party to whom it should have been given to set aside the judgment.

But where judgment was signed for want of a plea, and the costs were taxed without giving such notice, the Court, on an affidavit of merits, set aside the judgment and the execution issued upon it, without costs. *Ilderton v. Sill*, 15 Law J. Rep. (n.s.) C.P. 1; 2 Com. B. Rep. 249.

(b) *Rate of.*

Where, by consent of parties, a verdict is taken for a sum named for damages, and also all costs to which plaintiff had been put relating to the subject-matter of the cause, as between attorney and client, without being subject to taxation, that agreement is to pay such a sum for costs as would be considered fair and reasonable on taxation in a liberal way, and not by the ordinary rule. *Young v. Walker*, 16 Mee. & W. 446.

(c) *Order for Payment.*

After an order obtained for taxation under 6 & 7 Vict. c. 73. s. 43, before an attachment can issue an order for payment of the amount certified must be made, and have been disobeyed. *In re Woodhouse*, 2 Com. B. Rep. 290.

(d) *As between Attorney and Client.*

Where proceedings in an action were stayed by Judge's order, on payment by defendant of debt and costs, to be taxed as between attorney and client, the costs of obtaining the leave of the Court of Chancery to bring the action, the plaintiff having, on a creditors' bill being there filed, been restrained from bringing any action against persons indebted to the estate without the leave of the Court, were not allowed. *Lipscombe v. Turner*, 15 Law J. Rep. (n.s.) Q.B. 410; 4 Dowl. & L. P.C. 125.

(e) *Witnesses and Documents.*

Where a trial has been postponed at the instance of a defendant, a plaintiff who succeeds in the

action is entitled to the costs of detaining a material witness, a captain of a vessel, for 300 days, and is not bound to examine him on interrogatories. *Evans v. Watson*, 15 Law J. Rep. (n.s.) C.P. 256; 4 Dowl. & L. P.C. 193; 3 Com. B. Rep. 327.

The rule requiring that the costs of witnesses be actually paid before the allowance of them on taxation, applies to a plaintiff suing *in forma pauperis*.

The costs of proving documents ordered to be admitted under a Judge's order cannot be obtained unless the Judge at the trial actually certifies that they were proved to his satisfaction. Therefore, where such proof was not given, and no certificate obtained, in consequence of the counsel on the other side admitting the facts intended to be proved by such documents,—Held, that the costs of the witnesses subpoenaed to prove such documents could not be allowed upon taxation.

Where the plaintiff succeeded upon the issue of never indebted, but the defendant upon the plea of set-off,—Held, that the plaintiff was not entitled to the costs of a witness whose evidence was material to prove the issue found for the defendant as well as that found for the plaintiff. *Freeman v. Rosher*, 18 Law J. Rep. (n.s.) Q.B. 105; 6 Dowl. & L. P.C. 517.

A party is not entitled to the expenses of witnesses going to see the premises in question, and making scientific experiments to enable them to give evidence in the cause. *Lumb v. Simpson*, 18 Law J. Rep. (n.s.) Exch. 377; 4 Exch. Rep. 85.

The expenses of surveying and taking levels in order to ascertain whether a weir had been improperly raised, to the prejudice of plaintiff's water-mill, will not be allowed him on taxation. *Ormerod v. Thompson*, 16 Mee. & W. 860.

A party succeeding on an issue which entitles him to the *postea* and the general costs of the cause, is entitled to the costs of all witnesses attending to prove that issue, whether their evidence applies to any other issue or not. But the opposite party is entitled only to the costs of such witnesses as attend solely to prove the issue on which he succeeds, and if they also attend to prove an issue on which he fails, he is not entitled to any costs in respect of them. *Welby v. Brown*, 5 Dowl. & L. P.C. 746; 1 Exch. Rep. 770.

(f) *Reviewal of.*

Where the sum of 2l. 5s. only for costs was indorsed on the writ, the plaintiff, having succeeded in the action, was entitled to recover 178l. for a long and special notice of action; and the defendants, not having objected to the quantum, but only to any allowance at all, were not allowed, on a motion to review the Master's taxation, to question the amount allowed. *Kent v. Great Western Rail. Co.*, 16 Law J. Rep. (n.s.) C.P. 72; 3 Com. B. Rep. 714.

The Master having allowed a large amount for expenses of a commission to examine witnesses abroad, without exercising a discretion as to the propriety of particular charges, was ordered to review his taxation. *Stewart v. Shell*, 4 Com. B. Rep. 460.

The Master having, upon the taxation of the plaintiff's costs, been induced by false affidavits to allow a large sum as the fees and expenses to Commissioners named in a commission for the examin-

ation of witnesses, which sum, it was suggested, had not been paid,—the Court referred it back to the Master to inquire, by such means as he should think fit, what sums had actually been paid, and to review the taxation, if necessary. *Barnes v. Attwood*, 5 Com. B. Rep. 164.

(F) PAYMENT OF, HOW ENFORCED.

(a) *By Attachment.*

An attachment was granted for non-payment of the costs of an ejectment which had been taxed under the consent rule, where the rule and *allocatur* were served on the defendant, and a demand of the costs generally, without mentioning any specific sum, was made at the same time. *Doe d. Tew v. Ballingham or Billingham*, 15 Law J. Rep. (N.S.) Q.B. 220; 3 Dowl. & L. P.C. 769.

Where a rule for taxing costs is against several defendants, an attachment against one only for non-payment will not be set aside as irregular. *Regina v. Dobson*, 15 Law J. Rep. (N.S.) Q.B. 376; 9 Q.B. Rep. 302.

(b) *By Rule.*

The plaintiff having obtained a verdict in this court for 30s. in a case within the jurisdiction of the Middlesex County Court, a rule was made absolute for entering a suggestion on the roll depriving him of costs, and for his paying the defendant his costs of suit. This suggestion was traversed by the plaintiff:—Held, that as the costs of suit depended upon the trial of the suggestion, the Court had no power by rule to compel the plaintiff to pay them. *Sanson v. Price*, 17 Law J. Rep. (N.S.) Exch. 205; 2 Exch. Rep. 338.

(G) CERTIFICATE.

A certificate, under the statute 3 & 4 Vict. c. 24. s. 1, upon a writ of inquiry, directed to the sheriff of a county, signed by the under-sheriff, before whom the writ was in fact executed, in the name of the sheriff, is valid.

Semble—that if it were signed by the under-sheriff in his own name, it would have been erroneous.

Semble—also, that it would have been bad, if the certificate had in fact been signed by the sheriff himself. *Stroud v. Watts*, 15 Law J. Rep. (N.S.) C.P. 196; 3 Dowl. & L. P.C. 799; 2 Com. B. Rep. 929.

In an action for several breaches of covenant the defendant paid 10*l.* into court in respect of one breach, and the plaintiff had a verdict for 1*s.* in respect of two other breaches,—Held, that this was not a case in which the Judge could certify, under the 43 Eliz. c. 6. s. 2, to deprive the plaintiff of costs.

The true test by which to determine whether a case is within the statute of Elizabeth is, whether the debt or damages for which the Court can see that the action was brought do not amount to more than 40*s.* *Richards v. Bluck*, 18 Law J. Rep. (N.S.) C.P. 17; 6 Com. B. Rep. 443.

A verdict having been taken for the defendant by consent, the plaintiff had leave to move to enter a verdict for him, with 1*s.* damages, on a point reserved. The rule having been afterwards made absolute, the Judge, who tried the cause certified,

under the 43 Eliz. c. 6, to deprive the plaintiff of costs:—Held, that the Judge had power to certify, and that the Court had no authority to set aside his certificate. *Richardson v. Barnes*, 18 Law J. Rep. (N.S.) Exch. 373; 4 Exch. Rep. 128.

[See HIGHWAY.]

(H) SETTING OFF COSTS.

The costs of actions may be set off against each other, though the nominal parties are different, if the expenses are to be defrayed out of the same funds. Therefore, where, on the reference of three actions, an engineer recovered against H, for work done for one railway, with costs, and had costs awarded against him in actions against M. and against P, for work done for two other railways, and it appeared that the three railways were connected with each other, having common officers and a common fund for the expenses, the Court allowed the costs of the latter two actions to be set off against the damages and costs in the former. *Gravatt v. Hall*, 16 Law J. Rep. (N.S.) Q.B. 352.

In 1846 the defendant recovered in ejectment against the plaintiff, and the costs of the action were taxed at 5*9l.* The plaintiff was taken in execution for these costs, and was discharged under 48 Geo. 3. c. 123. In 1847 the plaintiff, suing *in formâ pauperis*, recovered a verdict against the defendant in assumpsit for 21*l.* for a debt incurred before the ejectment was brought, and his costs were taxed at 2*9l.*:—Held, that the defendant in the latter action was entitled to have the costs of the action of ejectment set off against those of such latter action, there being no claim of lien by the pauper plaintiff's attorney. *O'Hare v. Reeves*, 18 Law J. Rep. (N.S.) Q.B. 231.

Semble—that a party may set off interlocutory costs in an action, without an order of the Court or a Judge. *Levy v. Drew*, 5 Dowl. & L. P.C. 307.

(I) SUGGESTION ON THE ROLL.

(a) *Motion for Leave to enter.*

(1) *In general.*

The defendant ordered goods of a tradesman, and at the time stated that he lived at M B, Westminster, where the goods were delivered, and frequent interviews were had with the defendant, on the subject of payment. A writ was served on the defendant, in an action for the price of the goods, in which he was described as of M B, Westminster, and no objection was made to that description. A verdict having been obtained by the plaintiff for the amount of the debt, the defendant applied to the Court for leave to enter a suggestion on the roll, to deprive the plaintiff of costs, on the ground that the debt was under 5*l.*, and that the defendant resided at Wandsworth, within the jurisdiction of a court of requests:—Held, that the defendant was bound by his own representation as to his residence, on the faith of which the credit had been given.

On a subsequent motion to set aside the judgment and execution, on the ground that the judgment was void,—Held, that as there was no suggestion on the record, the judgment was regular. *Banks v. Newton*, 16 Law J. Rep. (N.S.) Q.B. 142; 4 Dowl. & L. P.C. 632.

The Small Debts Act, 9 & 10 Vict. c. 95. enacts,

by sect. 1, that the Queen may order the act to be put in force in such county as to her shall seem fit; and by sect. 129, that if any action shall be commenced in any of the superior courts for any cause for which a plaintiff might have been entered in any court holden under the act, and a verdict be found for the plaintiff for a less sum than 20*l.* in contract and 5*l.* in tort, the plaintiff shall recover no costs. The Queen, by order in Council, directed that the act should be put in force in every county on the 15th of March 1847. On the 26th of March following the present action was commenced in this court, for a cause of action accruing within the jurisdiction of the County Court of Kingston, in Surrey; but there was not then in existence at that place any county court at which a plaintiff could have been entered:—Held, that the plaintiff, who had recovered a verdict for 40*s.*, was entitled to costs. *Parker v. Crouch*, 17 Law J. Rep. (n.s.) Exch. 131; 1 Exch. Rep. 699.

A defendant is entitled to a suggestion to deprive a plaintiff of costs, under the 9 & 10 Vict. c. 95. s. 129, if he make out a *prima facie* case (as laid down in *Butler v. Corney*, 17 Law J. Rep. (n.s.) Exch. 265; 2 Exch. Rep. 474.)

An affidavit, stating that the plaintiff does not dwell more than twenty miles from the defendant (under section 128), without saying "twenty miles from the defendant's residence," is sufficient to entitle the defendant to a suggestion. *Hayter v. Fish*, 18 Law J. Rep. (n.s.) C.P. 68; 6 Com. B. Rep. 568.

Where on a motion to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, there are counter affidavits as to whether the defendant resides within twenty miles of the plaintiff, the Court will not decide the question on the affidavits, but will grant the application, and leave the plaintiff to raise the question of fact by a traverse to the suggestion. *Nolloth v. Crook*, 19 Law J. Rep. (n.s.) Q.B. 185; 1 L. M. & P. 37.

The plaintiff in an action of debt in the Queen's Bench for a sum less than 20*l.* applied to a Judge to have the case tried before the sheriff. The defendant opposed the application, on the ground that the case ought to have been brought in the county court, and that it ought, on account of legal difficulties, to be tried before a Judge of the superior court rather than before an under-sheriff. On the hearing of the summons a Judge's order was drawn up, by consent, that the summons should be dismissed—"the defendant hereby consenting that the taxation of costs shall be on the higher scale if a verdict be found for the plaintiff." At the assizes a verdict was found for the plaintiff for a sum of 4*l.* 10*s.*—Held, that the agreement in the Judge's order precluded the defendant from applying to enter a suggestion to deprive the plaintiff of his costs under the County Courts Act. *Gosling v. Conder*, 19 Law J. Rep. (n.s.) Q.B. 323; 1 L. M. & P. 320.

On a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, the affidavit of the defendant in support of the application, alleging that the contract on which the plaintiff had recovered was made within the jurisdiction of a certain county court, was met by an affidavit of the plaintiff which, detailing the circum-

stances, stated that the contract was not made within that district, nor on the occasion referred to by the defendant, but at another time and place. No other affidavits except those of the parties to the cause were used on this point, nor did it appear that any witnesses could be called to prove in what district the contract was made. The Court refused to allow the suggestion to be entered. *Caterer v. Dean*, 19 Law J. Rep. (n.s.) Q.B. 326; 1 L. M. & P. 38.

Where an action is brought for more than 20*l.*, and a plea in abatement is pleaded as to part, which is found in favour of the defendant, and the plaintiff gives credit in his particulars for a sum which, together with the sum to which the plain abatement applies, reduces the claim to less than 20*l.*,—this is a case for a suggestion to deprive the plaintiff of costs within section 129. of the 9 & 10 Vict. c. 95. *Hudspeth v. Yarnold*, 19 Law J. Rep. (n.s.) C.P. 321.

A rule *nisi* to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, stated as the ground for the suggestion, that the verdict found for the plaintiff was for a sum less than 20*l.*, and for which a plaintiff might have been entered in the county court. Whether such a rule be bad on the face of it where the action is in tort, *quære*. *Hand v. Daniels*, 1 L. M. & P. 420.

(2) After Judgment.

Leave will not be granted to enter a suggestion on the roll to deprive a plaintiff of his costs, pursuant to the statute 9 & 10 Vict. c. 95. s. 129, after final judgment has been signed (and which has not been set aside), and execution issued. *Soames v. Cooper*, 18 Law J. Rep. (n.s.) Exch. 38; 3 Exch. Rep. 38; s. p. *Smith v. Roberts*, 3 Exch. Rep. 39, n.

The plaintiff recovered a verdict for 3*l.* damages at the assizes on the 1st of April. On the 25th of April he entered judgment in the Master's book, leaving a blank for the costs. On the 6th of June he gave notice of taxation of his costs to the defendant, who thereupon applied to the Master to stay the taxation, to give him time to move for leave to enter a suggestion to deprive plaintiff of costs under the County Courts Act. The Master refused, taxed the costs, and granted his *allocatur*. The plaintiff on the next day signed final judgment, and issued execution for the damages and costs. The defendant on the 10th of June moved for a suggestion:—Held, that the application was not too late, but that as the defendant by lying by had allowed the plaintiff to sign judgment, the suggestion should only be granted on the terms of the defendant's paying the costs of entering the judgment, and of the subsequent proceedings thereon. *Bugg v. Scott*, 19 Law J. Rep. (n.s.) Q.B. 368; 1 L. M. & P. 538.

The plaintiff recovered a verdict for 9*l.* 2*s.* 1*d.* before the under-sheriff, who refused to stay proceedings to enable the defendant to apply for a suggestion to deprive the plaintiff of costs. Judgment having been signed and a *fi. fa.* issued, in the next term the defendant obtained a suggestion without moving to set aside the judgment. The Court afterwards made a rule absolute to set aside the judgment, and the *fi. fa.* issued thereon, and for the plaintiff to refund the money paid to the sheriff

under the execution. *Read v. Blayney*, 19 Law J. Rep. (N.S.) C.P. 110; 8 Com. B. Rep. 551.

The verdict having been obtained on the 30th of May, judgment was signed on the 6th of June. A rule for a suggestion was obtained on the 5th, and served on the plaintiff on the 7th of June (all in Trinity term):—Held, that the rule was not obtained too late; and it was made absolute, terms being imposed for the delay in serving it. *M'Gill v. Milton*, 19 Law J. Rep. (N.S.) C.P. 323.

(3) Judgment by Default.

A plaintiff who sues in a superior court, is not deprived of costs by stat. 9 & 10 Vict. c. 95. s. 129, unless the jury at the trial give a verdict for less than the amount therein named, and the Judge at the trial does not certify. Therefore, if a defendant suffer judgment by default, and the plaintiff, on a writ of inquiry, obtain less than 5*l.* in an action on tort, he is not deprived of his costs by the statute 9 & 10 Vict. c. 95. s. 129.

To a declaration in trespass for an assault, the defendant suffered judgment by default; and on a writ of inquiry the jury gave 40*s.* damages. The defendant having entered a suggestion on the roll to deprive the plaintiff of costs under 9 & 10 Vict. c. 95. s. 129,—Held, on demurrer (*dissentiente Cresswell, J.*), that the 129th section does not apply to a judgment by default. *Reed v. Shrubsole*, 18 Law J. Rep. (N.S.) C.P. 225; 7 Com. B. Rep. 630.

(4) What Cases are within the Jurisdiction of inferior Courts.

In order to deprive a plaintiff of costs under the 129th section of the Small Debts Act (9 & 10 Vict. c. 95), the defendant must shew that he dwelt or carried on his business at the time of the action brought, within the jurisdiction of the county court. It is not sufficient to shew that the cause of action arose within the jurisdiction of the Court. *Matthew v. Broughall*, 17 Law J. Rep. (N.S.) C.P. 221; 5 Dowl. & L. P.C. 791; 5 Com. B. Rep. 937.

An affidavit to deprive a plaintiff of costs, under the 129th section of the County Courts Act, 9 & 10 Vict. c. 95, must shew that the cause of action arose wholly or in some material point within the jurisdiction of the county court within which the defendant dwells, or carries on business at the time of the action brought. *Bailey v. Robson*, 17 Law J. Rep. (N.S.) C.P. 248; 5 Com. B. Rep. 934.

The City of London Local Court Act, 10 & 11 Vict. c. lxxi., gives a concurrent jurisdiction to the superior courts, "where the plaintiff dwells more than twenty miles from the defendant:—Held, that this means twenty miles from the place where the defendant dwells.

Held, also, that an affidavit stating that the defendant carried on business at No. 133, Fenchurch Street, in the city of London, and dwelt in the city of London, did not sufficiently shew his dwelling-place to entitle him to a suggestion on the record to deprive the plaintiff of costs. The Court, however, gave the defendant leave to suggest that the plaintiff did not live more than twenty miles from the place where the defendant carried on business. *Peterson v. Davis*, 17 Law J. Rep. (N.S.) C.P. 290; 6 Com. B. Rep. 235.

Defendant applied to be allowed to enter a suggestion on the record to deprive the plaintiff of costs, the cause having been tried before the Secondary of London, and the verdict being under 20*l.* The affidavit stated, "that the cause of action arose in some material point within the jurisdiction of the Westminster County Court, in which the defendant dwells and carries on business, and that the goods, &c., except to the amount of 10*s.*, were delivered at U, which is within the jurisdiction of the Westminster County Court, and is the place where, at the commencement of this suit, the defendant was and is employed, and dwells and carries on his business; and that neither the plaintiff nor the defendant is an officer of the Westminster County Court, nor was any officer of the said county court a party concerned in the said cause:—Held, that the affidavit was defective in not stating that the defendant dwelt within the jurisdiction of the Westminster County Court at the time the action was brought, and also that neither the plaintiff nor the defendant was an officer, at that time, of the said county court.

Quære—Is a plaintiff who brings his action in a superior court, and recovers less than 20*l.*, deprived of his costs, when some material point of the cause of action arises without the jurisdiction of the county court. *Dodd v. Wigley*, 18 Law J. Rep. (N.S.) C.P. 117; 7 Com. B. Rep. 106.

A plaintiff carried on business by his agent within twenty miles of, but dwelt more than twenty miles from, the residence of A. His agent having supplied A with goods under 20*l.* value,—Held, that the plaintiff might sue A in the superior courts for the debt. *Shields or Sheils v. Rait*, 18 Law J. Rep. (N.S.) C.P. 120; 7 Com. B. Rep. 116.

An affidavit for a rule to enter a suggestion to deprive the plaintiff of costs, under 9 & 10 Vict. c. 95. s. 129, which states "that the plaintiff did not dwell more than twenty miles from the defendant, that is to say, that the defendant dwelt at No. 33, John Street, &c., and within twenty miles of the Marylebone County Court aforesaid," is not sufficient. *Johnson v. Ward*, 18 Law J. Rep. (N.S.) C.P. 255; 7 Com. B. Rep. 868.

The 112th section of the City of London Small Debts Act, the 10 & 11 Vict. c. lxxi., which reserves to a plaintiff the right of suing in the superior court, where he dwells more than twenty miles from the defendant, is meant to apply where the plaintiff dwells more than twenty miles from the place of residence of the defendant. Therefore, a suggestion to deprive the plaintiff of costs, alleging that the plaintiff did not live more than twenty miles from the place where the defendant carried on his business in the city of London, was held bad on demurrer, though the 40th section of the act gives jurisdiction to the local court in cases where the defendant either dwells or carries on his business in the city of London. *Peterson v. Davis*, 18 Law J. Rep. (N.S.) C.P. 343; 6 Com. B. Rep. 235.

The plaintiff, a tailor, residing at Pentonville, within the jurisdiction of the Clerkenwell County Court, sued the defendant for the amount of a bill sent in, containing several items for clothes supplied, repaired and altered. The defendant resided at Hammersmith, within the jurisdiction of the Brompton County Court, and carried on his business at the Burlington Arcade, within the jurisdic-

tion of the Westminster County Court. As to three of the items, the orders were given, the work done, and the goods delivered at Hammersmith; as to ten other items, the orders were given and the goods delivered at the Burlington Arcade; and with regard to one, the order was given, the work done, and the goods delivered at the plaintiff's residence:—Held, on motion to enter a suggestion to deprive the plaintiff of costs, that the whole bill formed one cause of action; that the cause of action did not wholly occur within the jurisdiction of the county court either of Brompton or Middlesex, part being within that of Clerkenwell; but that as one item arose within the jurisdiction of a county court, the cause of action was to be considered as arising in a material point within the jurisdiction of a county court, under the 128th section of the 9 & 10 Vict. c. 95, and that the action ought not to have been brought in the superior court. *Wood v. Perry*, 18 Law J. Rep. (n.s.) Exch. 161; 3 Exch. Rep. 442.

Stat. 10 & 11 Vict. c. lxxi. s. 1. enacts that all personal actions (with some exceptions not material), where the debt or damage does not exceed 20*l.*, which shall be commenced in the Sheriff's Court of London, shall be holden according to the provisions of that act. By section 40, process may be issued out of that court provided that defendant dwell, or shall within six calendar months have dwelt, within the city or liberties; or if the cause of action arose therein. Section 113 deprives the plaintiff of costs if he sues in a superior court, and recovers less than 20*l.*, for any cause for which a plaintiff might have been entered in the London court; excepting out of this clause actions which, before the statute, might have been brought in the superior courts, where the parties live more than twenty miles from each other, or an officer of the London Court is a party; which actions, by section 112, may be brought in the London court or a superior court, at the plaintiff's option:—Held, that a party suing in a superior court on a promissory note, and recovering less than 20*l.*, may be deprived of costs under section 113, though the cause of action has no locality. *Lowley v. Rossi*, 12 Q.B. Rep. 952.

To deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95. s. 129, the defendant must have a fixed place of business, for some certain time within the jurisdiction of the Court within which the cause of action, or a material part thereof, arose.

Where, therefore, the defendant held the office of deputy sealer in the Court of Chancery, and followed the person of the Lord Chancellor, performing his duties partly at Westminster Hall, partly in the House of Lords, and partly in Lincoln's Inn, and when the Lord Chancellor was not sitting, at the Great Seal Patent Office, Quality Court, Chancery Lane,—Held, that he could not be said to have any fixed place of business within the meaning of the 128th section of the act, so as to entitle him to a suggestion to deprive the plaintiff of his costs. *Rolfe v. Learmonth*, 19 Law J. Rep. (n.s.) Q.B. 10.

On a motion to enter a suggestion to deprive the plaintiff of costs in an action by a second indorsee of a bill of exchange against the drawer, in order to shew that the cause of action arose in some mate-

rial point within the jurisdiction of a county court, it is sufficient to prove that notice of dishonour was given to the defendant within the jurisdiction.

If the defendant draws and indorses a bill of exchange within the jurisdiction of the county court, an indorsee is not relieved from the necessity of suing on it in that court by the circumstance that he does not know where the bill was drawn and indorsed. *Huth or Heath v. Long*, 19 Law J. Rep. (n.s.) Q.B. 325; 1 L. M. & P. 333.

The defendant accepted a bill of exchange for 12*l.* at his residence within the jurisdiction of the M County Court, and delivered it to the plaintiff, the drawer, without the jurisdiction:—Held, that the cause of action arose within the jurisdiction of the M County Court. *Roff v. Miller*, 19 Law J. Rep. (n.s.) C.P. 278.

A clerk who goes daily to a place of business in the city of London is not a person carrying on business within the meaning of the 10 & 11 Vict. c. lxxi. (the London Small Debts Act).

A bill of exchange was drawn and accepted within the city of London, and the defendant wrote his indorsement upon it within the city, but sent it by his agent to the plaintiff, who lived out of the city:—Held, that the cause of action did not arise within the city, and that the action might be brought upon it in the superior courts. *Buckley v. Hann*, 19 Law J. Rep. (n.s.) Exch. 151; 5 Exch. Rep. 43.

The affidavits for a suggestion to deprive the plaintiff of costs, under the County Courts Act, in an action brought against husband and wife, must shew that both the defendants were living within the jurisdiction of the county court at the time of action brought. *Parry v. Davies*, 19 Law J. Rep. (n.s.) Exch. 284; 1 L. M. & P. 379.

A clerk in the Privy Council Office held not to "carry on his business there" within the 60th section of the 9 & 10 Vict. c. 95. *Glennie v. Delmar*, 1 L. M. & P. 402.

(5) *Pauper Plaintiff.*

By stat. 9 & 10 Vict. c. 129. s. 78. the Judges of the county courts have power to admit persons to sue *in formâ pauperis* in their courts.

A pauper will be deprived of costs who sues in a superior court when his claim might have been entered in a county court. *Chinn v. Bullen*, 19 Law J. Rep. (n.s.) C.P. 42; 8 Com. B. Rep. 447.

(6) *Action on Judgment for Debt under 20*l.**

The plaintiff had judgment by default in a superior court for 15*l.* 3*s.* 6*d.* The defendant having no available goods, the plaintiff brought an action against him on the judgment for the amount recovered and costs, which exceeded 20*l.*, in order to have personal execution. The Court, exercising its discretion under the 43 Geo. 3. c. 46. s. 4. gave the plaintiff the costs of the action on the judgment, holding that the 9 & 10 Vict. c. 95. s. 129. did not apply to deprive him of such costs. *Slater v. Mackie or Mackay*, 19 Law J. Rep. (n.s.) C.P. 88; 8 Com. B. Rep. 553.

(7) *Affidavits.*

The plaintiff having recovered a verdict, for less than 20*l.*, the defendant applied to a Judge at chambers for leave to enter a suggestion to deprive

the plaintiff of costs, on the ground that the matter was within the jurisdiction of a local court. The Judge at chambers refused to grant the defendant leave, on the ground that the affidavits were insufficient. Two fresh applications at chambers were disposed of, on the ground that the matter had been previously decided:—Held, that the Court might entertain an application upon affidavits of new and material facts. *Peterson v. Davis*, 17 Law J. Rep. (N.S.) C.P. 290; 6 Com. B. Rep. 235.

Upon a motion to enter a suggestion under the Middlesex Court of Requests Act, the affidavit of the defendant described him as of No. 51, Bedford Row, Holborn, in the county of Middlesex, and stated that at the commencement of the suit he was, and ever since hath been, and still is inhabiting and resident in Bedford Row aforesaid, and that for and during all that time he was, and still is liable to be summoned to the Court of Requests held at Kingsgate Street, Holborn, aforesaid:—Held, that it was consistent with this affidavit, that at the time of the commencement of the action the plaintiff was resident in a part of Bedford Row which was not in Middlesex, and that the Court would not take judicial notice that the whole of Bedford Row was in Middlesex; and, also, that the Court would not take cognizance that the Court of Requests for Middlesex was held in Kingsgate Street, and that the affidavit was therefore insufficient. *Thorne v. Jackson*, 16 Law J. Rep. (N.S.) C.P. 87; 4 Dowl. & L. P.C. 478; 3 Com. B. Rep. 661.

The 129th section of the 9 & 10 Vict. c. 95, which prohibits a plaintiff from recovering costs in an action brought in a superior court, for which a plaintiff might have been entered in the county court, applies to actions on negotiable instruments in the same manner as to other actions.

Upon an application to enter a suggestion to deprive the plaintiff of costs under that section, the defendant need not aver that the Judge did not grant a certificate that the cause was fit to be tried in the superior court. *Nind v. Rhodes*, 17 Law J. Rep. (N.S.) Q.B. 179; 5 Dowl. & L. P.C. 621.

In order to deprive a plaintiff of costs under the 129th section of the County Court Act, the defendant must shew affirmatively that the case is not within any of the exceptions mentioned in the 128th section of that act. *Meeten v. Nicholls*, 17 Law J. Rep. (N.S.) C.P. 212; 5 Dowl. & L. P.C. 799; 5 Com. B. Rep. 848.

The defendant does enough to obtain leave to enter a suggestion to deprive the plaintiff of costs under the 9 & 10 Vict. c. 95. s. 129, if by his affidavits he brings the case within sections 128. and 129; he need not negative any grounds for refusing the suggestion not mentioned in these sections. Such grounds, if they exist, are to be shewn by the other party.

If a *prima facie* case be made out for entering a suggestion, the Court will not inquire into a doubtful point of law, which may be raised upon the record after the suggestion is entered.

The Court gave leave to enter a suggestion to deprive the plaintiff of costs in an action on a bill of exchange in which he had recovered less than 20*l.*, without expressing any opinion as to whether bills of exchange were within the jurisdiction of the

county courts. *Butler v. Corney*, 17 Law J. Rep. (N.S.) Exch. 265; 2 Exch. Rep. 474.

To deprive a plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95. s. 129, it is necessary to enter a suggestion on the roll; and a defendant making an application for this purpose must shew affirmatively, on his affidavits, that the case is not within any of the exceptions contained in the 128th section. A statement, therefore, by the defendant that the plaintiff resided at the commencement of the action within a "short distance" from the defendant, is not equivalent to a statement that the plaintiff did not "dwell more than twenty miles from the defendant," pursuant to the 128th section of the act. *Brooker v. Cooper*, 18 Law J. Rep. (N.S.) Exch. 41; 3 Exch. Rep. 112.

On a motion to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, in an action brought by an administratrix to recover a debt due to the deceased, whom she represents, and in which the plaintiff has obtained a verdict for less than 20*l.*, it is not necessary that the affidavits should negative the fact of the deceased having been an officer of the county court which had jurisdiction to try the cause.

If the motion be made before the judgment has been completed, by the insertion of the amount of the Master's *allocatur* for costs, it is not requisite that the motion be to set aside the judgment also, for there is no final judgment till the amount of costs be inserted. *Robieson v. Rees*, 19 Law J. Rep. (N.S.) Q.B. 145; 1 L. M. & P. 69.

In an action on a bill of exchange, where the plaintiff recovered less than 20*l.*, the defendant moved to enter a suggestion to deprive the plaintiff of costs, on an affidavit of William Jones. The affidavit did not state in terms that the said William Jones was the defendant, though it stated that the action was on a bill of exchange accepted by the deponent; that the plaintiff recovered a verdict for a certain sum; that at the time of the commencement of the suit the deponent was liable to be summoned in the county court for the sum so recovered; and that for the said cause of action a plaintiff might have been entered against him by the plaintiff in the said county court. The affidavit then negated the exceptions in section 128. of stat. 9 & 10 Vict. c. 95, with regard to the deponent, so as to bring the case within the statute, if the deponent had alleged himself to be the defendant:—Held, that for the purposes of this application it sufficiently appeared that the defendant and the deponent were the same person.

The affidavit stated "that the residence of the deponent was at the commencement of this suit, and still is, within the jurisdiction of the said county court, and that no officer of the said county court was or is a party to this action:—Held, that the affidavit shewed clearly enough that no officer of the county court was at the commencement of the suit a party to the action. *Nind v. Jones*, 19 Law J. Rep. (N.S.) Q.B. 321; 1 L. M. & P. 275.

In debt for money lent and on an account stated, the plaintiff recovered a verdict for 10*l.* on the count for the account stated on proof of the defendant's I O U for that amount. The defendant moved to enter a suggestion to deprive the plaintiff of costs under the County Courts Act on his own affidavit,

which, among other things, alleged that the cause of action arose wholly within the jurisdiction of the L. County Court. The plaintiff shewed cause on affidavits of himself and his wife, which stated that the cause of action was for 10*l.* lent to the defendant out of the jurisdiction of the L. County Court, and that the I O U was given for that loan:—Held, that the rule must be absolute, at all events, as the plaintiff's affidavits did not negative that the I O U was made within the jurisdiction of the L. County Court.

Whether on a motion to enter a suggestion to deprive the plaintiff of costs, where the only affidavits are those of the parties themselves, and the statements in them are contradictory as to where the cause of action arose, the Court will grant the rule—*quære*. *Mills v. Best*, 19 Law J. Rep. (N.S.) Q.B. 328; 1 L. M. & P. 43.

The affidavit in support of a motion to enter a suggestion to deprive the plaintiff of costs under the County Courts Act stated, "that the action is founded on contract, and that the debt claimed is not more than 20*l.*, but less than 20*l.*" &c., and "that the cause of action did arise in a material point within the jurisdiction" of a certain county court:—Held, that the nature of the action and the locality where a material part of the cause of action arose were sufficiently stated. *Montgomery v. Brogref*, 19 Law J. Rep. (N.S.) Q.B. 367; 1 L. M. & P. 507.

On a motion for a suggestion to deprive the plaintiff of costs under the County Courts Act, it appeared by the particulars of demand that some of the goods had been supplied in July 1848, and the defendant's affidavit stated that the residence of the defendant and the dwelling-house and place of business of the plaintiff were within the jurisdiction of the County Court of Surrey:—Held, that the existence of the *District* County Court at the time of the cause of action and the residence of the parties within its jurisdiction sufficiently appeared to entitle the defendant to a suggestion. *Walker v. Wall*, 19 Law J. Rep. (N.S.) Exch. 43; 4 Exch. Rep. 493.

An affidavit to enter a suggestion for the purpose of depriving the plaintiff of costs, under 9 & 10 Vict. c. 95. s. 129, stated, that at the time of the action brought, the defendant carried on his business at a place within the jurisdiction of the Southwark County Court, and that the plaintiff did not dwell more than twenty miles from the defendant, but dwelt within twenty miles from him:—Held, that this was not a sufficient statement that the defendant resided within twenty miles of the plaintiff's residence. *Duck v. Barton*, 19 Law J. Rep. (N.S.) Exch. 150; 4 Exch. Rep. 873.

An affidavit to deprive a plaintiff of costs under the County Court Act, 9 & 10 Vict. c. 95. s. 129, may be made by a party who is not connected with the cause.

It is no objection to such an affidavit that it describes the defendant as residing within the jurisdiction of the Westminster County Court, instead of the Westminster County Court of *Middlesex*. *Walker v. Furnell*, 19 Law J. Rep. (N.S.) Exch. 158; 4 Exch. Rep. 807.

The affidavits in support of a motion for a suggestion being technically defective, the Court dis-

charged the rule *nisi*, with costs, but permitted the application to be renewed. *Lloyd v. Gregory*, 19 Law J. Rep. (N.S.) Exch. 283.

If the affidavits on the part of a defendant shew a *prima facie* case for a suggestion, the Court will allow the suggestion to be entered, although the material facts are expressly denied by the affidavits of the plaintiff.

It is sufficient if the affidavit states that the cause of action arose within the jurisdiction. *Broad v. Carey*, 19 Law J. Rep. (N.S.) Exch. 283; 1 L. M. & P. 319.

An affidavit stating that "plaintiff dwelt and still dwells in K. Street, within twenty miles of defendant, who dwelt and still dwells in P. Street":—Held, insufficient. *Kirby v. Hickson*, 1 L. M. & P. 364.

An affidavit not shewing that the place described as defendant's residence was such at commencement of suit,—Held, insufficient.

Where the Court discharge such a rule by reason of the insufficiency of the affidavit in support of it, the defendant will not be permitted to renew his application. *Hand v. Daniels*, 1 L. M. & P. 420.

(b) After Notice not to trespass.

If, in trespass, the damages recovered be under 40*s.*, and the Judge does not certify that the trespass was wilful and malicious, proof that written notice not to trespass had been previously given will not entitle the plaintiff to full costs.

Quære, as to the effect of a suggestion on the record of such notice having been given. *Daw v. Hole*, 15 Law J. Rep. (N.S.) Q.B. 32.

Where an action of trespass had been brought, for placing stakes on the plaintiff's land, in which 40*s.* had been paid into court and accepted by the plaintiff, and afterwards the defendant was served with a notice in writing, that unless he removed the stakes a further action would be brought,—Held, that the continuance of the stakes on the plaintiff's land was a trespass after notice, within the 3 & 4 Vict. c. 24. s. 3, and that, in an action brought for such continuance, the plaintiff was entitled to full costs, and the proper mode of obtaining them was by entering a suggestion on the roll, and not by a certificate of the Judge. *Bowyer v. Cook*, 16 Law J. Rep. (N.S.) C.P. 177; 4 Dowl. & L. P.C. 816; 4 Com. B. Rep. 236.

COSTS, IN EQUITY.

[See INJUNCTION—LANDS CLAUSES CONSOLIDATION ACT—MORTGAGE—PRACTICE—PRACTICE IN EQUITY.]

(A) IN GENERAL.

(B) DEFENDANT'S RIGHT AND LIABILITY TO.

(C) BILL.

(D) PETITION.

(E) REHEARING AND APPEAL.

(F) MOTIONS.

(G) REFERENCES AND PROCEEDINGS BEFORE THE MASTER.

(H) CASE SENT TO A COURT OF LAW.

(I) ADMINISTRATION SUITS.

(K) CREDITORS' SUITS.

- (L) MORTGAGES.
- (M) TRUSTEES AND EXECUTORS.
- (N) ATTORNEY GENERAL.
- (O) HEIR-AT-LAW.
- (P) LUNATIC.
- (Q) INFANT.
- (R) CHARITIES. [See CHARITY, Costs.]
- (S) VENDOR AND PURCHASER.
- (T) SUBPENA FOR COSTS.
- (U) SETTING-OFF.
- (V) UPON WHAT FUND CHARGEABLE.
- (W) TAXATION OF COSTS.
 - (a) Practice as to, in general.
 - (b) What Charges are allowed.
 - (c) Solicitor's Bills.
- (X) RATE OF.
 - (a) In general.
 - (b) Pauper.
- (Y) SECURITY FOR COSTS.

(A) IN GENERAL.

As to costs in decree against several defendants. *Lawrence v. Bowle*, 2 Ph. 140.

Unsuccessful plaintiff charged with costs of suit, though the case was one of great difficulty arising out of a will and dependent on foreign law, and although the suit was instituted by order of the Master. *Nelson v. Bridport*, 10 Beav. 305.

In a suit instituted on fair grounds to establish a claim to a residuary bequest, the Court will give the plaintiff, though failing, his costs out of the estate. *Turner v. Frampton*, 2 Coll. C.C. 331.

A party who proved exhibits by two witnesses is not necessarily to be charged with the costs. Special directions as to costs of amendment improperly introduced. *Burchell v. Giles*, 11 Beav. 34.

Exceptions to a report were taken before, but not set down for argument until after, an act passed which rendered them immaterial:—Held, that the exceptant must pay the costs of them. *Heming v. Spiers*, 15 Sim. 551.

Parties compromised the subject-matter of a suit without providing for costs:—Held, that the cause could not be afterwards heard for the purpose of determining the costs alone. *Whalley v. Suffield*, 12 Beav. 402.

The defendant served the plaintiff with notice of a motion to dismiss the bill for want of prosecution. Before the motion was made, the Master, on an application to him for that purpose, gave the plaintiff liberty to amend the bill on payment of 10s. costs. The defendant brought on the motion for the purpose of obtaining the costs of the service of the notice:—Held, that the defendant was regular. *Findlay v. Lawrence*, 16 Law J. Rep. (n.s.) Chanc. 333.

Where two suits are instituted for the same purpose, and a plaintiff in one suit has notice of a decree in the other suit, but no order is obtained requiring him to stay further proceedings in his suit, if he proceeds, the Court will not allow him the costs of such further proceeding, but will not require him to pay the costs thereby occasioned to other parties. *Portarlington v. Damer, Lewis v. Damer*, 16 Law J. Rep. (n.s.) Chanc. 370; 2 Ph. 262.

A testator empowered his trustees to charge his

estates for certain purposes, and he devised it in trust for A & B. The charge was raised, and became vested in A, who filed a bill to raise the charge, and to ascertain the rights of the parties in the surplus:—Held, that A's costs of suit had priority over those of B. *Howard v. Prince*, 13 Beav. 72.

The assignee in insolvency of a sub-mortgagor disclaimed:—Held, that he was not entitled to his costs. *Staffurth v. Poll*, 2 De Gex & S. 571.

Costs of the day are not given where a cause is ordered to stand over at the hearing owing to an abatement or imperfection of the suit, which happened after the cause was at issue. *Fussell v. Elwin*, 18 Law J. Rep. (n.s.) Chanc. 349; 7 Hare, 29.

In a suit for the delivery up of deeds on which the defendant had a lien, the plaintiff offered to pay what the Master stated he should find due, which was less than the amount claimed, together with the costs of the defendant to that time. The latter refused the offer, but did not except to the report:—Held, on motion at the hearing on further directions, that the litigation subsequent to the offer was useless, and that each party must pay his own costs incurred since the report, including those of the motion. *Sentance v. Porter*, 18 Law J. Rep. (n.s.) Chanc. 448; 7 Hare, 426.

One of several co-plaintiffs gave notice to their solicitor that he was desirous of discontinuing the suit. Further proceedings were taken:—Held, on motion, that such plaintiff was not entitled to an indemnity from the solicitor against the costs of any subsequent proceedings. *Winthrop v. Murray*, 18 Law J. Rep. (n.s.) Chanc. 484; 7 Hare, 152.

A bill was filed by a mortgagee of an advowson for foreclosure of his mortgage, and for further relief. The defendants filed their answers; and after an order had been made in the cause, in which costs had been given against the plaintiff, the plaintiff died, and his executors, instead of reviving the original suit, filed a new bill in another court, praying the same relief as to the foreclosure of the mortgage, but omitting the further relief included in the original bill. The defendants moved that all further proceedings in the second suit should be stayed until the costs of the first suit, and the order made therein, should have been paid. Motion granted. *Long v. Storie*, 19 Law J. Rep. (n.s.) Chanc. 148.

(B) DEFENDANT'S RIGHT AND LIABILITY TO.

Defendants who, instead of disclaiming, supported the case of the plaintiff, but were ultimately held not entitled to any of the relief accorded to the plaintiff, were left to bear their own costs, irrespective of the consideration whether originally they were rightly made parties. *Ruckhan v. Siddall*, 2 Mac. & G. 607; 2 Hall & Tw. 244.

A defendant to a bill for discovery and to perpetuate testimony is entitled to his costs of the discovery, though he has examined witnesses in chief. *Skrine v. Powell*, 15 Sim. 81.

A defendant who has been served with a petition, although he has no interest in the subject-matter of it, is entitled to the costs of his appearance. *Marks v. Marks*, 18 Law J. Rep. (n.s.) Chanc. 171.

A bill was filed to restrain the infringement of a

patent, and an injunction was obtained upon motion, the defendants appearing and opposing, and the plaintiffs undertaking to bring an action to try their right at law. The plaintiffs failing to establish their right at law, the bill was ultimately dismissed, with costs, for want of prosecution:—Held, upon appeal, that the defendants were entitled to their costs of resisting the motion for an injunction as costs in the cause. *Stevens v. Keating*, 19 Law J. Rep. (N.S.) Chanc. 407; 1 Mac. & G. 659; 2 Hall & Tw. 176; reversing same case, 19 Law J. Rep. (N.S.) Chanc. 25.

(C) BILL.

The 125th Order of 1845 applies to a cross-bill of discovery filed as a defence to a suit in equity, and not to a bill of discovery in aid of defence of an action at law, in which the defendant's costs will be payable according to the old practice, upon the filing of the answer. *Dingwall v. Hemming*, 16 Law J. Rep. (N.S.) Chanc. 267.

If a cross-bill be filed *bona fide* by the defendant to the original suit, against whom the original bill is dismissed with costs, the costs of it will usually follow the decree in the original suit, notwithstanding charges of fraud are alleged in it which are not sustained. *Flight v. Robinson*, 16 Law J. Rep. (N.S.) Chanc. 178; 10 Beav. 73.

Husband and wife filed a bill for a claim made by him in his marital right. He became a bankrupt and the wife alone filed a supplemental bill, stating a settlement which had been before suppressed:—Held, that she was only entitled to relief on her next friend consenting to become liable for the costs of the former proceedings, and paying the extra costs occasioned by the suppression of the settlement. *Howard v. Prince*, 10 Beav. 294.

Where an original bill was filed for relief, and a cross-bill of discovery was filed by the defendant in aid of the defence to the original bill, which was heard in another branch of the court and dismissed, without costs, before the answer to the cross-bill was filed, an order for the taxation of the costs of the cross-bill obtained as of course, and without reference to the original bill, after the answer to the cross-bill was put in, was held irregular, and was dismissed, without costs. *Watts v. Penny*, 18 Law J. Rep. (N.S.) Chanc. 150; 11 Beav. 435.

Costs of unnecessary statements in supplemental bill. *Horsley v. Fawcett*, 11 Beav. 565.

(D) PETITION.

A party served with a petition appeared merely to ask for his costs:—Held, that this alone was not a sufficient reason to deprive him of them. *Bruce v. Kimlock*, 11 Beav. 432.

A petition was served upon a solicitor who was concerned in a cause for two defendants; it affected one only, but nothing was said to shew that the service was made in respect of that defendant. At the hearing the solicitor appeared for both,—Held, that the party having no interest in the matter was entitled to her costs. *Kilminster v. Noel*, 19 Law J. Rep. (N.S.) Chanc. 25; 12 Beav. 246.

A railway company took lands the subject of an administration suit, and in which infants and a married woman were interested, and a reference was made to the Master in the cause to ascertain what

course was the most beneficial for the parties under disability. The company were directed to pay all the costs, charges and expenses of the petition and reference. *Picard v. Mitchell*, 12 Beav. 486.

(E) REHEARING AND APPEAL.

An order for rehearing was discharged with costs, but in the mean time the cause had been set down and briefs delivered:—Held, that these costs could only be given on a rehearing, or on special application. *Davenport v. Stafford*, 9 Beav. 106.

Where an appeal was not only unsuccessful, but the respondent obtained a more favourable decree than had been made in the court below, the respondent's costs of the appeal were not thrown upon the appellant, but were made costs in the cause. *Phelps v. Prothero*, 17 Law J. Rep. (N.S.) Chanc. 404; 2 De Gex & S. 274.

(F) MOTIONS.

[See COMPANY, Railway Companies.]

On a motion to dismiss for want of prosecution, plaintiff undertook to file a replication. The cause having stood over for that purpose he was ordered to pay the costs of the motion. *Young v. Quincey*, 9 Beav. 160.

Costs of application to correct error in drawing up decree. *In re Bolton*, 9 Beav. 272.

The plaintiff, having filed his bill, gave notice of a motion for an injunction, which stood over, at the request of the defendants, that they might file affidavits. Before the motion was heard, the defendants put in a demurrer, which was, in the first instance, overruled, but was afterwards allowed upon appeal, and the plaintiff was ordered to pay the costs of the demurrer, and the costs of the suit:—Held, (reversing the decision of the Court below, 16 Law J. Rep. (N.S.) Chanc. 526; 16 Sim. 40,) that the defendants were entitled to their costs occasioned by the motion for an injunction. *Finden v. Stephens*, 17 Law J. Rep. (N.S.) Chanc. 342.

Where the right of a party who has given notice of a motion is intercepted by a step taken by his adversary, he is entitled to his costs; but he should not bring on his motion if the costs then incurred are tendered. *Newton v. Ricketts*, 11 Beav. 164.

Costs of a motion may be given though not asked for by the notice of motion. *Clark v. Jacques*, 11 Beav. 623.

A motion being refused, with costs, the party cannot renew the motion till the costs have been paid. *Oldfield v. Cobbett*, 12 Beav. 91.

On a motion that tenants may allow and pay their arrears of rent to a receiver, it is not the course of the Court to order the tenant to pay the costs of the motion. *Hobhouse v. Hollcombe*, 2 De Gex & S. 208.

Upon a motion by defendant to dismiss the bill upon payment or satisfaction to the plaintiff of the debt or claim made by the suit, and certain costs of the suit, the Court will, in some circumstances, determine the question of costs to be paid by defendant, as where such question is purely collateral to the subject of the suit.

The mere offer from a defendant to pay a claim and costs (without motion), held not to disentitle plaintiff to his costs of the subsequent proceedings

in the suit. *Kenny or Penny v. Beavan*, 18 Law J. Rep. (N.S.) Chanc. 64; 7 Hare, 133.

An application by the defendant to the Master of the Rolls to discharge, for irregularity, an order of course had been refused, with costs; but the order was varied by the Lord Chancellor on appeal, on the ground that the form of the order, though the usual form, was inaccurate:—Held, notwithstanding, that the defendant ought to pay the costs of the motion at the Rolls, and that although the cause belonged to a Vice Chancellor's Court, and the defendant was, therefore, unable to move at the Rolls to discharge the order except for irregularity. *Watson v. Life*, 1 Hall & Tw. 308.

(G) REFERENCES AND PROCEEDINGS BEFORE THE MASTER.

A testator devised his real estate to a trustee for 1,000 years, to raise, by sale or mortgage, 2,000*l.*, "to be equally divided amongst such of his next-of-kin, both maternal and paternal, as should be living at the time of his death." The devisee filed his bill, asking for an inquiry to ascertain the parties entitled to the 2,000*l.* Various proceedings were taken in the Master's office, in the course of which the sum of 2,000*l.* was raised; the Master made his first report, finding who were the next-of-kin *ex parte paternā*, and also stating that C B was one of the next-of-kin *ex parte maternā*; but upon a subsequent reference he found C B to be the only next-of-kin *ex parte maternā*:—Held, that the testator's estate was, from the first, liable to the costs of the inquiry, and that the money being raised and set apart before the next-of-kin were ascertained made no difference, and that the costs must be raised out of the testator's estate. *Dugdale v. Dugdale*, 19 Law J. Rep. (N.S.) Chanc. 42; 12 Beav. 247.

Upon an inquiry before the Master, a party put in an insufficient examination. Upon an *ex parte* motion he was ordered to pay the costs thereby occasioned. *Alfrey v. Alfrey*, 12 Beav. 420.

Where, under a decree in a creditors' suit, ordering that the real estates of the debtor should be sold, and that the Master should settle the conveyances in case the parties differed, an application is made to the Master respecting a conveyance, the purchaser is bound to pay the costs of his attendance before the Master. *Hodgson v. Shaw*, 16 Law J. Rep. (N.S.) Chanc. 56.

The costs incurred by a legatee who has instituted an administration suit, in attending before the Master by counsel in support of his state of facts,—Held, not to be within the 120th Order of May, 1845, as incurred upon a question of title. *Wroughton v. Colquhoun*, 1 De Gex & S. 357.

(H) CASE SENT TO A COURT OF LAW.

By an order made in a cause, a case was sent for the opinion of a court of law, and the certificate was returned in favour of the plaintiff. By the final decree made in the cause the costs of the suit generally were given to the plaintiff, the costs of the case sent to law not being mentioned:—Held, that the plaintiff was entitled to the costs of the case sent to law. *Humphrey v. Geary*, 18 Law J. Rep. (N.S.) Chanc. 488.

The costs of a case directed for the opinion of a court of law are not as a general rule included in

the ordinary costs of a suit—*semble*. *Salkeld v. Johnston*, 1 Mac. & G. 533; 1 Hall & Tw. 347.

(I) ADMINISTRATION SUITS.

[See ADMINISTRATION OF ESTATE.]

Costs as between solicitor and client will be allowed to the plaintiff in a legatee's suit where there is a deficient fund. *Burkitt v. Ransom*, 2 Coll. C.C. 536: s.p. *Cross v. Kennington*, 11 Beav. 89.

Where the fund is deficient, the executor's costs of an administration suit are paid thereout in priority to those of other parties. *Tanner v. Dancy*, 9 Beav. 339.

By the Master's report, made in an administration suit, the executor was found to be indebted to the testator's estate in a sum payable at a future day:—Held, notwithstanding, that the executor was entitled to immediate payment of his costs of suit. *Stephens v. Pellen*, 17 Law J. Rep. (N.S.) Chanc. 214.

Where one of a class of persons interested in a testator's residuary personal estate files a bill for its administration, the general costs of the suit are to be satisfied out of the fund generally; but where some of the parties beneficially interested have incumbered or absolutely assigned their portions of the fund, the costs of the assignors only will be allowed, the same to be paid to their assignees respectively, and the rest of the costs incurred by the assignees must be satisfied out of the assigned shares respectively. *Greedy v. Lavender*, 18 Law J. Rep. (N.S.) Chanc. 62; 11 Beav. 417.

Executors had made a division and appropriation of the residue. The husband of one of the residuary legatees, in ignorance of what had been done, filed a bill for an account. At the hearing the plaintiff, with notice of what had taken place, persevered in having the accounts taken, and no substantial variation resulted therefrom:—Held, that the plaintiff was entitled to costs out of the estate up to the hearing, but that the plaintiff's share alone must bear the subsequent costs. *Thompson v. Clive*, 11 Beav. 475.

Where a creditor, without notice of a decree in an administration suit, had commenced an action in Scotland against the administratrix, and afterwards had come in under the decree, but declined to undertake to discontinue his action, he was fixed with the costs of a motion for an injunction to restrain proceedings at law.

After a decree in an administration suit, it is no ground for allowing a creditor in the first instance to proceed at law to ascertain his claim, that the cause of action arose in Scotland, and the witnesses are resident there, and that questions of Scotch law are involved. *Graham v. Maxwell*, 18 Law J. Rep. (N.S.) Chanc. 225; 1 Mac. & G. 71; 1 Hall & Tw. 247.

Costs where two estates, those of the testator and the executor, are administered in the same suit. *Culsha v. Cheese*, 7 Hare, 246.

A, a legatee under the will of a testator, assigned his interest to B for the benefit of his creditors. A suit was instituted for the administration of the testator's estate, to which A and B were made parties: A joined with other legatees in his answer; B an-

swered separately:—Held, that B was not entitled to costs out of the testator's general estate. *Heywood v. Grazebrook*, 18 Law J. Rep. (N.S.) Chanc. 303.

A fund was settled in trust for A, B, and others. B mortgaged his share for more than it was worth and died intestate. A suit was instituted by A against the mortgagee of B's share, and the other persons interested in the fund, for the purpose of obtaining a division of it. A cited the next-of-kin of B in the ecclesiastical court, whereupon C appeared, and took out administration to B, and was afterwards made a party to the suit in that character:—Held, that, as the proceedings in the ecclesiastical court were incurred only for the purpose of making the suit complete, the costs attending them ought to be borne by the general fund. *Cotton v. Penrose*, 18 Law J. Rep. (N.S.) Chanc. 128.

(K) CREDITORS' SUITS.

Where the plaintiffs in a creditors' suit claimed to have a particular part of the testator's estate appropriated towards payment of their debt, the expenses attending that claim, being unconnected with the general administration of the estate, were directed to be borne by the plaintiffs; and the other creditors were not required to contribute towards them. *Dunning v. Hards*, 16 Law J. Rep. (N.S.) Chanc. 403; 2 Phi. 294.

In a creditors' suit against the administrator of an intestate, and against the assignees of the administrator, who afterwards became bankrupt, no costs of the suit were given to either the bankrupt or his assignees.—Held, also, that the assignees were not entitled to the costs of a petition which had been served on them by an equitable mortgagee, not a party to the suit, praying payment to him out of court of monies arising from the sale of the mortgaged estate, which were not sufficient to pay the principal and interest monies, and to the sale of which he had consented. *Carr v. Henderson*, 18 Law J. Rep. (N.S.) Chanc. 39; 11 Beav. 415.

The costs of the plaintiff in a creditors' suit in opposing a motion to dismiss for want of prosecution by a party named executor, who had renounced probate and disclaimed, was refused to a creditor, whose bill was dismissed upon payment of his claim by the acting executor. *Kenny or Penny v. Beavan*, 18 Law J. Rep. (N.S.) Chanc. 64; 7 Hare, 133.

Where a decree for the general administration of an estate has been made, and the Court upon that ground restrains the proceedings in another (a creditors') suit, the question of payment of the costs of the plaintiff in such creditors' suit will be reserved, if the debt be disputed by the executors. *Davey v. Plestow*, 19 Law J. Rep. (N.S.) Chanc. 491.

A creditors' suit against a personal representative for the administration of a testator's estate had proceeded to replication when a decree was obtained in another creditors' suit against the same personal representative for the same object. After the defendant had given the plaintiff in the first suit notice of the decree, the plaintiff threatened to proceed; and thereupon the defendant upon a notice of motion, intitled only in the former cause, asked that the proceedings might be stayed. The Court made an order in both suits, granting the injunction, and giving the restraining plaintiff liberty to

tax his costs of the first suit, and on the motion, and to go in and prove his debts and such costs in the second suit, but declined to direct that the costs should be paid out of the first assets. *Ladbroke v. Sloane*, 3 De Gex & S. 291.

(L) MORTGAGES.

After action brought by mortgagee (a solicitor) against mortgagor for his bill of costs on effecting the mortgages and 35*l.* taken out of court in that action by the plaintiff in satisfaction of his demand; and after a second action between the same parties to recover the mortgage-money and costs taxed in that action at 19*l.* 16*s.* 4*d.*, mortgagor tendered to mortgagee principal and interest, the said sum of 19*l.* 16*s.* 4*d.*, and 10*l.* for any other costs that might be due; mortgagee however refused to re-convey because the bill of costs, the subject of the first action, had not been satisfied, and the taxed costs of the second action were only costs as between party and party. Upon a bill filed by mortgagor against mortgagee to compel a re-conveyance,—Held, that the mortgagee must pay the costs of the suit.

Under the circumstances of the case a tender of mortgage-money held to be absolute and not conditional.

Semble—that a Judge at chambers will not order a re-conveyance of mortgage premises. *Morley v. Bridges*, 2 Coll. C.C. 621.

Where an application against a receiver was refused with costs, and which the applicant was unable to pay, the receiver was held entitled to be indemnified and to have his costs as between solicitor and client out of the fund in hand belonging to incumbrancers. *Courand v. Hammer*, 9 Beav. 3.

Where a ship had been mortgaged to several distinct parties, and the value was admitted not to be of an amount equal to what was due in respect of the first mortgage,—Held, on bill by the second mortgagees, for redemption against the first mortgagee and the assignees of the third and other mortgagees, which bill was dismissed, that the assignees, notwithstanding their disclaimer of all interest in the ship, were not entitled to their costs from the plaintiffs. *Gibson v. Nicol*, 15 Law J. Rep. (N.S.) Chanc. 195; 9 Beav. 403.

In a foreclosure suit by the first mortgagee against a second mortgagee and the mortgagor, the second mortgagee disclaimed, and was brought to the hearing of the cause by the plaintiff:—Held, that the plaintiff was bound to pay the disclaiming party his costs, and was entitled to add them to the mortgage debt. *Dalton v. Lambert*, 15 Law J. Rep. (N.S.) Chanc. 208.

Foreclosure suit by first mortgagee against a second mortgagee and the mortgagor. The second mortgagee disclaimed:—Held, that the disclaiming mortgagee was not entitled to his costs at the hearing. *Ohrlly v. Jenkins*, 17 Law J. Rep. (N.S.) Chanc. 22; 1 De Gex & S. 543.

Where an incumbrancer of a fund in court obtains an order for payment, out of a fund in court, of his principal and interest, and his costs as mortgagee, the taxing Master will not, unless specially directed, include the expenses of obtaining a stop order; but if the incumbrancer is entitled to these costs, they should be expressly mentioned on the

order. *Waddilove v. Taylor*, 17 Law J. Rep. (N.S.) Chanc. 408; 6 Hare, 307.

Where a disclaiming defendant has no interest in the subject-matter of the suit at the time of filing the bill, he will be entitled to his costs from the plaintiff; but where the defendant has an interest at the time of the bill filed, and disclaims such interest by his answer, it is in the discretion of the Court to order the plaintiff to pay him his costs upon consideration of the circumstances; as, *ex. gr.*, whether the plaintiff might not have had from the defendant what he seeks without suit. *Gabriel v. Sturgis*, 15 Law J. Rep. (N.S.) Chanc. 201; 5 Hare, 97.

In a foreclosure suit a party interested in the equity of redemption disclaimed, and stated that he never claimed any interest. The bill being brought to a hearing, he was held not entitled to his costs. *Buchanan v. Greenway*, 11 Beav. 58.

A mortgagee filed a bill of foreclosure and, pending the suit, transferred the mortgage to A B, who transferred it to plaintiff.—Held, that the costs occasioned were chargeable against the estate, but that the extra costs were not to be charged against the mortgagor. *Coles v. Forrest*, 10 Beav. 552.

A mortgaged an estate to B for a term, and died, having devised the estate to his wife and children, some of whom were infants. B filed a foreclosure bill against A's wife and children. On the application of the plaintiff, the solicitor of the suitors' fund was appointed the guardian of the infant defendants. A decree was made that in default of payment the defendants should be foreclosed, and that in the event of foreclosure the property should be sold. Upon a question as to the costs of the suit incurred by the solicitor of the suitors' fund,—Held, that the plaintiff was liable to pay such costs. *Harris v. Hamlyn*, 18 Law J. Rep. (N.S.) Chanc. 403.

The extra costs of a re-conveyance of a mortgaged estate, which were caused by the lunacy of the mortgagee, were ordered to be paid by the mortgagor, in a case where the lunatic was a trustee only of the mortgage money, and that fact was disclosed on the face of the mortgage deed. *In re Lewes*, 18 Law J. Rep. (N.S.) Chanc. 153; 1 Mac. & G. 23; 1 Hall & Tw. 123.

(M) TRUSTEES AND EXECUTORS.

Trustees can only be allowed costs out of pocket for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee. *Christophers v. White*, 10 Beav. 523.

Costs incurred by executors in unsuccessfully defending an action brought by the surgeon who had attended the testator up to his death, were, under the circumstances, not allowed to the executors; but the plaintiffs having gone into evidence as to the reasonableness of the surgeon's bill, instead of leaving it for inquiry before the Master, the additional costs occasioned thereby were not to be borne by the executors.

Where in a suit against executors expenses are incurred by going into evidence upon particular items, which are proper subjects for inquiry before the Master, those expenses will be borne by the plaintiffs. *Chambers v. Smith*, 16 Law J. Rep. (N.S.) Chanc. 291; 2 Coll. C.C. 742.

Upon a bill filed on behalf of an infant against

two trustees for maintenance out of the trust fund, charging one with misconduct, but not the other, the trustees answered separately. One set of costs only was allowed, and the whole given to the innocent trustee. *Webb v. Webb*, 17 Law J. Rep. (N.S.) Chanc. 13; 16 Sim. 55.

A trustee put in a disclaimer to a bill of foreclosure, and set out a correspondence to shew he had always refused to act:—Held, that he was entitled to the whole costs, as the plaintiff might have shewn by the bill that a simple disclaimer was sufficient. *Benbow v. Davies*, 11 Beav. 369.

Under the ordinary reference to the Master to tax the costs of trustees, it is competent to the Master to take notice of the fact, that a trustee has appeared for himself as solicitor in the proceedings, and to disallow him all costs, except costs out of pocket.

A trustee, a solicitor, appearing for himself as a party to a suit is only entitled to costs out of pocket; but this rule does not extend to the case of a trustee acting as solicitor in the cause for his *cestui que trust* or his co-trustees; and where such trustee had appeared jointly for himself and his co-trustees, and no extra costs had been occasioned thereby, he was allowed the full costs of such appearance.

Where the order of the Court below was held upon appeal to be right in effect, though founded upon erroneous principles, the appeal was dismissed, with costs. *Cradock v. Piper*, 17 Sim. 41; affirmed, 19 Law J. Rep. (N.S.) Chanc. 107; 1 Mac. & G. 664; 1 Hall & Tw. 617.

Trustees who file a bill for the administration of a testator's estate are entitled to their costs, however small the estate may be, and however small the risk in administering the estate. *Hodgkinson v. Gilbert*, 19 Law J. Rep. (N.S.) Chanc. 424.

(N) ATTORNEY GENERAL.

A fund was settled on A for life with remainder to B and others. B mortgaged his reversionary share to C, and was afterwards convicted of felony. A suit was instituted for the administration of the fund to which C and the Attorney General were made defendants:—Held, that the Attorney General was not entitled to his costs out of the general fund. *Kitchener v. Kitchener*, 18 Law J. Rep. (N.S.) Chanc. 152.

The rule that the Attorney General neither receives nor pays costs, will in future be modified in this way, namely, that the Attorney General never receives costs in a case in which he might have been liable to pay costs if he had been a private party. *Attorney General v. London (Corporation)*, 19 Law J. Rep. (N.S.) Chanc. 314; 2 Hall & Tw. 1; 2 Mac. & G. 247.

(O) HEIR-AT-LAW.

The heir-at-law is only allowed costs as between solicitor and client in charity cases, and where he is a trustee. *James v. James*, 11 Beav. 397.

(P) LUNATIC.

[See (L) Mortgages.]

Where a lunatic was bound by covenant to grant a renewal of a lease, the expenses incurred by the lessee in applying to the Court, under the 1 Will. 4.

c. 65, for a direction to the committee to execute a lease instead of the lunatic, must be borne by the lunatic's estate. *Ex parte Barnes*, 17 Law J. Rep. (N.S.) Chanc. 436.

(Q) INFANT.

[See PRACTICE, Infants' Suits.]

Under a decree in a creditors' suit, the real estates of a debtor, who had died intestate, leaving an infant his heir, were ordered to be sold. The estates were accordingly sold by auction in lots. Under the conditions of sale was this note:—"N.B. This sale is made by an order of the Court of Chancery, &c., and, the property being vested in an infant, the purchaser will have no covenants for title." A purchased one of the lots:—Held, that the costs attending the settling of the deed of conveyance from the infant to A, by the Master, by reason of the infancy of the heir, ought to be borne by the intestate's estate, and not by A. *Brown v. Lake*, 15 Law J. Rep. (N.S.) Chanc. 34.

The petition of an infant plaintiff in a cause is the petition of his next friend, and the next friend was ordered to pay costs. *Jones v. Lewis*, 1 De Gex & S. 245.

(R) CHARITIES.

[See CHARITY, Costs.]

(S) VENDOR AND PURCHASER.

A purchase was completed under the powers of an act of parliament, which authorized a corporation to purchase property compulsorily. The vendors being under disabilities, the purchase-money was paid into court under the act, whereby the Court was enabled to order that all the reasonable costs, charges, and expenses attending the re-investment of the purchase-money and of obtaining proper orders, and of the other proceedings for such purpose, be paid by the corporation. A contract was entered into for investment in property free from incumbrances, but the title proving to be subject to numerous incumbrances, the purchaser's counsel advised that the vendors should procure all the incumbrances to be conveyed to them so as to shorten the conveyance. The draft re-conveyances, eight in number, were submitted to the purchaser's solicitors and settled by their counsel:—Held, that the corporation could not be charged with the costs thereby incurred unless they were incurred with their express consent. *Jones v. Lewis*, 1 De Gex & S. 245.

Where a bill for specific performance is filed by a purchaser and dismissed because the vendor cannot make a good title, it is without costs. *Malden v. Fyson*, 9 Beav. 347.

(T) SUBPENA FOR COSTS.

An order was made, on the application of the plaintiff, that certain costs should be taxed and paid, without stating to whom. The subpoena for costs directed them to be paid to the plaintiff and an attachment issued in the usual form:—Held, regular.

It is not necessary to bring up a party who is in custody for non-payment of costs. *Oldfield v. Cobbett*, 12 Beav. 91.

(U) SETTING OFF.

The costs of exceptions to the answer of a defendant to a bill of discovery which the Master, under the 19th Order of December 1833, has certified ought to be borne by the defendant, are not within the 28th Order of April 1828, or the 124th Order of May 1845; but the Court will, on application *ex parte*, order such costs to be taxed and deducted from the costs of the suit payable to the defendant. *Hughes v. Clark*, 6 Hare, 195.

A testatrix devised real estates to A on trust for sale, and directed him to pay a legacy to B out of the purchase-money, and appointed A executor, who proved the will. B in the lifetime of the testatrix married C. B had in the lifetime of the testatrix taken a banker's deposit note for 40l. belonging to her, and, on her death, refused to deliver it to A. A brought an action of trover against C, and recovered 42l. damages, to be reduced to 40s. on the delivery of the note. A having refused to pay the legacy, except on the condition of deducting the costs of the action, a bill was filed by B and C against A, for the payment of the legacy. After the suit was commenced, C delivered up the note:—Held, that A had no right to set off the costs of the action against the legacy. *Reeve v. Richer*, 17 Law J. Rep. (N.S.) Chanc. 86; 1 De Gex & S. 624.

(V) UPON WHAT FUND CHARGEABLE.

Residuary real and personal estate was devised and bequeathed upon trust for the benefit of certain parties for life, during which time the estates were to be kept separate; they were then to be blended together, and divided among a class. The gift to the class failed, and a suit was then instituted by parties who claimed both estates as personality. The costs of the suit were directed to be borne proportionally by the real and personal estate; and that, although the title of the heir-at-law to the realty was held by the Court to be free from any doubt. *Christian v. Foster*, *Bunnett v. Foster*, 16 Law J. Rep. (N.S.) Chanc. 119; 2 Ph. 161.

A testator devised two estates in different ways, and charged one only with payment of his debts, funeral and testamentary expenses. In a creditors' suit, both estates were sold for payment of debts:—Held, that the charged estate was primarily liable for the costs of suit. *Wilson v. Heaton*, 11 Beav. 492.

The defendant, the administratrix and residuary legatee of the testatrix, admitted assets, and had set apart a fund to secure the payment of a bequest:—Held, the suit being merely for the determination of the validity of the bequest, that setting apart from the general estate a sufficient fund to meet the bequest did not constitute such a severance as would exonerate the residuary estate of the testatrix from payment of the costs of suit, and that such costs were properly payable out of such residuary estate. *Attorney General v. Lawes*, 19 Law J. Rep. (N.S.) Chanc. 300; 8 Hare, 32.

(W) TAXATION OF COSTS.

(a) Practice as to, in general.

Wastell v. Leslie, 5 Law J. Dig. 226; 14 Sim. 84.
Taxation of costs on private bills, in the House

of Commons regulated by 10 & 11 Vict. c. 69; 25 Law J. Stat. 217. And in the House of Lords 12 & 13 Vict. c. 78; 27 Law J. Dig. 152.

Prior irregularity waived by subsequent neglect of the client. *In re Mourilyan*, 11 Beav. 48.

Where upon appeal from the taxing Master there appeared considerable difficulty in ascertaining the real facts, and questions of law depended upon them, the Court directed an action to try the question.

Discretion as to costs of taxation. *In re Burchell*, 11 Beav. 596.

One of the defendants in a suit to whom the costs had been ordered to be paid by the plaintiffs, died before taxation, and the suit had not been revived:—Held, on motion by the representative of the deceased defendant, that notwithstanding the decree having been passed and entered, and the costs having become, under 1 & 2 Vict. c. 110. s. 18, a charge upon the real estate of the plaintiffs, the Court would not direct the Master to proceed with the taxation until the suit had been revived. *Robertson v. Southgate*, 18 Law J. Rep. (N.S.) Chanc. 404; 7 Hare, 109.

A party to whom costs are awarded may proceed in the taxation, though he is in contempt. *Newton v. Ricketts*, 11 Beav. 67.

The survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed and paid by the plaintiff, are entitled to proceed with the taxation, notwithstanding the death of one of such defendants without a revivor of the suit, and although the surviving defendants and the deceased in his lifetime had carried in a joint bill of costs for taxation. *Hunter v. Daniel*, 7 Hare, 281.

One of several co-defendants, whose costs of the suit had been ordered to be paid by the plaintiff, and who had carried in a joint bill of costs, died before the taxation was completed:—Held, on motion, that the surviving co-defendants might proceed with the taxation of their own costs without reviving the suit. *Hunter v. Daniel*, 19 Law J. Rep. (N.S.) Chanc. 404.

A defendant against whom a bill has been dismissed with costs, to be paid by the plaintiff, and received by the plaintiff out of the estate, is not bound to serve the parties interested in the estate with a warrant to attend taxation, but may proceed with the taxation, serving the plaintiff only with the warrant. *Lander v. Ingersoll*, 6 Hare, 73.

(b) What Charges are allowed.

Brief of pleadings prepared for counsel after publication, and before the cause was set down, and which became useless by reason of a compromise, disallowed on taxation as between solicitor and client.

A review of taxation refused where the Master exercised his discretion and did not proceed on any general principle. *Friend v. Solly*, 10 Beav. 329.

Brief of pleadings before the case was at issue, and fee to counsel for settling a special affidavit for leave to amend disallowed.

Costs of an abstract of a deed to accompany a case submitted to counsel disallowed. *In re Pender*, 10 Beav. 390.

In taxation, abstracts are ordinarily passed if

they contain eight folios on an average; but the strict rule is that they should contain ten folios.

Taxation of a paid bill sought on the ground of overcharge in abstracts containing less than ten folios refused, the practice being in uncertainty, and there being no pressure or surprise. *In re Walsh*, 12 Beav. 490.

A had been entrapped by B into becoming a trustee of B's marriage settlement, and on discovering the fact, advised with his solicitors as to the proper course to be pursued to relieve himself from the liabilities arising therefrom. B offered to indemnify A by giving him the best security in his power. After conference with counsel, the draft of a bond and release was settled by counsel for B's execution. It was afterwards discovered that the personal security of B was of no value, and no alternative remained but for A to file a bill against B and wife and the former trustees of the settlement, who had committed a breach of trust by lending the trust-money to B on his personal security. After bill filed, it was arranged between all the parties that the suit should be settled and put an end to, and a petition was accordingly presented to the Court by A for that purpose, when a reference was directed to the taxing Master to tax the plaintiff's costs, charges, and expenses of and incidental to the trusts, and also his costs of the suit, including the costs of the petition, as between solicitor and client. The taxing Master, in pursuance of the order, proceeded to tax the plaintiff's bill of costs, and disallowed the costs incurred in the preparation of the draft bond and release, and of copies sent to the defendant's solicitors for perusal. The Master also disallowed the following items, viz. a conference fee paid to counsel on the occasion of counsel being consulted by the plaintiff's solicitors on the propriety of accepting a security offered by B after the institution of the suit, with a view to staying proceedings therein; a charge for brief copies for counsel of an affidavit which had been used by the plaintiff's counsel on the plaintiff's motion to pay money into court, but not entered in the order of the Court when drawn up; costs arising out of the delivery to the plaintiff's counsel of supplemental briefs, with fees, on a petition presented by the plaintiff to compromise the suit under an arrangement entered into between all parties, and which, at first, was understood to be unopposed, but to which opposition was afterwards threatened by the respondents; costs of copies of the affidavit made on the occasion of the motion to pay money into court (of the reading whereof on the hearing of the petition notice had been given to the respondents), and which was recited in the order made on the petition, and of a copy of a lengthened correspondence which arose between A's solicitors and the defendant's respective solicitors, having relation to the trusts, and which was laid before counsel as part of his instructions for the preparation of the bill:—Held, that the Master ought not to have disallowed any of the above items, except the charges for the briefs of the affidavit used on the occasion of the motion, and for the copy of the correspondence. *Stephens v. Lord Newborough*, 17 Law J. Rep. (N.S.) Chanc. 332; 11 Beav. 403.

Under the 120th Order of May 1845, which directs the taxing Master to allow all reasonable

expenses, including the attendance of counsel at the Master's offices, upon questions relating to pleadings or title, the Master would not be justified in allowing fees for the attendance of counsel upon questions relating to the allowance of items in an executor's account. *Russell v. Nicholls*, 15 Law J. Rep. (N.S.) Chanc. 289; 15 Sim. 161.

(c) *Solicitor's Bills.*

A solicitor on behalf of a client agrees to advance a sum of money for him in payment of legacy and administration duties, on condition that the same be secured with interest on a fund in court to which the client is entitled; a security is accordingly given by the client, charging the fund in court with the payment of the sum to be advanced by the solicitor with interest thereon; the sum actually advanced by the solicitor is much less in amount than the sum originally mentioned and intended to be advanced, and is inserted in the solicitor's bill of costs as a disbursement:—Held, that the sum was properly introduced into the bill as a disbursement.

Anticipated charges introduced into a bill in respect of business to be transacted at a future period, not allowed.

Where a 5*l.* stamp was affixed to an instrument executed for securing a particular sum of money, and it was afterwards discovered that a smaller sum was all that was required to be advanced, and that a stamp of less value would have been sufficient, the 5*l.* stamp was allowed on the ground of the transaction having been a *bond fide* one on the part of the solicitor. *In re Bedson*, 15 Law J. Rep. (N.S.) Chanc. 153; 9 Beav. 5.

In a case directing taxation of an agent's bill of costs, where the Master has received no special directions from the Court, it is his duty to confine himself to the payments plainly proved to have been made on account of the bills of costs, and not to take on himself to certify whether a certain alleged transaction, not amounting to actual payment, and the nature and circumstances of which were disputed, was or was not such a transaction as either a court of law or equity would, under the special circumstances, have adjudged to constitute a debt or payment.

Under an order, directing taxation of a town agent's bill of costs, the taxing Master taxed all the bills except certain bills which had been previously taxed by the proper officer, and paid, and, in respect of the latter, the Master merely required the agent to verify his disbursements:—Held, that the Master was right, the petition containing no allegations of specific errors. Interest on a bill of costs while under taxation, not allowed. *In re Smith*, 15 Law J. Rep. (N.S.) Chanc. 238; 9 Beav. 182.

Where a solicitor makes against his client any charge not authorized in the usual and regular mode of proceeding, the burthen of proving authority is on the solicitor.

Money advanced to put in the answer of a co-defendant, though for the interest of the client, disallowed without clear proof of his authority or acquiescence. *In re Pender*, 10 Beav. 390.

The solicitor of a defendant in the cause, and who is himself a defendant in the same cause, and appears by a second solicitor, cannot be allowed more

than one bill of costs, if it appears that the second solicitor has either before or after retainer agreed to allow his client a portion of the profits of his costs.

If the taxing Master has ground for suspecting that an arrangement has been made between solicitors in the cause by which a portion of the profits of the bill of costs of one is to be paid to another, he may inquire into it on affidavit, and if such an arrangement appear, the bill of costs should be taxed as in case of agency.

A, B and C were defendants against whom the bill was dismissed, with costs. B and C acted as the solicitors of A, and appointed D to act as their own solicitor in the same cause. After the retainer an agreement was entered into between B and D, whereby D agreed to allow B and C a portion of the profits of his bill of costs.

Held, that this constituted D in substance an agent for B and C, and that the separate bills of B and of C and D were properly taxed as a joint bill, and that all such costs as would not have been allowed in a case of agency were properly disallowed. *Deere v. Robinson*, 7 Hare, 283.

An order had been made for the taxation of a solicitor's bill, and the solicitor was to refund what (if anything) should be certified to have been overpaid. Under such an order, the Master was not authorized to take a general account of all transactions between the parties; but he ought to take into account all monies which were received by the solicitor in that character, and which were applicable by him to the payment of his bill of costs. *Cooper v. Ewart*, 16 Law J. Rep. (N.S.) Chanc. 417; 2 Ph. 362; 15 Sim. 564.

A, as the executor of B, employed R as his solicitor and agent. A, as such executor, became indebted in 64*l.* 18*s.* 6*d.*, for the costs of an action brought by him through another attorney. In negotiating the payment of these costs, R was employed for A, who finally requested R to pay them for him, and he signed an authority to that effect. R accordingly gave his undertaking to pay, and subsequently paid, the costs. In making out his bill of costs, R included the 64*l.* 18*s.* 6*d.* paid for these costs as a professional disbursement, but the taxing Master disallowed it. R applied for leave to except to the taxing Master's certificate, and for a reference back to him to review his report:—Held, upon a general certificate of all the taxing Masters, that those payments only which are made in performance of professional duties and in a professional character, ought to be allowed as disbursements in a bill of costs, and that the 64*l.* 18*s.* 6*d.* was not paid in a professional character, and was not properly introduced into the bill of costs; and the petition was dismissed, but, under the circumstances, without costs. *In re Remnant*, 18 Law J. Rep. (N.S.) Chanc. 374; 11 Beav. 603.

The taxing Masters of this Court, under the common order, can tax a bill of costs for parliamentary business upon the scale of parliamentary allowances, and will not confine the charges within the allowances made for business done in this court.

A solicitor and agent of a company retained parliamentary agents on behalf of the company. The bills of costs were delivered to the solicitor, but the directors of the company obtained an order for taxa-

tion:—Held, that such order was irregular. *In re Sudlow*, 18 Law J. Rep. (N.S.) Chanc. 182; 11 Beav. 400.

A solicitor in carrying in a state of facts to obtain the Master's approval of a contract to purchase, appended thereto a long schedule of the parcels proposed to be purchased. The taxing Master disallowed the charge for drawing, and allowed only for copying the schedule.—Held, that the disallowance was proper, although the Master in ordinary had allowed attendances upon a number of warrants proportioned to the length of the state of facts, including the schedule.—Held, also, that the allowances in respect of these attendances were properly considered by the taxing Master as a compensation for other business actually transacted, and in respect of which he disallowed the charges. *Jones v. Lewis*, 1 De Gex & S. 245.

Two of the defendants, the solicitors in the cause of a co-defendant, from whom they had severed in their defence, appeared by their own solicitor, and agreed with him for the allowance of part of his profits in the cause. The suit having been dismissed, with costs, as against all three defendants, two bills of costs were carried in—one for those of the two solicitors defendants, and another for those of their co-defendant. The taxing Master required evidence of the fact of alleged agency between the two solicitors, defendants, and their solicitor in the cause, and ultimately blended the costs of the three defendants into one bill, allowing only costs of agency as between the two defendants and their solicitor:—Held, on petition, that the taxing Master was right, and had a discretion in requiring evidence of the fact of agency, and that in cases of agency the solicitors could only carry in one bill of costs. *Deere v. Robinson*, 19 Law J. Rep. (N.S.) Chanc. 405.

The costs of a petition and order thereon for the transfer of certain funds in a cause were allowed to a solicitor, notwithstanding he had not used his best exertions to procure an earlier transfer of the funds under an order made on further directions; but the sums of 10s., paid by the solicitor to a stationer for expedition money, and of 3l. 3s. being a customary allowance to the clerks in the Accountant General's office, as a gratuity, and also of 11s. paid by the solicitor for two transfers, owing to the want of reasonable diligence on the part of the solicitor, were disallowed on taxation of his bill of costs. *In re Bedson*, 15 Law J. Rep. (N.S.) Chanc. 189; 9 Beav. 187.

The town agents of a country solicitor, in passing the accounts of an administrator, paid four sums amounting to 11l. 8s. 6d. at the Stamp Office for legacy duty and stamps. These were included by the country solicitor in his bill of fees and disbursements, but upon taxation they were struck out, by which the bill was reduced more than one-sixth. Upon a petition asking for liberty to except to the taxing Master's certificate,—Held, that the payment for legacy duty and stamps could only be made as agent, and that it was not a professional disbursement; that it ought to be inserted in the cash account, and not in the bill of fees and disbursements; that the taxing Master was right: and the petition was dismissed, but without costs. *In re Haigh*, 19 Law J. Rep. (N.S.) Chanc. 79; 12 Beav. 307.

(X) RATE OF.

(a) In general.

Davenport v. Powell, 5 Law J. Dig. 227; 14 Sim. 275.

The costs of more than two counsel disallowed in taxation between party and party, notwithstanding the third counsel was retained after the counsel by whom the pleadings were drawn had been called within the bar.

In taxation between party and party, it is not the practice to allow the common retaining fee to counsel.

Before the 120th Order of May 1845, the expense of attending the Master by counsel was not allowed between party and party, except on references for scandal. *Green v. Briggs*, 7 Hare, 279.

Upon taxation of costs the taxing Master disallowed the fees paid upon the hearing to a second Queen's counsel who had drawn all the pleadings, but had subsequently been called within the bar:—Held, that under the circumstances of this case, the Master had decided wrongly in disallowing the said fees. *Carter v. Barnard*, 17 Law J. Rep. (N.S.) Chanc. 278; 16 Sim. 157.

The circumstance of the junior counsel being called within the bar after settling the pleadings and before the cause is at issue, will not of itself justify the plaintiff in retaining him as third counsel, and to the allowance of his fees on the taxation of costs between party and party.

The retaining fee for counsel is not allowed on taxation of costs between party and party.

The fees for the attendance of counsel in the Master's office (except upon reference for scandal) were not allowed in taxation of costs between party and party previously to the 120th Order of May 1845. *Green v. Briggs*, 19 Law J. Rep. (N.S.) Chanc. 294.

Where the subject-matter of a petition is of a very complicated and intricate character, the costs of two counsel for the petitioner will occasionally be allowed, although the petition is unopposed. *Sturge v. Dimsdale*, 15 Law J. Rep. (N.S.) Chanc. 124; 9 Beav. 170.

The general rule, that for the purposes of taxation as between party and party only two counsel can be allowed as against an adverse party, will not be departed from except under very special circumstances. *Attorney General v. Munro*, 1 Mac. & G. 213; 1 Hall & Tw. 457.

In taxing the costs of a suit to be paid by defendant, a special retainer paid by plaintiff to the Attorney General who did not usually practise in Chancery was allowed, though there were no special circumstances which rendered his employment necessary. *Nichols v. Haslam*, 15 Sim. 49.

On a re-hearing the petition was dismissed, with costs, as between party and party. On the taxation the taxing Master refused to allow a special fee which had been paid to a senior counsel of the common law bar, the costs of short-hand writer's notes of the proceedings at the hearing in the court below, the fees paid to a third counsel engaged on the re-hearing, and also the fees of the second and third consultations preparatory to the re-hearing:—Held, that the Master was correct in the conclusions he had come to in each particular.

The general rule in the taxation of costs as between party and party is, that the client, and not the adverse party, who is ordered to pay the costs, must bear the costs of specially retaining counsel.

The rule of allowing the costs of two counsel only where the taxation is as between party and party will not be departed from, except in a few very special cases.

No general rule has been laid down in practice since the General Orders of the 8th of May 1845 were issued, as to the number of consultations to be allowed on taxation of costs as between party and party, each case depending on its own particular circumstances. *Smith v. Effingham (Earl)*, 16 Law J. Rep. (N.S.) Chanc. 297; 10 Beav. 378.

In a suit by residuary legatee, the assets proved insufficient to pay the expenses and general legacies:—Held, that the plaintiff was not entitled to his costs as between solicitor and client, except so far as the general estate had been increased by the proceedings. *Wroughton v. Colquhoun*, 1 De Gex & S. 357.

In a suit by residuary legatee against an executor, the testator's estate proved insufficient to pay his debts:—Held, that the plaintiff was entitled to his costs not as between solicitor and client but as between party and party only. *Weston v. Clowes*, 15 Sim. 610.

Four suits were consolidated, and the conduct given to the plaintiff in one of them, who was a devisee and legatee:—Held, that he was entitled to his extra costs properly incurred in the prosecution of the decree. *Lockhart v. Hardy*, 10 Beav. 292.

(b) Pauper.

In all cases in which costs are ordered to be paid to a party suing or defending *in forma pauperis*, such costs shall, unless the Court shall otherwise order, be taxed as *dives* costs. Order of December 10, 1849. 19 Law J. Rep. (N.S.) Chanc. i; 1 Mac. & G. xi; 1 Hall & Tw. ix.

[See as to the former practice, *Rubery v. Morris*, 18 Law J. Rep. (N.S.) Chanc. 444; 16 Sim. 433; 1 Mac. & G. 413; 1 Hall & Tw. 400.]

(Y) SECURITY FOR COSTS.

[See COMPANY, Joint-Stock Companies Winding-up Acts.]

The plaintiff in a cross-suit (impeaching an instrument which the original suit seeks to enforce), although residing out of the jurisdiction, is not bound as against the plaintiff in the original suit to give security for costs. *Vincent v. Hunter*, 5 Hare, 320.

A plaintiff having no settled place of residence was ordered to find security for costs, although his temporary place of abode was correctly stated. *Player v. Anderson*, 15 Law J. Rep. (N.S.) Chanc. 189; 15 Sim. 104.

After the defendant had put in his answer the plaintiff let his house and went to reside at Boulogne, but had since occasionally been within the jurisdiction. He denied all intention to reside abroad, but said it was pleasant to remain where he was then staying; he also denied leaving England to avoid the jurisdiction:—Held, that the plaintiff's

explanation was ambiguous, and that he must give security for costs. *Kennaway v. Tripp*, 18 Law J. Rep. (N.S.) Chanc. 298; 11 Beav. 588.

The residence of the plaintiff, as stated in the bill, was the place at which he had lived many years, but being in pecuniary difficulties, he was not at present to be met with there; but it did not appear that any communications addressed to him there would not find him. A motion that he should give security for costs was refused. *Hurst v. Padwick*, 17 Law J. Rep. (N.S.) Chanc. 169.

A petitioner having in his petition given a false address, and having neither explained it nor given a true address, was ordered to give security for costs, though he was not contemplating going out of the jurisdiction. *Ex parte Foley in re Smith*, 11 Beav. 456.

A plaintiff filed his original bill stating himself to be resident within the jurisdiction. The bill was amended on June 28, 1847. On the 14th of July 1847 the defendant served a notice of motion on the plaintiff, seeking an order for security for costs on account of the plaintiff being resident abroad, which was afterwards abandoned by the defendant. On the 8th of January 1848 a demurrer to the plaintiff's amended bill was filed, and the same was allowed by the Court on the 13th of March 1848, but leave was at the same time given to the plaintiff to amend. On the 8th of March 1848 an order was made by the Court in the cause on a motion of the defendant. On the 27th of March 1848 the plaintiff further amended his bill, in which he for the first time stated himself to be residing out of the jurisdiction of the Court:—Held, that an order as of course, for security for costs, obtained by the plaintiff, was regular.

The rule that parties must state clearly the facts to the Court applies only to material facts.

After answer, ordinarily, security for costs is not ordered, except on petition stating special circumstances. *Wyllie v. Elliot*, 17 Law J. Rep. (N.S.) Chanc. 378; 11 Beav. 99.

A plaintiff who inadvertently described herself as of a place which she had left at the date of filing the bill was not ordered to give security for costs, and a motion for that purpose was refused, but the Court gave the defendant making it his costs, on his not putting the plaintiff to amend her bill. *Smith v. Cornfoot*, 1 De Gex & S. 684.

A plaintiff described himself as "late of B, in the county of L, but now working on the railway line between S and M, labourer":—Held, that this description was insufficient, and the plaintiff was ordered to give security for costs. *Sibbering v. Balcarras (Earl)*, 17 Law J. Rep. (N.S.) Chanc. 102; 1 De Gex & S. 683.

A plaintiff described himself as living abroad. Having given notice of motion the defendant appeared and asked for time to answer the affidavits, and he afterwards filed affidavits in opposition:—Held, that he had not thereby waived his right to security for costs.

A defendant does not by simply defending an application against him lose his right to security for costs. *Marrow v. Wilson*, 12 Beav. 497.

A petitioner who is out of the jurisdiction may deposit a sum in lieu of giving security for costs,

but the undertaking of his solicitor is insufficient. *In re Norman*, 11 Beav. 401.

After an order had been made that the plaintiff, who was resident abroad, should, within a month, procure a sufficient person to give security for costs, and that, in the mean time, proceedings should be stayed, with which order the plaintiff neglected to comply; the Court directed the plaintiff's bill to be dismissed, with costs, in default of the plaintiff giving security for costs within six months. *Giddings v. Giddings*, 16 Law J. Rep. (N.S.) Chanc. 183; 10 Beav. 29.

A bill was filed by a mortgagee of a reversionary interest for sale or foreclosure. The defendant by his answer, admitted the debt. The defendant filed a bill against the plaintiff alleging that nothing was due from him to the plaintiff, but that the plaintiff was indebted to him and that the security had been obtained from him by fraud, as had also been his answer in the original suit, and praying an account and payment of what was due to him from the plaintiff and a re-assignment of the property comprised in the security:—Held, that the second suit was a cross-suit, and that the plaintiff in it, although out of the jurisdiction, need not give security for costs. *Macgregor v. Shaw*, 2 De Gex & S. 360.

A brought an action against B. B thereupon filed a bill against A in respect of the matters which were the subject of the action. On a motion by A that B should give security for the costs of the suit,—Held, that A was not entitled to such security. *Watteu v. Billam*, 18 Law J. Rep. (N.S.) Chanc. 455.

COSTS ON APPEAL TO THE HOUSE OF LORDS.

When a decree is varied by the House, but only on a point which was not raised in the court below, nor made a ground of appeal, the appellant must pay the costs of the appeal. *Wallace v. Patton*, 12 Cl. & F. 491.

The House will not grant the costs of an appeal to come out of the estate, upon a mere miscarriage of the Court below, where the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact. *Piers v. Piers*, 2 H.L. Cas. 331.

The officers of state in Scotland obtained a judgment on interdict against an individual who had, by erecting a wall, encroached on the sea shore, the suit being instituted by them solely to protect the public right. The judgment of the Court below was appealed against, and affirmed, but was affirmed without costs. *Smith v. Earl of Stair*, 2 H.L. Cas. 807.

COSTS IN THE ECCLESIASTICAL COURTS.

An allegation, responsive to a libel for the restitution of conjugal rights, pleaded cruelty and adultery, which were held not to be proved. The charge of adultery rested on the testimony of the woman

alone, with whom the husband had, previously to his marriage, cohabited. Evidence of mere probability of a transaction is not evidence to corroborate a single witness. To constitute evidence corroborative, the evidence must have relation to the transaction itself. The Court will not give costs to a party who has fettered a witness by taking written declarations from the witness previously to his examination. *Simmons v. Simmons*, 1 Robert. 566.

A vessel sailing upon a foggy night with all her sails set excepting her foretop gallant sail, dismissed upon the ground of inevitable accident. Practice of the Court is not to give costs on either side where a collision has occurred from inevitable accident. *The Itinerant*, 2 Rob. 236.

A salvage claim is part sustained and in part dismissed upon the ground that the salvors had misconducted themselves in the latter stages of the alleged service, by continuing to obtrude their services after they had been formally discharged by the owners. Full costs not allowed, but a sum *nomine expensarum* only given in consideration of the salvors' misconduct. *The Glasgow Packet*, 2 Rob. 306.

Objections to the report of the registrar and merchants in a case of damage by collision. All the objections with one exception overruled. Objection sustained, that the repairs of the damaged vessel were paid for on the 25th of January 1845; and interest was allowed by the registrar to run only from the 15th of May 1846, on which day the damage was pronounced for. Report directed to be amended with respect to this item. Each party to pay their own costs. *The Hebe*, 2 Rob. 530.

Question as to the costs of a reference to the registrar and merchants. Where a bond is pronounced for, and upon being referred to the registrar and merchants large deductions are made in the registrar's report, the party setting up the bond will be liable to the costs of the reference. *Semble*, the main consideration in the judgment of the Court will be the amount of the sum deducted in proportion to the sum which is claimed. *The Catherine*, 3 Rob. 1.

An agent at Lloyd's is not entitled to sue as a salvor for the mere hiring and engaging of men to assist a vessel in distress. Claim of alleged salvor dismissed, with costs. *The Lively*, 3 Rob. 64.

Claim for salvage pronounced for, but without costs, the nature of the claim being so trivial, that in the opinion of the Court it ought not to have been brought into the Court of Admiralty. *The Red Rover*, 3 Rob. 150.

Prima facie a bondholder establishing his bond is entitled to his costs. Where, however, the general validity of the bond is established, and upon reference to the registrar and merchants a large deduction is made, and is confirmed by the Court, the bondholder will not be entitled to his costs in the original suit. The party opposing the bond in the original suit having made various charges against the bondholder, which were not established, equally disentitled to his costs in the original suit; but the costs of the reference decreed to him. *The Gauntlet*, 3 Rob. 167.

COSTS IN CRIMINAL CASES.

A prosecutrix and witnesses were bound by recognizance to appear against a prisoner at the assizes, on a charge of felony. By the advice of counsel, instead of an indictment for felony, an indictment was preferred for a misdemeanour at common law, on which no costs could be allowed. The Judge made an order for the expenses of the attendance of the prosecutrix and witnesses. *Regina v. Hanson*, 2 Car. & K. 912.

COUNSEL.

[See BARRISTER.]

Fees to counsel's clerks. *Ex parte Cotton*, 9 Beav. 107.

COUNTY COURT.

[See INFERIOR COURT—Small Debts.]

County Courts for the recovery of small debts established by 9 & 10 Vict. c. 95; 24 Law J. Stat. 219.

The County Courts Act, 9 & 10 Vict. c. 95, amended by 12 & 13 Vict. c. 101; 27 Law J. Stat. App. 1.

The County Courts Acts extended and amended by 13 & 14 Vict. c. 61; 28 Law J. Stat. 121.

COURT BARON.

[See INFERIOR COURT.]

COURT-MARTIAL.

Acts relating to courts-martial altered by 10 & 11 Vict. c. 59; 25 Law J. Stat. 199.

COVENANT.

[See INJUNCTION, Special Injunction—LEASE—LIMITATIONS, STATUTE OF—SETTLEMENT.]

(A) FORM OF.

(B) CONSTRUCTION OF.

(a) *In general.*

(b) *Covenants in gross.*

(c) *Independent Covenants and Conditions Precedent.*

(d) *What passes with the Land.*

(e) *In restraint of Trade.*

(f) *Joint and several.*

(C) ACTIONS AND SUITS, WHEN MAINTAINABLE.

(D) PLEADINGS.

(E) DAMAGES.

(A) FORM OF.

A declaration in covenant stated that the defendants demised to the plaintiffs certain refreshment-rooms at Swindon, for ninety-nine years, at the

annual rent of one penny; and that the plaintiffs covenanted to complete, to keep in repair, and to insure the same; and that the defendants covenanted, that in case the refreshment-rooms should be disused as the regular and general place of stoppage for refreshment of passengers, they would purchase the buildings of the plaintiffs on certain terms. That it was, by the said indenture, *declared to be the intention* of the defendants and the understanding of the plaintiffs, that all trains carrying passengers, not being goods, express, or special trains, &c., should stop at Swindon for refreshment of passengers for a reasonable time of about ten minutes; and that the defendants engaged not to do any act which should have an effect contrary to that intention. The declaration then assigned as a breach, that whilst the Swindon station was used as the regular and general place of stoppage for refreshment for passengers, the defendants caused divers trains containing passengers to pass Swindon without stopping for the refreshment of passengers for a reasonable space of about ten minutes, and caused several trains to stop for a short and unreasonable time, to wit, for the space of one minute and no more; the said time not being sufficient to enable the passengers to obtain any refreshment:—Held, on demurrer, that the declaration of the defendants' *intention*, coupled with the rest of the indenture, amounted to a covenant by them, that 'so long as they made Swindon the general place of stoppage for refreshment, they would not do any act to prevent the trains stopping there; and that the breach was well assigned, although it was not stated that any passengers wanted refreshment, or had given notice thereof. *Rigby v. the Great Western Rail. Co.*, 15 Law J. Rep. (N.S.) Exch. 60; 14 Mee. & W. 811.

An agreement must be taken to be in the words of both parties.

Where in an instrument under seal incorporating an agreement, the language of the agreement shews that it was the intention of the parties, that one of them should be liable to do a certain thing, a covenant by that party to do the thing will be implied.

The plaintiff and the defendants agreed by deed to a series of articles. The defendants were to let to the plaintiff, for a term of twelve years, premises in which the plaintiff carried on the manufacture of fuel. The fourth stipulation in the agreement was that all the coals used by the plaintiff for the purpose of his manufacture during the said term of twelve years should be bought and purchased of the defendants, provided they could and should supply him with the quantity required, at a certain price and no more. The fifth stipulation provided that the defendant should not be compelled to supply more than 500 tons per week, and that in case they should, from any substantial cause, be unable to supply certain coal, then they were to give six months' notice, &c.:—Held, that it sufficiently appeared that it was the intention of the parties that the defendants should be liable to supply the plaintiff with coal to the extent of 500 tons per week, during the twelve years; and that a breach of the agreement in a declaration of covenant complaining of the non-supply of coal by the defendants was good, although the deed contained no express covenant by the defendants to sell the coal

to the plaintiff. *Wood v. Copper Miners Co.*, 18 Law J. Rep. (N.S.) C.P. 293; 7 Com. B. Rep. 906.

(B) CONSTRUCTION OF.

(a) *In general.*

W., by voluntary conveyance, assigned to plaintiff, his executors, &c., his furniture, effects, &c., in trust, to the use of *W.*, the settlor, for his life, and at his death, in equal moieties, to the use of two nieces of *W.*, named. Covenant by *W.*, for himself and his heirs and executors, to do all further reasonable acts and things for further and better assigning and transferring the said furniture, &c. to plaintiff, on the same trusts as by plaintiff or his counsel should be reasonably advised. *W.* was in possession of the furniture, &c. till his death. On that event, defendant, his executor, became possessed, and sold the whole. Plaintiff sued the defendant, as executor of *W.*, on the above covenant for further assurance, averring in his declaration that it was at no time necessary to sell any of *W.*'s chattels to pay any debt of *W.*, and that there were no creditors of his who could impeach the validity of the indenture, and assigning, by way of breaches, first, that defendant refused to deliver possession of the furniture to plaintiff; and, secondly, that defendant converted and sold the same, not alleging that he sold it in market overt:—Held, that the plaintiff was entitled to recover, at least on the last breach, the value of the furniture possessed by *W.* from the time of his executing the deed to his death, and afterwards sold by the defendant as his executor, though trover might have been sustained for the same cause of action. *Ward v. Audland*, 16 Mee. & W. 862.

A declaration in covenant, after reciting an agreement dated the 27th of April 1840, between the plaintiffs and the defendant, and that the defendant was indebted to the plaintiffs in 60*l.*, to be repaid with interest, stated the agreement thus:—That the sum of 60*l.* shall remain in the hands of *J H.* (the defendant) from the date hereof for one whole year; that at the expiration of that period (if the interest shall be then paid, and no notice be then given to call in the same,) the 60*l.* shall continue in the hands of the said *J H.* for another year, and so on from year to year, until notice in writing shall be given by the said *W B.* (the plaintiff) to call in the same; that twelve calendar months' notice in writing shall be given to call in the said 60*l.*, and that at the expiration of the said notice the same shall be paid by instalments of 10*l.* every third month, until the whole amount be paid, the first payment of 10*l.* to be made at the expiration of fifteen months from the date of the said notice, so that the whole amount of 60*l.* shall be paid by the end of two years and six months from the date of the said notice. The declaration then stated, that on the 29th of May 1846, a notice in writing of that date was served upon the defendant, to call in the sum of 60*l.*, and alleged, that although twelve calendar months from the date of service of the notice had elapsed before the commencement of this suit, and although six months from the expiration of the said calendar months had also elapsed before the commencement of this suit, and although two instalments had become due and payable from the defendant, yet the defendant had not paid the said two instalments:—Held,

(*Platt, B., dissentiente*.) that the notice to pay the principal sum might be given at any period of the year, and that the payment of the instalments was to be calculated from the date of the notice, and not from the end of the current year under the agreement. *Brown v. Hartill*, 17 Law J. Rep. (N.S.) Exch. 278; 2 Exch. Rep. 434.

A declaration stated that, by an indenture between the plaintiff and the defendants, the plaintiff sold certain letters patent to the defendants, and that the defendants covenanted to pay the price by instalments: provided, that if within twelve months from the date of the indenture the defendants should disapprove of the patent, and of their disapprobation and intention to sell it they should give notice to the plaintiff, the payment of the instalments should be suspended; and if the defendants should within six months after notice sell the said patent, and retaining to themselves 24*l.* pay over the surplus to the plaintiff, the covenant for payment of the entire sum should cease; but if the defendants having given such notice should neglect or refuse to observe all the other matters or things in the proviso, the covenant for payment of 840*l.* should stand. Averment, that the defendants gave due notice of their disapprobation and of their intention to sell, and that the defendants had not sold the letters patent. Breach, non-payment of the instalments. Plea, that the defendants were ready and willing and endeavoured to sell the letters patent, but that no *bona fide* sale could be effected:—Held, that the defendants not having sold the letters patent were liable to pay the instalments. *Cherry v. Heming*, 17 Law J. Rep. (N.S.) Exch. 305; 2 Exch. Rep. 557.

A insured his life for 1,000*l.*, subject to a condition, that "in case the assured should die upon the seas, except in certain passages, or go beyond the limits of Europe, or enter into or engage in military service, unless licence were obtained, or should die by his own hands or by the hands of justice, or in consequence of a duel, &c., the policy should be void." Previously to his marriage in 1828, A assigned the policy to trustees, for the benefit of his intended wife and the issue of the marriage. The settlement contained a covenant by A that he would "at all times during his life duly pay all such premiums and other moneys, and do and perform all such acts, matters, and things as should be requisite for keeping on foot the said policy." In 1838, A threw himself into the Thames and was drowned. In an action to recover the amount of the policy, the jury had found that the assured voluntarily threw himself into the river, intending to destroy his life, but that at the time of committing the act he was not capable of judging between right and wrong; upon which finding the Court of Common Pleas had held that this was such a dying by the party's own hands as discharged the office from liability:—Held, that the act of self-destruction by A was not a breach of the above covenant for keeping the policy on foot. *Dormay v. Borradaile*, 5 Com. B. Rep. 380.

Held also, that the trustees of the settlement were not entitled to claim as against the settlor's estate the sum secured by the policy. *Dormay v. Borradaile*, 16 Law J. Rep. (N.S.) Chanc. 337; 10 Beav. 263, 335.

A declaration on a covenant in a farming lease stated, that the defendant covenanted to consume and convert into manure and spread on the premises all the green crops grown on the farm. Breach, that he carried turnips off the premises and sold them. The covenant, as it appeared in the lease produced at the trial, went on to say that in case the tenant should sell off any part of the green crops, which he was at liberty to do, he should bring back and spread on the premises a ton of stable manure for every ton of such crops within three months:—Held, that the covenant was in the alternative, and that the latter part was not a proviso to be pleaded by the defendant; and that the Judge at the trial was right in refusing to give the plaintiff leave to amend the declaration. *Richards v. Bluck*, 18 Law J. Rep. (N.S.) C.P. 15; 6 Com. B. Rep. 437.

The plaintiff being lessee of certain coal mines, &c. for a term of years, by indenture assigned the same for the residue unexpired of the same term to the defendant, who thereby covenanted with the plaintiff *inter alia*, to pay the rents, galiages, &c. by the original indenture of lease reserved so long as the defendant should be in possession or receipt of the rents, produce, and profits of the premises, and at all times thereafter effectually to keep harmless and indemnify the plaintiff from and against all the rents, covenants, &c. of the original lease, and against all actions, &c. in respect of the same. To a declaration assigning as a breach non-payment by the defendant of certain rents due whilst he was in possession or receipt of the rents, produce, and profits, *per quod* the plaintiff was forced to and did pay the said rents, and was put to great charges, &c., together with a breach of the covenant to indemnify the plaintiff against the consequences of such non-payment by the defendant, the pleas were, first, a denial of the original demise; second, *non est factum*; third, that the defendant was not in possession, &c. when the said rents became due; fourth, as to the non-payment by the defendant of the said rents, payment to the plaintiff in accord and satisfaction; fifth, that the defendant did indemnify; and sixth, that the plaintiff did not pay the said rents, and was not put to great charges, &c. After a verdict for the defendant on the third, and the plaintiff on the other issues,—Held, that the restrictive words, “so long as the defendant should be in possession or receipt of the rents, produce, and profits,” &c., contained in the first covenant, did not extend to the covenant to indemnify, and that such a plea was no answer to the breach to that covenant. That on the whole record the plaintiff was entitled to judgment *non obstante veredicto*; and that a repleader was unnecessary. *Crossfield v. Morrison*, 18 Law J. Rep. (N.S.) C.P. 135; 7 Com. B. Rep. 286.

A declaration by executors of covenantee for breach of covenant for quiet enjoyment, after reciting that the defendant's wife was heiress of A H, alleged that the defendant covenanted that for and notwithstanding any act, matter, or thing done, omitted, &c. by the defendant and wife or A H deceased, defendant and wife were lawfully seised of or entitled to the premises, &c., and that for and notwithstanding, &c. defendant and wife had power to appoint the said premises, &c. to the uses thereby declared. And that it should be lawful for the

testator, his heirs, &c. peaceably to enter and possess the said premises, &c. without any lawful let, suit, or eviction of the defendant and wife, or of, from, or by any other person, lawfully, or equitably claiming under them, or the said A H deceased. Then followed a covenant for further assurance against all acts, &c. of defendant and wife, and all persons claiming under them or A H deceased. The declaration alleged, as a breach of covenant for quiet enjoyment that the testator was not permitted peaceably, &c. to enter and possess, &c. in words negating the averment, but that on the contrary thereof, one P H, claiming as heir of A H, brought ejectment against the testator, and recovered possession of the premises. Plea (*inter alia*), that A H died, leaving the defendant's wife heiress-at-law, and the testator instigated P H to claim the said premises, and institute the said proceedings against him, and so the testator was ousted through his own act. Replication, *de injuriâ*:—Held, first, that if the recital in the deed that the defendant's wife was heiress was an estoppel, it was waived by the defendant's pleading over and averring in his plea that the wife was, in fact, heiress.

2. That the allegation in the plea of the defendant's wife's heirship required to be proved.

3. That the statement in the declaration that P H claimed as heir must, after pleading over, be considered a sufficient allegation that he was heir.

4. That the covenant for quiet enjoyment was not qualified by the restrictive words introductory to the set of covenants. *Young v. Raincock*, 18 Law J. Rep. (N.S.) C.P. 193; 7 Com. B. Rep. 310.

A lease, reciting that the defendants had appropriated and laid out certain meadows as building ground, demised a portion of them to the plaintiff, who covenanted to build two houses thereon; and the defendants covenanted “that on such buildings being covered in they would cut good and sufficient roads and footpaths in, through, and over the said fields and meadows, and cut and construct a good and sufficient sewer along and under the said turnpike road and under the said intended roads in the said fields for the common use of the plaintiff and all other lessees or tenants of other portions of the said fields or meadows”:—Held, that this covenant, so far as concerned the roads, was not performed by the defendants making a road up to the plaintiff's houses; but that they ought, as soon as the plaintiff's houses had been covered in, to have made the roads in, through, and over the whole meadows as contemplated by the building scheme, although no other houses than the plaintiff's had been built. *Mason v. Cole*, 18 Law J. Rep. (N.S.) Exch. 478; 4 Exch. Rep. 375.

The Great Western Railway Company leased to Messrs. R. certain refreshment-rooms at Swindon, and covenanted (*inter alia*) that every train should stop at Swindon station ten minutes for refreshment. The Messrs. R. afterwards sub-leased the premises to S Y G by a deed which, after reciting the said covenant by the Great Western Railway Company, contained a covenant by the Messrs. R. that they would during the continuance of the term do all such acts and things as should be necessary and proper for enforcing the fulfilment and performance of the said covenants by the Great Western Railway

Company. It then contained a proviso that the said S Y G might, in the names or name of the Messrs. R, bring, commence, and prosecute any action, suit, or other proceeding whatsoever for enforcing the fulfilment and performance of the covenants and agreements in the said recited indenture of lease contained on the part of the said Great Western Railway Company, or for recovering damages and compensation for the non-performance or non-fulfilment of the same covenants and agreements or any of them, he the said S Y G indemnifying the said Messrs. R from and against all costs, charges and expenses to be incurred or defrayed in or about any such action, suit, or other proceeding as aforesaid. S Y G entered under this lease. The Great Western Railway Company caused some trains to pass Swindon without stopping for refreshment. Messrs. R had notice of this breach of covenant, and were requested to file a bill in Chancery against the company, by way of injunction, to prevent the said trains so passing Swindon:—

Held, that assuming the filing such bill was under the circumstances a necessary and proper act, the Messrs. R were bound to have filed such bill, for that the latter stipulation empowering S Y G to sue in the name of the Messrs. R did not limit or qualify the general covenant, and they were therefore liable in an action of covenant for not filing such bill. *Rigby v. Great Western Rail. Co.*, 18 Law J. Rep. (n.s.) Exch. 404; 4 Exch. Rep. 220.

A lease contained a demise of land and quarries, with power to open and work them at certain rent and royalties, with an exception of the trees on the premises. The lessee covenanted not to commit waste by cutting the trees, &c.; and there was a proviso for re-entry in case the lessee should commit any waste by any of the means aforesaid. The lessee cut down trees which it was necessary to remove in order to work the quarries:—Held, that this was not a breach of the covenant working a forfeiture; and that the covenant meant that the lessee was not to cut down the trees excepted so as that the cutting should amount to an excess of the rights which it was intended that he should exercise. *Doe d. Rogers v. Price*, 19 Law J. Rep. (n.s.) C.P. 121; 8 Com. B. Rep. 894.

A declaration in assumpsit stated that an action had been commenced by the public officer of the North of England Joint-Stock Banking Company against T, for the recovery of the amount of a bill of exchange drawn by him upon and accepted by the defendant for 1,250*l.*; that whilst the action was pending, it was agreed between the company and T and the defendant, that the action should be settled as follows: 250*l.* and 500*l.* by the promissory notes of T, and 500*l.* to be paid by the defendant's promissory note of 500*l.*, the defendant consenting to the company appropriating the securities held by them to the payment of the balance, and the defendant agreeing to give them a power of selling certain property, the company to forego all interest on receiving the three notes, and to guarantee to give up the bills sued on, and also the 1,000*l.* bill. Breach, that the defendant did not give the banking company the promissory note for 500*l.*, together with the said power of sale. Plea, that the defendant made the said agreement jointly with M B, B B, and J B, and that after breach thereof by an inden-

ture to which the public officer of the banking company, the plaintiffs, the defendant, M B, B B, and J B, and T were parties, the public officer did remise, release, and for ever discharge the said B B, M B, and J B from the said action, and all actions, &c. without the consent of the defendant, and thereby released the defendant from the same:—Held, on motion to arrest the judgment, first, that the release stated in the plea operated only as a covenant not to sue. Secondly, that the agreement in the declaration was a binding agreement and not a mere accord, inasmuch as it would be broken if the plaintiffs proceeded with the action. *Henderson v. Stobart*, 19 Law J. Rep. (n.s.) Exch. 135; 5 Exch. Rep. 99.

A wife's distributive share of her husband's effects under his intestacy is not a performance of the husband's covenant to leave her an annuity for life. *Salisbury v. Salisbury*, 17 Law J. Rep. (n.s.) Chanc. 480; 6 Hare, 526.

(b) Covenants in gross.

Where it appears on the face of a lease as set out in the declaration, in an action of covenant for rent, that the lessor has only an equitable interest, the covenant for the payment of the rent may be properly treated as a covenant in gross. And it may be well averred in the declaration that the plaintiffs had no reversion at the time of the demise. And a plea that the reversion was in the plaintiffs, at the time of the demise, and that before breach the plaintiffs had assigned it to J S, is a bad plea. *Pargeter v. Harris*, 15 Law J. Rep. (n.s.) Q.B. 113; 7 Q.B. Rep. 708.

(c) Independent Covenants and Conditions Precedent.

By an indenture, reciting that by a deed of 1842, the plaintiff had granted to the defendant a licence to make and vend a patent, subject to payment of a royalty, with a proviso for keeping the royalty at an average of 16*l.* 13*s.* 4*d.* per month, and also reciting that the defendant had agreed with the plaintiff to purchase one-half of the patent, (subject to the previous deed, but with the benefit to the defendant of one-half the royalty thereby reserved), the plaintiff, in consideration of 2,200*l.* for the purchase of one-half the patent and one-half the royalty, assigned to a trustee for the defendant the patent and the matters intended to be assigned as therein mentioned. The plaintiff covenanted in the usual form for the title; and the indenture contained a covenant by the defendant to pay the 2,200*l.* by certain instalments. In an action on this last covenant, alleging as breaches non-payment of two instalments, the defendant, after setting out the deed of 1842 and the letters patent, pleaded several pleas, merely denying the validity of the patent:—Held, to be no answer to the action: first, because the defendant, under the deed of 1842, would be at all events bound to pay 16*l.* 13*s.* 4*d.* royalty per month; and, secondly, because the defendant's covenant was independent of the covenant for title by the plaintiff. *Cutler v. Bower*, 17 Law J. Rep. (n.s.) Q.B. 217; 11 Q.B. Rep. 973.

A declaration in covenant stated that the plaintiff and the defendant had agreed to enter into partnership as surgeons, &c. until January 1, 1846, for certain considerations therein mentioned; and that

it was further agreed that the plaintiff should, after the 1st of January 1846, introduce the defendant to his patients as his successor in business, and use his best endeavours to establish him in it; in consideration whereof the defendant covenanted to pay a further sum of 50*l.* on the 25th of March 1846, in addition to another sum covenanted to be paid. Breach, non-payment of the said sum of 50*l.* Plea, that after the 1st of January 1846, and before the 25th of March 1846, the plaintiff refused to introduce the defendant as the plaintiff's successor to, &c., wherefore the defendant refused to pay the said sum of 50*l.* Verification:—Held, that the plea was bad, as the introduction to the patients was an independent covenant, and not a condition precedent to the payment of the 50*l.* *Judson v. Bowden*, 17 Law J. Rep. (N.S.) Exch. 172; 1 Exch. Rep. 162.

A declaration stated that by indenture the plaintiff conveyed all the coals and mines of coal within and under certain premises to the defendant, and the defendant covenanted to pay 40*l.* for every statute acre of coal which should be found; and that he would, till the consideration money should be paid, pay the sum of 40*l.* part, &c. annually by half-yearly instalments, commencing from the date of the indenture, whether a whole acre should have been gotten in any such year or not. It was then averred that at the time of making the indenture there had been, and still was, coal within and under the premises, and that two half-yearly instalments were in arrear:—Held, reversing the judgment of the Court of Exchequer, that the declaration was good, and that the finding of coal was not a condition precedent to the payment. *Jowett v. Spencer*, 17 Law J. Rep. (N.S.) Exch. 367; 1 Exch. Rep. 647.

By a deed which recited that the defendant was the surviving devisee in trust, under the will of J B, and that the plaintiff and his brother, amongst others, were each entitled to legacies of 3,000*l.*, and that the assets of J B were insufficient to pay the legacies, and also that the plaintiff was in want of 1,700*l.* before a certain day, and had requested the defendant to advance him that sum out of the assets of J B, which the defendant had covenanted to do on the terms after mentioned, the defendant covenanted that he would before the day mentioned pay the plaintiff by and out of the assets of J B the sum of 1,700*l.*, and the plaintiff and his brother, in consideration thereof, agreed that they would execute an indemnity and release to the defendant in respect of all matters connected with the will of J B, and that in case the share of the plaintiff and his brother of and in the assets of J B, should not amount to 1,700*l.*, they would pay him the difference, and indemnify him against all loss, &c., by reason of the payment by him:—Held, that the covenant of the defendant was absolute, and not conditional or contingent on the receipt of assets. *Bain v. Kirk*, 18 Law J. Rep. (N.S.) Q.B. 83.

A declaration in covenant stated that the defendant covenanted that she would within eighteen months from the date of the indenture erect certain buildings, "the whole of which were to be left to the superintendence of the plaintiff and E J, the defendant's son." The breach alleged was, that though the eighteen months had expired, the defendant had not erected the buildings:—Held, that the declaration was good, although it contained no

averment that the plaintiff was ready and willing to superintend the erection of the buildings; for that the covenant to erect the buildings was an absolute covenant, and the clause respecting the superintendence merely granted a liberty to the parties to superintend, but did not impose any duty so as to make the superintendence a condition precedent or concurrent. *Jones v. Connoch*, 19 Law J. Rep. (N.S.) Exch. 371; 5 Exch. Rep. 713.

A lease contained a proviso, that on notice to quit being given by the lessor eighteen months before the end of the eighth year, and all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should determine at the end of the eighth year, "nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." Held, that the performance of all the covenants by the lessee was not a condition precedent to his right to determine the lease. *Friar v. Gray*, 19 Law J. Rep. (N.S.) Exch. 368; 5 Exch. Rep. 584.

A party covenanted with a single woman to pay to her for her life, subject to the proviso thereafter contained, an annuity of 40*l.* per annum. The proviso was, that if she should marry, the annuity should be reduced to 20*l.* per annum. She afterwards married:—Held, that she was entitled after her marriage to the annuity of 20*l.* per year only; there being no unqualified gift of an annuity of 40*l.* for life, and the qualification of being unmarried being as to each successive payment a condition precedent.

Held, also, that the principles of law, upon which restraints upon marriage were void as against public policy, did not apply to this case. *Grace v. Webb*, 18 Law J. Rep. (N.S.) Chanc. 13; reversing s.c. 16 Law J. Rep. (N.S.) Chanc. 113; 15 Sim. 384.

(d) What passes with the Land.

A, by indenture, demised to B certain land, and B covenanted for himself, his heirs, executors, administrators and assigns, to build certain houses upon such land within two years. B underlet to C, and covenanted for himself, and his heirs, executors and administrators, to observe and perform, or effectually to indemnify C against, the covenants in the first indenture. B afterwards assigned his reversion to D. A having entered, and ejected C by reason of the non-performance of the first-mentioned covenant,—Held, (in error, affirming the decision of the Queen's Bench, 16 Law J. Rep. (N.S.) Q.B. 414) that B's covenant with C did not run with the land, and that D was not liable to C. *Doughty v. Bowman*, 17 Law J. Rep. (N.S.) Q.B. 111; 11 Q.B. Rep. 444.

(e) In Restraint of Trade.

A covenant not at any time to be concerned as attorney or agent, or otherwise, for any person who had already been, or who should thereafter be the client of the plaintiff, or any partner he might have, or any person to whom he might assign his business; and not to act as partner, clerk, &c. with any person who should interfere as aforesaid,—Held to be divisible, and that the plaintiff might recover in respect of breaches as to persons who had been his

clients before and at the time of making the covenant, and of persons who had been his clients while the defendant was under articles. *Nicholls v. Stretton*, 10 Q.B. Rep. 346.

The saleable quality of good-will in trade deserves protection.

A covenant by which a butcher, on assigning certain premises for the residue of a term, and also his good-will in trade, to another butcher, covenanted not to carry on the trade of a butcher within five miles of the premises assigned, is good in law, and it continues binding on the covenantor after the expiration of the term, and during the life of the covenantee, although he may have ceased to carry on the trade. *Elves v. Croft*, 19 Law J. Rep. (n.s.) C.P. 385.

(f) *Joint and several.*

A being possessed of a term of 5,000 years created on the 4th of August 1815, assigned to B by indenture of the 5th of August 1818, subject to redemption on payment by A to B of 1,200*l.* and interest. On the 17th of August 1820, B (by indenture, to which A was a party, and executed by him), at the request of A, demised to C for 4,000 years: "redendum to B, his executors, &c. during the continuance of the mortgage, and after payment and satisfaction thereof, to A, his executors, &c., the yearly rent of 18*l.* 18*s.*"; and C covenanted "to and with A, his executors, &c., and also to and with B, his executors, &c., to pay the said yearly rent of 18*l.* 18*s.* on the several days and times and in the manner in which the same was made payable." To an action of covenant by the assignee of B against the assignee of C, for non-payment of this rent, the defendant pleaded that before the rent became due, and during the continuance of the mortgage, B was paid and satisfied all the principal and interest due on the mortgage, out of monies arising by the sale of the demised premises, and afterwards, by indenture executed by him, acknowledged himself to be so paid and satisfied, and released and discharged A from all claims in respect thereof:—Held, on demurrer to the plea, first, that it sufficiently shewed that the mortgage no longer continued; but, secondly, that it was bad for duplicity, in averring both the payment of the mortgage money and the execution of the release; thirdly, that the covenant was capable of being read as several by reason of its being for payment of the rent at one period to A, and at another to B, and that the action was therefore rightly brought by B only; lastly, that the continuance of the mortgage was sufficiently shewn, on general demurrer. *Harrold v. Whitaker*, 15 Law J. Rep. (n.s.) Q.B. 345.

B having a term of sixty-one years in land, granted an annuity to W; and, for securing payment, assigned the term, wanting one day, to R. R then, at the request of W and of B, demised, and B demised and confirmed the premises to S for thirty-one years, paying rent to W, while the land remained subject to the annuity, and afterwards to B. S covenanted with W and R, and their respective executors, &c., and also with B, to pay the rent, while the land was subject to the annuity, to R, and afterwards to B, and also to repair the premises. The premises came by assignment to G, who failed to repair. W being dead,—Held, that

an action for breach of the covenant to repair was properly brought against G by R and B jointly. *Wakefield v. Brown*, 15 Law J. Rep. (n.s.) Q.B. 373; 9 Q.B. Rep. 209.

A declaration stated that the defendant covenanted with the plaintiffs to pay a certain sum of money, and alleged as a breach non-payment thereof, and that the amount was and is still due and owing from the defendant. Plea, *non est factum*. The covenant given in evidence was that defendant and A and B, and any two of them, did for themselves jointly, and each of them for himself, &c. severally, covenant with the plaintiffs that the defendant, A and B, or some or one of them, would pay to the plaintiffs a certain sum of money on a day named:—Held, no variance. *Addison v. Gibson*, 16 Law J. Rep. (n.s.) Q.B. 165; 10 Q.B. Rep. 106.

A, by indenture, covenanted with B & C, their executors, administrators, and assigns, to pay a sum of money, to be held by them on certain trusts. C did not assent to or execute the deed, and subsequently by an indenture, to which neither A nor B were parties, disclaimed all the trusts of the first indenture:—Held, that B could not alone sue A upon the covenant during the lifetime of C. *Wetherell v. Langston*, 17 Law J. Rep. (n.s.) Exch. 338; 1 Exch. Rep. 634.

The rule as to joint and several covenants is one merely of construction, and parties may by apt words covenant severally although there be a joint interest. If the words are capable of two constructions, then the legal construction will depend upon the nature of the interest.

A covenanted with B, and as a separate covenant with C:—Held, that B could sue alone, although the deed shewed that the consideration moved partly from C; and that C would under some circumstances be interested in the amount recovered. *Keightley v. Watson*, 18 Law J. Rep. (n.s.) Exch. 339; 3 Exch. Rep. 716.

By an indenture between E H, G B, and others, subscribers to a certain projected company, of the first part, A B and C D of the second part, and G B and others (being some of the parties of the first part) of the third part, it was recited that the parties of the third part had acted as managing directors, that the parties of the first part had become respectively subscribers, and paid their respective deposits into the hands of certain bankers of the company, appointed by the parties of the third part, the receipt of which by the said bankers the parties of the third part acknowledged: it was then witnessed that for the purpose of carrying out the objects of the company, the parties of the first part did mutually agree with each other, and with each and every of the persons who were subscribers, and each of them did for himself, and as to and concerning only the acts and deeds and defaults of himself respectively covenant with A B and C D in manner following. The deed then set out several clauses, the first of which was, that the parties of the third part should be managing directors. The seventh and eighth were, that the managing directors should have absolute discretion to do what was necessary for the obtaining an act of parliament, and as to the expenditure of the funds until the act should be obtained, subject to certain provisos. The ninth was, that the managing directors should have power to dissolve the

company, and that their deposits were to be returned without any abatement. The tenth was, that if within three years the act was not obtained the deed should be null and void to all intents and purposes whatever, and thereupon the deposits should be returned without any deduction or abatement whatsoever. After the lapse of the three years, E H brought an action of covenant against G B, and joined A B and C D as co-plaintiffs:—Held, on demurrer to the declaration, first, that there was a misjoinder of plaintiffs. Secondly, that there was no joint covenant by the managing directors to return the deposits.

And, *semble*, that the tenth clause did not avoid the deed so as to prevent an action of covenant upon it. *Higginbotham or Higginbottom v. Burge*, 19 Law J. Rep. (N.S.) Exch. 73; 4 Exch. Rep. 667.

(C) ACTIONS AND SUITS, WHEN MAINTAINABLE.

No action will lie on a covenant by C to pay a sum of money to A B, and himself C, or the survivors or survivor of them, on their joint account. *Faulkner v. Lowe*, 2 Exch. Rep. 595.

A father, on the marriage of his daughter, covenanted with her intended husband, by deed or will, to give, leave, and bequeath to her an equal share with his, the covenantor's, other children in his real and personal estate at the time of his death. The daughter died in her father's lifetime, without issue, after the new Will Act came into operation. The father, by his will, gave all his real and personal property to executors and trustees for the benefit of his surviving widow and daughters, having provided for a son in his lifetime, but not leaving any provision for the deceased daughter:—Held, by this Court (concurring with the certificate of the Court of Common Pleas), that the covenantee, the husband of the deceased daughter, had not, under the circumstances, any good cause of action against the executors of the father, the covenantor; and that if the latter had died possessed of no personal estate, and seised only of copyhold estate, the husband could not have recovered any substantial damages in such action. *Jones v. How*, 19 Law J. Rep. (N.S.) Chanc. 324.

Bill for the execution of a covenant contained in a renewed lease granted by trustees, dismissed, the covenant being *ultra vires* of the trustees. *Bellringer v. Blagrove*, 1 De Gex & S. 63.

(D) PLEADINGS.

A declaration in assumpsit recited an agreement in writing by which the defendant agreed to permit the plaintiff to occupy certain lands until the 29th of September 1843, the plaintiff paying therefore on that day, as he thereby agreed to do, 30*l*. as rent for the same, and then to deliver up the premises to the defendant in good repair, and meantime to cultivate the same in a husbandlike manner; and that, upon the plaintiff so quitting the premises, paying the rent, and observing the other stipulations, and releasing the defendant from all claim under the will of H G, as also releasing to the defendant all the lands devised by H G, which the plaintiff thereby agreed to do, the defendant should pay to the plaintiff 200*l*., with interest from the 29th of September 1842; it was further agreed that all releases required by the defendant should be

prepared by the defendant's attorney. Averment, that the plaintiff was ready and willing to deliver up the premises, and to pay the rent, and to release the defendant (as agreed on). Breach, that although the 29th of September did elapse, &c., and although a reasonable time elapsed between that day and the commencement of this suit for the payment of the 200*l*., and although no release was prepared by defendant's attorney before the said day,—non-payment of the 200*l*. by the defendant. Plea, that the plaintiff was not ready and willing to deliver up the premises:—Held, on special demurrer, that the acts to be done by the plaintiff were not conditions precedent to, nor independent of, but concurrent with, the payment of the 200*l*. by the defendant. That it was, therefore, sufficient for the plaintiff to aver his readiness and willingness to do them, without alleging performance; but that this averment was necessary, and, therefore, that the plea was good, as raising a material issue.

Third plea, that the plaintiff was not ready and willing to release the defendant:—Held, that as the release was to be prepared by the defendant's attorney, and it was averred that no such release was prepared, the plaintiff's readiness to execute it was immaterial, and the plea was therefore bad, as raising an immaterial issue. *Giles v. Giles*, 15 Law J. Rep. (N.S.) Q.B. 387; 9 Q.B. Rep. 164.

A defendant covenanted that he would pay over the first fruits and proceeds, which should be first realized and be at his disposition, under a sequestration, forthwith upon the receipt thereof to the plaintiff. In an action upon the covenant, the declaration stated, that although divers first fruits and proceeds were realized and at the defendant's disposition, yet that the defendant had not paid them over:—Held, sufficient; and that it was not necessary to aver a receipt of them by the defendant. *Smith v. Nesbitt*, 15 Law J. Rep. (N.S.) C.P. 9; 2 Com. B. Rep. 286; 3 Dowl. & L. P.C. 420.

A declaration stated, that, by an indenture between the plaintiff, J J, and the defendant, the plaintiff granted to the defendant all the coals, and mines of coals, under a certain messuage and lands; that the defendant covenanted to pay to the plaintiff, as the price of the coal so granted, 40*l*. for every statute acre of the said coal which should be found under the said messuage and lands, and, until the said price for the said coal should be fully paid, to pay to the plaintiffs 40*l*., part of the said price, in each year, by two equal instalments, on the 3rd of January and the 3rd of July, and whether the whole of an acre of the said coal should in every such year be gotten or not. That, at the making of the said indentures, there were under the said messuage and lands, divers, to wit, fourteen acres of the said coal, and that thirteen acres of the said coal still remained under the said messuage and lands, and that a sum of money, to wit, 40*l*., for two of the half-yearly instalments of the said price for the coal aforesaid, became and was due, and still was in arrear and unpaid:—Held, that, as the finding of the coals was a condition precedent to the defendant's obligation to pay, the declaration was bad, in arrest of judgment, for not averring that coals had been found. *Jowett v. Spencer*, 15 Law J. Rep. (N.S.) Exch. 347; 15 Mee. & W. 662.

A declaration alleged that the defendant covenanted that he and all persons claiming under him would, upon request, and at the expense of the said defendant, execute all such further assurances as might be required, &c. It appeared by the indenture, when produced at the trial, that the covenant was, that the defendant "would, upon the request and at the expense of the said defendant, execute," &c.:—Held, a fatal variance. *Whyte v. Burnby*, 16 Law J. Rep. (N.S.) Q.B. 156.

A lease contained a proviso that on notice being given by the lessee eighteen months before the end of the eighth year, and all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should determine at the end of the eighth year; "nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained":—Held, that the performance of all the covenants by the lessee was a condition precedent to his right to determine the lease, notwithstanding the concluding clause.

To an action by the lessor on the lease where the declaration alleged specific breaches of covenant, the lessee pleaded that he gave eighteen months' notice to determine the lease at the end of the eighth year, and that at the expiration of that year all arrears of rent had been paid, and all and singular the covenants and agreements on the part of the lessee had been observed and performed, and thereupon the lease determined. The plaintiff replied, setting out a specific breach of covenant which had been assigned in the declaration, *absque hoc* that all and singular the covenants and agreements on the part of the lessee had been observed and performed by him at the end of the eighth year, concluding to the country:—Held, that the plaintiff was at liberty to put the defendant to proof of his averment in the general terms in which it was made, and that the replication concluded properly to the country. *Friar v. Grey*, 17 Law J. Rep. (N.S.) Q.B. 301 (see this case in error, next below).

It is a general rule of pleading, and not confined to actions on bonds, that where a defendant, in order to have a complete defence to the action, ought to have performed all of a large number of covenants, and the breach of any one of them would entitle the plaintiff to succeed, the defendant may plead performance of all generally; and the plaintiff in his replication must then specify some particular breach, concluding with a verification, and cannot take issue on the general averment of performance.

A lease for forty-two years contained a proviso, that if the lessee should desire to quit at the end of the first eight years and should give eighteen months' notice beforehand of such desire, then and in such case, all arrears of rent being paid, and all covenants and agreements on the part of the lessee having been observed and performed, the lease should at the expiration of the eighth year cease, determine and be utterly void, as if the whole term of forty-two years had run out. The proviso concluded thus:—"but nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the

covenants or agreements hereinbefore contained;" —*Semble*—that the payment of the rent and performance of the covenants was not a condition precedent to the tenant's right to determine the lease at the end of the eighth year, since the latter branch of the proviso contemplated that breaches of covenant might exist for which the lessor might have to sue after such determination of the lease.

A declaration in covenant on the lease stated various breaches. The defendants pleaded, that the breaches happened after eight years of the lease had expired, and that they had determined the lease by a notice at the end of the eight years. The plaintiff replied to the plea, and also new assigned that certain of the breaches were committed within the eight years. The defendants demurred to the replication, and traversed the new assignment. After judgment for the plaintiff that the replication was sufficient in law, the jury assessed separate damages on the breaches and on the issue in law, and 1s. damages on the new assignment. On a writ of error brought, the Court of Exchequer Chamber decided that the replication was bad in law:—Held, that the judgment must be reversed altogether, and that the court of error could not without the consent of the plaintiff below, the defendant in error, reverse the judgment as to the demurrer and affirm it as to the causes of action contained in the new assignment. *Grey v. Friar*, 19 Law J. Rep. (N.S.) Q.B. 393.

A declaration in covenant stated the making of an indenture between the plaintiffs and the defendant which recited the effecting of a life policy of assurance by the defendant, he paying the annual premium of 49l. 8s. 4d. on or before the 24th of June in each year; that the defendant covenanted with the plaintiffs to pay them the premiums and all other sums of money that should become due on the policy at the proper times for that purpose, and do every other matter or thing which should be necessary for keeping on foot the policy. First breach, that the defendant did not pay the plaintiffs the premiums which became due on the policy according to his covenant, but, on the contrary, to wit, on the 24th of June 1847, a premium of 49l. 8s. 4d. became due, yet the defendant did not then or at any other time pay it. Second breach, that the defendant did not do all such matters or things as were necessary for keeping on foot the policy, but that on the 24th of June 1847 it was necessary in order to keep the policy on foot, that the annual premium should be paid within twenty-one days from that day, yet the defendant did not pay it within that period or at any other time:—Held, on special demurrer, that the first breach was good, and the second bad. *North British Insurance Co. v. Riky*, 18 Law J. Rep. (N.S.) Exch. 281; 2 Exch. Rep. 687.

A declaration in covenant by the assignees of B, a bankrupt, stated, that by a deed between B of the first part, D and S his wife of the second part, V and the said B, described as trustees, of the third part, and the Thames Haven Dock and Railway Company, the defendants, of the fourth part; after reciting that certain persons, on behalf of the company, had agreed to buy certain premises, and that B had agreed to sell the same, it was witnessed that, in consideration of a certain sum already paid

to B, and in consideration of the further sum of 2,936*l.* to be paid to B and to V and B according to their respective rights and interests in the premises, on or before the 25th of March 1844, B G S and V agreed to sell the premises, and that B would at his own expense deduce a good title to the same; and that B and all other necessary parties would, on or before the said 25th of March, on payment by the company of the said sum of 2,936*l.*, at the costs and charges of the company execute and procure to be executed a proper conveyance for conveying the fee simple of the premises; and that the company thereby agreed with B that they would, on or before the said 25th of March, and on the execution of such conveyance, pay the said sum of 2,936*l.*, and until payment of the said sum would pay interest on the same unto B and his assigns; that the 25th of March 1844 had elapsed; that although B before his bankruptcy, and the plaintiffs as his assignees after it, were ready and willing to deduce a good title, and though B and the necessary parties were ready and willing on payment by the defendants of the said sum of 2,936*l.* to execute a conveyance, and would have done so, but that the defendants discharged B and the plaintiffs from deducting such good title and from executing such conveyance. It then alleged as a breach, that the defendants did not prepare a proper conveyance, nor pay to B or to the plaintiffs the 2,936*l.*, or any part thereof:—The Court of Exchequer Chamber affirmed the judgment of the Court of Exchequer in favour of the plaintiff, on a special demurrer to the declaration. And, held, that assignees of a bankrupt, suing on a deed made to the bankrupt, are not bound to make proof of the deed; that the breach, that the defendants had not prepared the conveyance nor paid the money, was good, since as the deed provided that the conveyance was to be at the costs and charges of the defendants, it lay on them to prepare it; that the execution of the conveyance and the payment of the money were to be concurrent acts, but that the deduction of a good title by B was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced; that the averment that the defendants discharged B and the plaintiffs from deducting title was sufficient on general demurrer, as if traversed the averment could not have been proved otherwise than by the production of a deed of discharge, and it was not made a ground of special demurrer that the declaration did not allege the discharge to be under seal; and that it was not necessary to point out the respective interests of B and others in the money to be paid, as the covenant was not a covenant to pay the principal sum to B and the others, according to their respective interests, and the interest to B, but was a covenant to pay to B, both principal and interest. *Thames Haven Dock and Rail. Co. v. Brymer*, 19 Law J. Rep. (N.S.) Exch. 321; 5 Exch. Rep. 696.

(E) DAMAGES.

R P covenanted with J G not to carry on the trade of a perfumer, &c. within the cities of London and Westminster, or within 600 miles from the same, and bound himself in 5,000*l.* by way of liqui-

dated damages for the observance of the covenant. The plaintiff below, the executor of J G, brought his action for a breach of the covenant by the defendant carrying on the business in the city of London. Plea, that the indenture was void, because the covenant extended to all England. On demurrer to the plea, judgment was given for the plaintiff. A writ of inquiry having been executed before a Judge, he directed the jury to assess the damages at the whole sum of 5,000*l.* The defendant tendered a bill of exceptions to the Judge's ruling, and brought a writ of error on the judgment upon the demurrer:—Held, that the covenant was divisible; and that, although void as regarded the distance of 600 miles from London and Westminster, it was good as regarded the cities of London and Westminster themselves.

Held, also, that the jury were properly directed to assess the damages at the whole 5,000*l.*, and not to ascertain the actual damage. *Price v. Green*, 16 Law J. Rep. (N.S.) Exch. 108; 16 Mees. & W. 346.

The plaintiff and the defendant being attorneys and solicitors, carrying on business at Ely Place, in London, in co-partnership, dissolved the partnership by indenture, whereby the defendant covenanted with the plaintiff that he, the defendant, would not thereafter, within the next seven years, directly or indirectly, by himself or in partnership, carry on the business of an attorney or solicitor within fifty miles from Ely Place, nor interfere with, solicit, or influence the clients of the said co-partnership, and if he should infringe the covenant, then that he would immediately pay to the plaintiff 1,000*l.* as and for liquidated damages, and not by way of penalty:—Held, that the intention of the parties was, that the sum of 1,000*l.* was to be considered as liquidated damages, and not as a penalty. *Galsworthy v. Strutt*, 17 Law J. Rep. (N.S.) Exch. 226; 1 Exch. Rep. 659.

Lessees covenanted that they would pay all taxes, charges, rates, or rent-charges in lieu of tithes that then were or should at any time thereafter, during the demise be taxed, charged, assessed, or imposed upon the demised premises, except the land tax and property tax:—Held, that the lessees were bound to pay all rates then imposed on the lessees in respect of their occupation, *e. g.*, church-rate, highway rate and poor-rates, and all other rates which might be imposed on the land itself.

A declaration stated that the defendants had covenanted not to cut down or lop any tree under a penalty of 20*l.* for each tree so cut down or lopped, over and above the value of such tree, and averred as a breach that the defendants lopped divers, to wit, twenty trees, of the value of 80*l.*, and then and thereby the defendants became liable to pay a large sum, to wit, 10*l.*, being the value of the said trees to the plaintiff, and also the further sum of 20*l.* for each of the trees so lopped. It was proved that one tree only had been lopped:—Held, that the Judge ought to have directed the jury that the 20*l.* penalty could not be recovered. *Hurst v. Hurst*, 19 Law J. Rep. (N.S.) Exch. 410; 4 Exch. Rep. 571.

A declaration in covenant, after stating that the defendant and the plaintiff had agreed to enter into partnership as surgeons, &c., stated that the defendant covenanted that he would not at any time

practise in the profession of a surgeon at No. 28, Dorset Crescent, or within the distance of two miles thereof, measuring by the usual streets or ways of approach thereto, nor reside within the distance of two miles and a half of No. 28, Dorset Crescent, without the plaintiff's consent, nor would attempt to prevail on any of the patients of the defendant or of the partnership to withdraw from the plaintiff, or to employ any other medical attendant in prejudice of the plaintiff, but would in all things endeavour to promote the business and advantage of the plaintiff in the profession of a surgeon as far as it was in the power of the defendant and he could reasonably and properly be required to do, and that if the defendant should in any respect break or infringe this stipulation he should pay the plaintiff 1,000*l.* as liquidated damages and not by way of penalty:—Held, first, that the distance was to be measured not by the most frequented public ways but by *any* of the usual public ways; secondly, that the stipulation as to residence was not void as being in restraint of trade or contrary to public policy, and that the declaration was good in arrest of judgment; lastly, that the sum payable was to be considered as liquidated damages and not as a penalty. *Atkins v. Kinnier*, 19 Law J. Rep. (n.s.) Exch. 132; 4 Exch. Rep. 776.

A declaration in covenant, after reciting two agreements between the plaintiff and the defendant, stated that by a third agreement, of the 27th of September 1848, between the same parties, the defendant agreed to demise to the plaintiff, on or before the 29th of November, a certain ferry, &c. at a certain rent, and agreed, within fourteen days from the date thereof, to deduce a good title thereto; and that the plaintiff agreed to pay to the defendant, before the 29th of November, 3,150*l.* upon having a good title deduced. Breach, that the defendant did not, within fourteen days, &c., or at any time, deduce a good title. Second plea, that the plaintiff was not ready and willing to perform all things to be performed, &c. Third plea, that the defendant did deduce a good title to the premises according to the agreement:—The plaintiff, a solicitor and promoter of a company, provisionally registered, for making improvements in Hayling Island, by agreement of the 17th of September 1850 agreed with the defendant, who was the owner of land there, for the demise to the plaintiff of a ferry, land, houses, and premises, and that the defendant should, within fourteen days from the date thereof, furnish an abstract of his title to the premises and deduce a good title thereto, and that the plaintiff agreed to pay to the defendant, on or before the 29th of November, 3,150*l.* After this agreement a company was formed and provisionally registered by the plaintiff as its promoter, its object being to make a ferry, to erect gas works and bathing-houses, &c., on Hayling Island. On the 10th of November the defendant sent to the plaintiff an abstract of his title, which disclosed a mortgage of the premises to the trustees of the defendant's marriage settlement, one of whom was imbecile. There were also two judgments against the defendant. In consequence of these objections to the title, the association was dissolved by its members, and the 3,150*l.* was not paid to the defendant:—Held, that the plaintiff was entitled to succeed on

the above issues, and that he was entitled to recover as damages the costs of preparing and entering into the agreement, of investigating the title, of endeavouring to procure a good title, and also of the grant of the lease; but that he was not entitled to recover as damages the expenses of raising the 3,150*l.* and loss at interest; nor the expenses of preparing the deed of settlement of the company; nor the money expended in forming the company and in registering it provisionally; nor the loss of profits from the granting of the lease and the establishment of the association; nor the profits he would have derived as an attorney in carrying out the objects of the association; nor the other advantages he would have derived from his time, trouble, &c. bestowed in the formation of the company. *Hanslip v. Padwick*, 19 Law J. Rep. (n.s.) Exch. 372; 5 Exch. Rep. 615.

CRIMINAL LAW.

[See the various titles of Criminal Offences; also Felony—Indictment—Misdemeanour—Pleading.]

Power of transportation and imprisonment altered, 9 & 10 Vict. c. 24; 24 Law J. Stat. 70.

CROWN CASES RESERVED, COURT FOR.

The Court of Criminal Appeal, constituted under the statute 11 & 12 Vict. c. 78, has no power, on a case stated by the Judge, to review the propriety of a judgment given by him for the Crown on a demurrer to an indictment. *Regina v. Foderman*, 19 Law J. Rep. (n.s.) M.C. 147; 1 Den. C.C. 565.

On a case reserved, the question stated in the case upon the facts therestated can only be argued; and if any material fact has been omitted, application should be made to the Judge to insert it. *Regina v. Smith*, 2 Car. & K. 882.

Seemle—that the recorder of a borough has power to reserve questions of law under the 11 & 12 Vict. c. 78. *Regina v. Masters*, 18 Law J. Rep. (n.s.) M.C. 2; 1 Den. C.C. 332.

CRUELTY.

Cruelty to animals more effectually prevented by 12 & 13 Vict. c. 92; 27 Law J. Stat. 182.

CURRENCY.

A, resident in Amsterdam, being the owner in possession of a plantation in British Guiana, by an instrument executed in her behalf by her attorney in London, in 1817 sold the plantation, *cum annexis*, to B for 100,000 guilders "Holland currency," and 30,000*l.* sterling, taking, as part of the consideration money, a first mortgage on the plantation for the 100,000 guilders. By the terms of this mortgage it was stipulated that the 100,000 guilders were not to be paid during the lifetime of A, but upon her death to her lawful descendants (if she had any), and if not to the nephews and nieces of J B; and it was specially provided that if, at any time the interest,

at the rate of 5*l.* per cent. should not be punctually paid every year at Amsterdam, and that if, by such default, A should be obliged to appoint an attorney to demand the same in the colony, the interest in that case should be at the rate of 6*l.* per cent. and a further charge of 10*l.* per cent. for commission. A intermarried with E, and the interest on the mortgage not having been paid as stipulated, an attorney was appointed at British Guiana to recover the arrears. In 1828 A died without issue or lawful descendants, leaving E, her husband, surviving, at which time the interest on the mortgage was still in arrear. In the year 1836, C & Co. purchased the first mortgage, and all the interest therein, which the parties claiming title under the limitation in the mortgage deed to the nephews and nieces of J B had. The consideration money paid by C & Co. was considerably less than the amount of the first mortgage and interest thereon. Upon the passing of the act for the abolition of slavery C & Co. received from the Compensation Commissioners, in respect of this mortgage, a sum more than sufficient to repay them what they had paid for the mortgage, but much less than was due upon the mortgage for principal and interest. The plantation was sold in 1838 at the suit of B, and all creditors having claims were summoned to render their claims, and upon C & Co. claiming priority under the first mortgage, the Supreme Court of Demerara and Essequibo held, that the second mortgagee was preferent over the first, as under the Anastasian law, which they declared prevailed in British Guiana, an assignee for a valuable consideration of a debt or chose in action secured by deed could not recover more than the amount of the consideration money actually paid to the assignor with legal interest from the time of payment, and that the sum received by C & Co. from the Compensation Commissioners was more than sufficient to pay off, and must be held to extinguish the whole debt upon the first mortgage:—Upon appeal, it was held by the Judicial Committee of the Privy Council (reversing the decree)—first, that in the absence of any fraud by C & Co. in the purchase of the first mortgage, and of any authority to shew that the *lex Anastasiana* prevailed in British Guiana, or could be applied to a case so circumstanced, the amount of the consideration money given by C & Co. was not to enter into question between them and the second mortgagee; secondly, that the term, in the mortgage deed, “Holland currency,” coupled with the fact of Amsterdam being the place mentioned for payment, meant Dutch currency, and not colonial currency; thirdly, that the clause for varying the interest from 5*l.* to 6*l.* was not confined in its operation to the lifetime of A, but that circumstances might have rendered it inequitable to increase the rate of interest after A’s death, or during some portion of the time after that event. *Macrae v. Goodman*, 5 Moore P.C. 315.

CUSTOMS.

[See REVENUE.]

DAMAGES.

GENERAL POINTS. [See BANKRUPT—COVENANT—LANDS CLAUSES ACT—PLEADING.]
 IN ACTIONS FOR PERSONAL INJURIES. [See LIBEL—MALICIOUS PROSECUTION—SLANDER.]
 IN ACTIONS FOR INJURIES TO PROPERTY. [See FALSE REPRESENTATION—NUISANCE—SHERIFF—TRESPASS.]
 IN ACTIONS ON CONTRACTS. [See PRINCIPAL AND AGENT—VENDOR AND PURCHASER.]
 DOUBLE AND TREBLE DAMAGES. [See DISTRESS—SHERIFF, Extortion.]
 SPECIAL DAMAGE. [See FALSE REPRESENTATION—SLANDER—TROVER.]
 REDUCTION OF DAMAGES. [See NEW TRIAL—SET-OFF.]
 MOTION TO INCREASE DAMAGES. [See PRACTICE.]
 NEGLECT TO ASSESS DAMAGES. [See ERROR.]
 NOMINAL DAMAGES. [See PAYMENT.]

DEBT, ACTION OF.

[See PAYMENT.]

WHEN IT LIES.

By indenture under seal, B assigned to A a policy of insurance, as security for a debt due from B to A, and covenanted to pay to the insurance office the annual premium thereon as it should become due. It was in the same deed further agreed, that if B should neglect to pay the premium, it should be lawful for A to pay it, and recover the same from B in an action for money paid. A having paid the premium, upon B’s neglect so to do,—Held, that an action of debt lay for the amount. *Barber v. Butcher*, 15 Law J. Rep. (N.S.) Q.B. 289; 8 Q.B. Rep. 863.

An action of debt lies upon a bond binding the defendant to pay to a party, treasurer of a company, or his attorney, executors, &c., or the treasurer of the company for the time being. *White v. Hancock*, 15 Law J. Rep. (N.S.) C.P. 186; 2 Com. B. Rep. 830.

The defendant entered into an agreement, in writing, with the plaintiff, by which he was to board and lodge with the plaintiff at a certain weekly sum, and the plaintiff agreed to take, in payment for the board and lodging, certain furniture of the defendant, then in the plaintiff’s house. The furniture having afterwards, and before the plaintiff had appropriated it, been taken in execution for a debt of the defendant to another party,—Held, that the plaintiff was entitled to recover, in the ordinary action of debt, for board and lodging, as if the special contract had never existed. *Keys v. Harwood*, 15 Law J. Rep. (N.S.) C.P. 207; 2 Com. B. Rep. 905.

An action of debt for turnpike tolls lies where the defendant has frequently passed through the gate, misrepresenting facts, which led the collector to believe he was not entitled to receive toll, and consequently demanded no toll at the times the defendant passed through. *Maurice v. Marsden*, 19 Law J. Rep. (N.S.) C.P. 152.

By a local act of parliament overseers of a parish were authorized to grant the fee simple of certain plots of land to certain parties, subject to the payment to the said overseers and their successors of certain yearly chief rents, and also subject to certain covenants, amongst which covenants were, that the grantee, for himself, his heirs, &c. covenanted with the said overseers and their successors, "that he would duly pay the said yearly chief rent to the said overseers," &c. In an action of debt brought by the overseers against a grantee holding under a conveyance containing such covenant, for arrears of rent.—Held, on general demurrer, that debt would lie.

Quere—Whether since the passing of the statute 3 & 4 Will. 4. c. 27. s. 36. an action of debt lies for the recovery of the arrears of a rent in fee. *Varley v. Leigh*, 17 Law J. Rep. (N.S.) Exch. 289; 2 Exch. Rep. 446.

The plaintiff was mortgagee under a mortgage from the defendant to him, with a power of sale in the event of non-payment of a certain sum of money, which was further secured by a bond given by the defendant to him. The property was afterwards sold by the plaintiff under the power, but did not produce sufficient to discharge the debt. An account was then stated between the plaintiff and the defendant, charging the defendant with the full amount of the principal and interest, and giving him credit for the net proceeds of the sale. The defendant admitted the correctness of the amount and promised to pay the balance, to recover which the plaintiff brought an action of debt on simple contract for money lent, and on an account stated:—Held, that the debt having been secured by specialty, the action could not be maintained. *Middle-ditch v. Ellis*, 17 Law J. Rep. (N.S.) Exch. 365; 2 Exch. Rep. 623.

DEBTOR AND CREDITOR.

[See *INSOLVENT DEBTOR*.]

(A) CREDITOR, RIGHTS OF.

(B) COMPOSITION DEEDS.

- (a) *When and how far binding.*
- (b) *What Creditors entitled to the Benefit of.*
- (c) *Order of Payment of Debts.*
- (d) *Favouring a particular Creditor.*

(C) RECOVERY OF SMALL DEBTS UNDER 8 & 9 VICT. c. 127.

(D) PROCEEDINGS UNDER 7 & 8 VICT. c. 70.

(A) CREDITOR, RIGHTS OF.

A, the owner of estates in the West Indies, upon which B had an annuity charged, empowered B to arrange with a firm in London, to receive the consignments, and, in consideration thereof, to make the necessary remittances and to pay the charges upon the estates. B, as the agent of A, entered into an agreement with D & Co. that they should make such remittances and provide for the charges upon the estates (including B's annuity), and that the produce of the estates should be consigned to D & Co. in repayment of such advances. The

consignments were made accordingly, and D & Co. for some time paid B's annuity, but afterwards refused to continue such payments. The bill was filed by B against A and D & Co. for payment of the arrears of his annuity out of the consignments. On demurrer, by D & Co. for want of equity, held, that D & Co., by the subsequent payments of B's annuity on the footing of the agreement, had given him an interest in the deed, and a right of suit, and the demurrer was overruled, with costs. *Kirwan v. Daniel*, 16 Law J. Rep. (N.S.) Chanc. 191; 5 Hare, 493.

A creditor, whose debt is collaterally secured by a policy of insurance on the life of one of several debtors, under an agreement that the debt shall not be recoverable during the payment of the premium by the debtors, has a right to enforce payment of the debt upon forfeiture of the policy, notwithstanding his having, subsequently to the forfeiture, obtained a renewal of the policy. *Winthrop v. Murray*, 19 Law J. Rep. (N.S.) Chanc. 547.

(B) COMPOSITION DEEDS.

[See 13 & 14 Vict. c. 106. s. 230.]

Bush v. Shipman, 5 Law J. Dig. 239; 14 Sim. 239.

(a) *When and how far binding.*

The agreement of any one creditor to take less than his debt is a sufficient consideration for a similar agreement by any other creditor; and the assent of all the creditors is not necessary, unless made a condition of the agreement.

A plea, after stating that the defendant was indebted to the plaintiff and divers other persons, averred an agreement for composition between the defendant, the plaintiff and the said other creditors:—Held, that the plea was proved by proof that the plaintiff and all other creditors, except three, agreed to the composition. *Norman v. Thompson*, 19 Law J. Rep. (N.S.) Exch. 193; 4 Exch. Rep. 755.

A conveyance for the benefit of creditors held not to be revocable by the author as against any creditors with whom such communications had taken place as would give them an interest under the deed, but, at the utmost, to be revocable only as to the surplus proceeds of the estate after satisfying such creditors; and whether the deed was revocable at the option of the author as to such surplus, *quære*. *Griffith v. Ricketts*, 7 Hare, 307.

A person in pecuniary difficulties entered into a composition deed, by which he covenanted to pay 1,500*l.* to trustees, and to effect an insurance on his own life for that amount. He paid 500*l.*, and then effected an insurance for 1,000*l.* only. One of the creditors who had signed the deed brought an action against the debtor for his debt, insisting that the deed was void, in consequence of the breach of covenant to insure for 1,500*l.* But it being shewn that the creditor was aware of the amount of the insurance soon after it was effected, and his conduct being considered by the Court as shewing acquiescence in such breach of covenant, he was held not to be entitled to take advantage of it, and was restrained by perpetual injunction from bringing any action against the debtor. *Watts v. Hyde*, 17 Law J. Rep. (N.S.) Chanc. 409.

(b) What Creditors entitled to the Benefit of.

Hop-merchants sold a quantity of hops to a person, who paid a small part only of the purchase-money, and shortly afterwards entered into a composition with his creditors. The creditors were to execute or assent to the composition-deed within three months, or be precluded from the benefit of it. The vendors retained a lien on the hops according to the custom of the trade, and afterwards sold them for much less than the original purchase-money, and then claimed to share in the dividend under the composition-deed, for the balance remaining due to them. They had not executed the deed, but had virtually assented to it:—Held, that the vendors were not entitled to receive any dividend under the deed. *Bush v. Shipman*, 15 Law J. Rep. (N.S.) Chanc. 356; (*nom. Buck v. Shippam*) 1 Ph. 694.

By a deed by which A conveyed estates, in trust, for payment of his debts, it was provided that no creditor should be entitled to the benefit of the trust, unless the trustees having investigated and allowed his debt, should give him a debenture for it. The trustees gave debentures to three creditors. In a suit by one of the trustees against his co-trustees, the Master was directed to take an account of all A's debts due at the date of the conveyance, and to advertise for his creditors to prove their debts by a day named or to be excluded from the benefit of the decree. The plaintiff and several other creditors proved their debts under the decree:—Held, nevertheless, that only the plaintiff and the debenture creditors were entitled to the benefit of the trust. *Drever v. Mawdesley*, 16 Sim. 511.

(c) Order of Payment of Debts.

A debtor conveyed real and personal estate to a trustee for sale, with a declaration that the proceeds of the sale should be applied by the trustee in discharge of the debts mentioned in the schedule, "and now remaining justly due and owing" by the debtor to the persons named in the schedule, "according to the priority, nature and specialty of such debts respectively":—Held, upon the construction of the whole instrument, that a bond debt mentioned in the schedule with interest (the principal and interest not exceeding the penalty of the bond) was payable in priority to a simple contract debt. *Passingham v. Selby*, 2 Coll. C.C. 405.

(d) Favouring a particular Creditor.

The plaintiff being in insolvent circumstances, and indebted to several persons, in sums partly secured by outstanding bills, entered into a deed of composition, by which composition bills were agreed to be given to the respective creditors by the plaintiff to the amount of 5s. in the pound, and guaranteed by one T M. The creditors severally covenanted not to sue while these composition bills were running, and to release the plaintiff if the same were paid at maturity. They also covenanted severally to indemnify the plaintiff against and in respect of such bills as were outstanding in their hands as his creditors at the execution of the deed. H P and his partner J M were, at the time of the execution of the composition deed, creditors of the plaintiff, and holding acceptances of the plaintiff for part of their

debt. These bills were afterwards negotiated, and the plaintiff was sued upon them and compelled to pay the amount, with costs. He thereupon sued H P on the covenant for not indemnifying and holding him harmless. The defendant pleaded, that before the execution of the deed, it had been agreed between the plaintiff and himself and his partner, that in addition to the composition of 5s. in the pound, the plaintiff should pay in full a portion of his debt to them, and should pay the composition of 5s. in the pound in cash instead of by a bill; and that this agreement was unknown to the other creditors; and that he, the defendant, in part performance of the agreement, had executed the deed to induce the other creditors to believe that he and his partner had received the same composition as the rest:—Held, that the transaction was fraudulent, and that the plaintiff could not sue the defendant upon the covenant to indemnify.

The declaration alleged that the defendant did, on &c. to wit, as such creditor, jointly with J M subscribe his, the defendant's, name and affix his seal to the indenture. The plea stated, that in part pursuance of the agreement stated therein, "he, the defendant, for himself and his partner, made and executed the indenture as in the declaration mentioned":—Held, that it sufficiently appeared that the defendant had himself executed the deed.

The plea did not state in terms that the agreement was a fraud upon the other creditors:—Held, that the facts sufficiently shewed that the deed was fraudulent, and that it could not be enforced by any of the parties to the fraud. *Higgins v. Pitts*, 18 Law J. Rep. (N.S.) Exch. 488; 4 Exch. Rep. 312.

Whatever may be the general rule, if there be any, as to extending indulgence to a creditor under a composition deed, who does not claim the benefit of the deed within the time specified in it, that rule does not apply to a creditor who actively refuses to come in under or assent to the deed within the time limited and who does not retract that refusal within the time. *Johnson v. Kershaw*, 1 De Gex & S. 260.

(C) RECOVERY OF SMALL DEBTS UNDER § 9 VICT. c. 127.

The expression "costs remaining due at the time of the order of imprisonment being made," in the 8 & 9 Vict. c. 127. s. 3, means the costs ordered by the Commissioner of Bankruptcy or other Court mentioned in the act to be paid by instalments or otherwise; and the expression "all subsequent costs," in the same section, means the costs incurred by reason of the debtor's default in payment of the instalments. *Ex parte Shuckard re Archer*, 16 Law J. Rep. (N.S.) Bankr. 5; 1 De Gex 454.

(D) PROCEEDINGS UNDER 7 & 8 VICT. c. 70.

A certificate of protection duly granted by a Commissioner in Bankruptcy to a petitioning debtor, under the 6th section of the 7 & 8 Vict. c. 70. (for facilitating arrangements between debtors and creditors), is no bar to a subsequent action against such debtor, brought by a creditor who had notice of all the proceedings under the act, for a debt inserted in the debtor's petition.

Such certificate amounts to no more than a pro-

tection of the debtor from arrest. *Blackford v. Hill*, 19 Law J. Rep. (N.S.) Q.B. 346; 15 Q.B. Rep. 116.

A plea under the 7 & 8 Vict. c. 70. s. 8. must shew, by express averment that the estate of the petitioning debtor, or the particular debt sued for, vested in the trustee by the resolution in writing of the creditors; for, unless it is otherwise provided for by such resolution, the petitioning debtor retains his right of action. *Chilcote v. Kemp*, 19 Law J. Rep. (N.S.) Exch. 258; 3 Exch. Rep. 514.

DEED.

[See DEBTOR AND CREDITOR, Composition Deed—PARTNERS—PRINCIPAL AND AGENT—WARRANT OF ATTORNEY.]

- (A) CONSTRUCTION OF.
- (B) VALIDITY OF.
- (C) REFORMING FOR MISTAKE.
- (D) SCHEDULE.
- (E) DELIVERY OF.
- (F) REGISTRATION OF.

(A) CONSTRUCTION OF.

In searching for the intention of a donor, which is the standard to govern the construction of a deed of gift, the facts, first, that the gift is subject to the condition of making certain payments to others, —secondly, that forfeiture will be incurred by non-performance of that condition, —and, thirdly, that the donee may be subjected to loss by the performance of that condition, are sufficient to raise the presumption that in case of the increase of the fund, the donor intended to give to the donee the benefit of that increase.

A donor granted to the principal and professors of a college certain lands, “upon the conditions hereinafter specified,” to maintain three bursars, “according to the manner, measure, and quality, and as the rest of the bursars of philosophy, presently in the said college already founded, are educated and entertained,” and imposed as a condition (the penalty for the breach of which was forfeiture), that the principal and professors should admit to the bursarships the presentees of the donor and his family.

Held (reversing the judgment of the Court of Session), that this was a grant upon condition, and not a mere trust, and that the principal and professors were entitled, after satisfying the conditions of the deed of gift, to appropriate any surplus arising from the lands thus given. *Jack v. Burnett*, 12 Cl. & F. 812.

One only of the settlor's daughters had issue, four daughters and no son; L E S, one of the four, in 1779, while her sisters, mother and aunts were living, executed a post-nuptial settlement, which recited a deed of 1752—and another of 1749, under which she was entitled to a vested estate tail in lands called the B estate, on the death of her father—and that she was entitled in remainder or reversion expectant and to take effect in possession on the determination of certain prior estates, to several parts of lands in the deed of 1752 mentioned. It also recited a post-nuptial settlement of

1776, in which were recited L E S's title to certain shares in remainder or reversion expectant, &c., and her desire to limit and assure the same, and that it was thereby witnessed, that in order to bar the estates in remainder or reversion expectant and to take effect in possession as aforesaid, *then vested in her*, but without prejudice to the prior estates, she and her husband covenanted to levy fines of her said undivided shares in remainder, to enure to these uses, namely, that the trustee should, out of the hereditaments comprised in the deeds of 1749 and 1752, *first falling into possession*, take an annuity of 300*l.*, and out of those *next falling into possession*, a similar annuity, both being for L E S's separate use, and subject thereto, to the use of her husband for life, remainder to herself in fee. It further recited that no fines were levied under the deed of 1776, and that L E S was desirous of securing payment of certain debts, and, subject thereto, of settling the said remainders and reversions expectant and to take effect as aforesaid for the benefit of her two children, and had agreed to settle the same, and all her right and interest in the premises to the uses thereafter mentioned; and it was, by the deed of 1779, witnessed that, in order to bar the estate tail in remainder or reversion expectant upon and to take effect as aforesaid, *then vested in L E S* in the hereditaments comprised in the deeds of 1749 and 1752, without prejudice to the prior estates, the said L E S and her husband covenanted to levy fines of all her undivided shares in remainder or reversion expectant and to take effect as aforesaid in the said hereditaments, to enure to trustees for 1,000 years, to raise the amount of the aforesaid debts; remainder to other trustees for 1,500 years, to raise 5,000*l.* for L E S; remainder to other trustees for 2,000 years to raise an annuity of 100*l.* out of the lands *first falling into possession*, and a similar annuity out of those *next falling into possession* for maintenance of her only son; remainder to trustees for 3,000 years, to raise 3,000*l.* for her only daughter; remainder to the use of the son and his issue, in strict settlement; remainder to the use of the daughter and her daughters in tail:—Held, that all the estates and interests, contingent as well as vested, in the lands to which L E S was entitled under the limitations of the deed of 1752, passed and were bound by the deed of 1779, and the fines that were levied in pursuance thereof.

The settlor's three daughters died, —one in 1784, s. p., another, the mother of L E S, in 1793, the third in 1799, s. p.—all intestate and without having disposed of the reversion vested in them by descent. One of L E S's sisters died in 1788, intestate and without issue. In 1809 one-third of the lands comprised in the deed of 1752 was, on partition, allotted to L E S, and by a decree for sale made in 1820, in a suit instituted against her by the trustees of the term of 1,000 years comprised in the deed of 1779, it was declared that the whole of the one-third so allotted was subject to the trusts of the term, and bound by that deed, and the fines levied in pursuance thereof. By a deed executed in 1825, it was witnessed that for barring all estates tail therein mentioned, and settling the lands therein comprised, L E S and her husband and a trustee of the deed of 1779, conveyed all the

said one-third part, so allotted in severalty to L E S as aforesaid, and also her undivided third part of the B estate (which had then by the death of her father come into possession) to a trustee, that recoveries might be suffered of the said lands, and it was covenanted that they should enure, as to such of the said undivided parts as were comprised in the deed of 1779, to the uses therein mentioned, and in confirmation thereof, and of the term of 1,000 years; and—after reciting that three specified denominations of lands, of which L E S was stated to be seised in tail in remainder, at the date of the deed of 1779, were not comprised therein or in the fines levied in pursuance thereof, and reciting the said suit and decree for sale therein made, and that L E S had agreed to make the said denominations subject to the said term—it was further agreed and declared that the said recoveries should enure to confirm the sale of the said three denominations for the said term, and to give validity to the said decree, and, subject to the said term, to such uses as L E S should appoint, and, as to the lands comprised in the deed of 1779, to such further uses as had not been thereby declared concerning the same, as L E S should by deed or will appoint.

Held, that by this deed, and the recoveries suffered in pursuance thereof, the whole of the lands allotted in severalty to L E S on the partition, except the said three denominations, were made subject to the uses of the deed of 1779. *Cole v. Sewell*, 2 H. L. Cas. 187.

An estate being limited to the use of A and his wife, and the heirs of their bodies, with remainder to A in fee, and A having died, leaving his widow, and G, an only son, and L and H, only daughters, the widow, in 1735, by deed-poll, in consideration of an annuity granted to her by G, and of natural affection, granted, surrendered, and yielded up the estate to him in fee; and he afterwards, during her life, suffered a recovery. She died in 1767. G died, without issue, in 1779, having devised the estate to trustees, to secure an annuity to B, only son of his sister L (then dead), and subject thereto, to W, eldest son of B, for his life, with remainder to B's second son. In 1790, W, on his father's death, entered into possession of the whole estate, claiming under the will of G, and subsequently did various acts in the character of devisee for life. In 1814 he suffered a recovery of one moiety of the estate, and in 1816 conveyed the entirety to mortgagees in fee. In 1818, M, the descendant of H, the other coparcener, suffered a recovery of the other moiety, which, it was declared, should enure (subject to the trusts of a term) to the use of W's mortgagees.

Held, by the Lords—affirming a judgment of the Court of Exchequer Chamber,—First, that the deed-poll of 1735 operated as a covenant to stand seised, and created a base-fee, determinable by the entry of the issue in tail; second, that this base-fee did not, on the widow's death, become merged in the reversion in fee in G, as the estate tail subsisted as an intermediate estate; third, that, although G, being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued to any one until his death, and therefore the period of twenty years, for the operation of the Statute of Limitations against the issue in tail, was

to be calculated from his death, and not from the death of his mother, and consequently W's entry (in 1790) was not barred by lapse of time; fourth, that although W entered under the will, and manifested an intention to take the estate under it for his life only, that was immaterial, and he was remitted as to his moiety to the original estate tail, which was barred by the recovery in 1814; and fifth, that the entry and remitter of W did not operate to remit his coparcener M to the other moiety of the estate. *Doe d. Daniel v. Woodroffe*, 2 H. L. Cas. 811.

Where the words in the operative part of a deed of conveyance are clear and unambiguous they cannot be controuled by the recitals or other parts of the deed. But where those words are of doubtful meaning, the recitals or other parts of the deed may be used as a test to discover the intention of the parties and to fix the meaning of those words.

A deed of settlement, after reciting that A had power to appoint the lands thereafter appointed, &c., or expressed and intended so to be, with other hereditaments, and then reciting an indenture of mortgage of certain of the lands to secure 20,000*l.* at 4*l.* per cent. interest, and that upon the treaty for an intended marriage it was agreed that such of the hereditaments subject to the appointment of A as were comprised in the said recited indenture of mortgage (together with the lady's property) should be settled to certain uses, proceeded: "Now for carrying into execution the said agreement as far as respects the said hereditaments subject to the appointment of A as are hereinafter appointed, &c., or expressed and intended so to be," it was witnessed that, in consideration of the said intended marriage, A directed, limited and appointed that the messuages, &c., thereafter released, &c., should be and remain (but subject and charged as thereinbefore mentioned) to certain uses, including an annuity of 250*l.*, with powers of distress and entry; and it further witnessed that the said A granted, released, &c., "all and singular the messuages, &c. of him the said A situate in the several parishes of C, D, and E, and which are intended to be specified and described in the schedule hereunder written, but which schedule is not intended to abridge or affect the generality of the description hereinbefore expressed and contained." The schedule comprised only the mortgaged hereditaments, the rental of which was 1,390*l.* A had other lands in the parishes of C, D, and E, besides those included in the mortgage:—Held, that, taking the whole of the deed of settlement together, a clear intention was shewn that only the hereditaments included in the mortgage should pass by it.

Held, also, that the powers of distress and entry being given in respect of an equity of redemption did not controul the intention to be collected from the whole deed. *Walsh v. Trevanion*, 19 Law J. Rep. (N.S.) Q.B. 458; 15 Q.B. Rep. 733.

To an action of trespass *quare clausum fregit*, the defendant pleaded, that being seised of a manor, of which the closes in question were part, with the appurtenances, he demised the closes in question to C B (whose tenant the plaintiff was), for ninety-nine years, and that afterwards C B granted to the defendant the sole and exclusive right to kill all birds of warren upon the said closes, together with

free liberty to enter upon the closes, and kill, &c., and justified the trespasses on that ground. The plaintiff set out the deed on oyer, which was a lease of the closes in question by the defendant to C B, and which contained the clause, except and always reserved unto the said Sir J B Mill, all timber trees, &c., "and also except and reserved all royalties whatsoever to the said premises belonging or in anywise appertaining." The lease also contained a covenant by C B, to allow the defendant to prosecute trespassers in pursuit of game, at his own expense:—*Semble*—that the clause operated as an exception, and not as a grant, and that the words were therefore the words of the grantor, Sir J B Mill.

Whether the words amounted to an exception or a grant, held, that they did not shew, with sufficient clearness, an intention, on the part of C B, to grant unto Sir J B Mill, the liberty of entering upon the lands for the purpose of shooting. *Pannell v. Mill*, 16 Law J. Rep. (N.S.) C.P. 91; 3 Com. B. Rep. 625.

H W being tenant in tail in possession of certain lands, with the reversion to the heirs of her late husband, executed a deed-poll in 1735, which operated as a covenant to stand seised to the use of her only son, G W, in fee. G W afterwards, and during the lifetime of his mother, suffered a recovery of the same lands to the use of himself in fee. He died, in 1779, without issue, having by his will devised the lands to trustees and their heirs, in trust to pay an annuity to his nephew, and subject thereto to his great nephew W B, for life, with certain remainders over. The trustees entered into and continued in possession until the death of the annuitant in 1790, when they gave possession to W B, who continued in possession of the rents and profits of the entirety up to the time of his death in 1824, and did various acts shewing that he claimed and held under the will.

On the death of G W without issue, the estate tail would have descended in moieties to two coparceners; and at the time of the entry of W B, in 1790, was vested as to one moiety in W B, and as to the other in A W:—Held (in error), that the base fee created by the deed-poll did not upon H W's death become merged in the reversion in fee in G W, as the estate tail still subsisted as an intermediate estate.

Held, also, that G W was not remitted to his title under the estate tail, the recovery suffered by him having estopped him.

Held, also, that W B, although taking by the Statute of Uses, was capable of being remitted, as the estate tail had not been discontinued.

Held, also, that the acts done by W B did not amount to a disclaimer by him of the estate tail, as a party cannot waive an estate to which he would be remitted, where the remitter would enure to the benefit of others as well as himself.

Held, also, that the right of entry first accrued on the death of G W in 1779, when there was first an available right of entry; and consequently that the entry by W B in 1790 was not too late.

Held, also, reversing the judgment given below, that the entry and remitter of W B in 1790 did not operate to remit A W, his coparcener, to the other moiety of the estate.

Held, also, that the continuance in possession of the whole of the estate by W B until the right of A W was barred, did not operate to give him a fee simple by wrong in the entirety to his own use. *Woodroffe v. Doe d. Daniell*, 15 Law J. Rep. (N.S.) Exch. 356; 15 Mee. & W. 769.

A deed, which may operate either at common law or under the Statute of Uses, must, in pleading, be taken to operate at common law, unless there is an express averment of an election that it shall operate under the statute.

Quere—Whether an entry by a lessee under such a deed will not be conclusive of an election that it shall operate at common law.

Semble—that, under a grant to A, B and C, their executors, &c. of liberty to get coals under certain closes until all the coals in the said closes should be gotten, an interest passes to the executors of the survivor if the deed operates under the Statute of Uses. *Haigh v. Jagger*, 17 Law J. Rep. (N.S.) Exch. 110; 16 Mee. & W. 525.

A declaration recited that the defendant was possessed, for the residue of a term of years, of a certain messuage and premises, and also of certain fixtures annexed to the premises, and averred that the plaintiff agreed with the defendant to purchase of him the residue of the term of the said messuage and premises, with the appurtenances and the said fixtures, and the defendant, amongst other things, agreed to give up possession of the messuage, with the appurtenances and the said fixtures, on a certain day. The declaration then averred that the plaintiff tendered to the defendant for execution an instrument, which, amongst other things, contained a recital that the plaintiff had lately contracted with the defendant for the sale to him of the residue of the term granted to him by one J P in the messuage or tenements and hereditaments, &c., with their appurtenances, and also *all and singular* the fixtures belonging to the said messuage or tenements and hereditaments for a certain sum, the receipt of which was thereby acknowledged:—Held, on motion in arrest of judgment, that as the agreement between the parties was for the assignment of the fixtures which belonged to the defendant, the recital in the instrument tendered to the defendant was too large, and that he was not bound to execute it; and the judgment was arrested. *Manning v. Bailey*, 18 Law J. Rep. (N.S.) Exch. 77; 2 Exch. Rep. 45.

To a declaration on an indenture made between the plaintiff and the defendants, provisional directors of a projected railway company, called the Direct Northern, after reciting that the plaintiff was owner of certain lands through which that railway and another, called the Great Northern, were intended to pass, and that the plaintiff would support the former and oppose the latter line, it was covenanted that, if the Direct Northern's bill should pass before six months from the date of the deed, the company should pay the plaintiff certain large sums of money, in certain specified cases, for the injury done to and for the purchase of his land; that if the Great Northern's bill should pass within eighteen months from the same date the Direct Northern was to pay the plaintiff, within three months after that event, certain sums of money in certain specified cases, for compensation, &c.: provided, that if no act authorizing the Great Northern

to make their line should be passed within six months from the date of the indenture, either party might put an end to the agreement by giving notice in writing; and that, after the giving of such notice, the agreement and everything contained in it should be absolutely null and void, except the proviso and a covenant as to certain costs to be paid to the plaintiff; and lastly, that if the companies should be amalgamated, then, three months after such event, the amalgamated companies should pay certain sums of money in certain events, one of these being the sum of 6,000*l.* if the line followed the course of the direct line without a branch to Stamford; and that in such case all the covenants applicable were to be performed by the amalgamated companies. The declaration, after alleging that the companies were amalgamated, that the line took the course of the Direct Northern without a branch to Stamford, and that the period of three months had elapsed, concluded with laying as a breach the non-payment of the 6,000*l.* The defendants pleaded, that no act of parliament authorizing the Direct Northern to make their intended line was passed within six calendar months; and that the defendants gave the plaintiff notice that they were desirous to put an end to the agreement; that no part of the line had passed through the plaintiff's estate, and that it had not been injured under the act:—Held, on error in the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that the plea was bad in substance, and afforded no answer to the action. *Earl of Lindsey v. Capper*, 2 Exch. Rep. 801.

Under the will of a testator who died in India, A was entitled during the life of his wife to the income of property in the course of being transmitted from India, and B to the capital after her death. By a deed, reciting that certain arrears of interest were due to A in respect of monies remitted, and that certain sums (specifying them) still remained due to the testator's estate in India, which were carrying interest, and also reciting that B had paid 2,000*l.* in discharge of A's debts; and that A, in consideration thereof, had agreed absolutely to assign to B all his interest in the estate of the testator, it was witnessed that, in consideration of the premises, A absolutely assigned to B (in the most comprehensive terms) all his interest in the monies received or to be received in respect of the testator's estate, with a general release of all claims in respect of the same. At the date of the deed both parties were ignorant of the existence of a sum of 12,000*l.*, part of the assets, which had been received and fraudulently retained by the executor. On a bill by the executors of A, praying a declaration that, upon the true construction of the deed, A's interest in the 12,000*l.* did not pass thereby,—Held, reversing the decree of the Court below, that the mutual ignorance of the existence of this sum was not sufficient ground for limiting the effect of the general words.

Semble—If the bill had been to reform the deed the circumstances would not have raised an equity for relief. *Hawkins v. Jackson*, 19 Law J. Rep. (N.S.) Chanc. 451; 2 Mac. & Gor. 372; 2 Hall & Tw. 301.

By deeds of lease and release dated in 1779, being the settlement made on the marriage of A with B,

in consideration of 2,000*l.* paid to A by F, the father of B, as her marriage portion, A conveyed certain real estates to trustees, to the use of A for life, with remainder to B for life, with remainder to the children of the marriage, as A and B or the survivor should appoint, and in default of appointment to the use of the heirs of the body of B by A begotten; and in default of such issue, then the estates were to stand charged with the sum of 2,000*l.* to be paid to F, his heirs and assigns, within twelve months after the death of the survivor of A and B. By a deed of 1798, made between A and B of the first part, C and D (trustees) of the second part, and E of the third part, reciting the marriage settlement, and that there was no issue of the marriage, and that it was the intention of A and B not only to defeat and destroy the uses, estates and provisions thereby limited, but to limit the estates to new uses, it was witnessed that as well for barring, docking and extinguishing all estates tail and reversions and remainders thereon expectant or depending, of and in the said estates, as for settling and assuring the same to new uses, A and B covenanted to levy a fine of the settled estates, to enure to such uses as A and B should appoint; and in default of appointment to A for life, with remainder to trustees for 1,000 years, with remainder to B for life, with remainder to the right heirs of A for ever. It was then declared, that the term of 1,000 years was limited to the trustees upon trust after the death of A to raise by sale or mortgage of the premises the sum of 2,000*l.*, which A had received as the marriage portion of B, and to pay the same to B for her own use if she survived A, otherwise as B should by will appoint, and in default of appointment to the next-of-kin of B. The fine was duly levied in accordance with the covenant. In 1821 B died without issue and without having made any appointment. In 1838 A died, having by his will devised the estates in question. In 1839, the plaintiff as representative of F, and as administrator and one of the next-of-kin of B, filed his bill against the devisees of A and the other next-of-kin of B, claiming to have two sums of 2,000*l.* each raised out of the estates under the deeds of 1779 and 1798:—Held, first, that the first sum of 2,000*l.* was payable at all events, the fine levied not being effective to bar it. Secondly, that the Court could not, upon the construction of the deeds, refuse to decree the raising and payment of the second sum of 2,000*l.*, notwithstanding upon the face of the deed this was contrary to the intention of the parties, the trusts being executed, and valuable consideration moving from the wife, who took a less beneficial interest in the estates under the second deed; and that the Court could not reform the deed on the ground of mistake so as to avoid its legal effect without a bill filed by the devisees of A for that purpose; but the cause was ordered to stand over, with liberty to the devisees to file such bill. The devisees then filed their cross-bill to reform the deed upon the ground of mistake, but adducing no new question or fact. The Court held that the wife could not be deprived of the advantage for which she had stipulated by the deed of 1798, merely because the husband had omitted to take the necessary steps to extinguish the first charge, and the cross-bill was dismissed.

Parties in the same interest unnecessarily severing in their defence, allowed only one set of costs. *Farr v. Sheriffe, Dykes v. Farr*, 15 Law J. Rep. (N.S.) Chanc. 89; 4 Hare, 512.

(B) VALIDITY OF.

A bill by A F, as heiress-at-law of J J and E J, to set aside conveyances made by them to W F, of real and personal estates, on the ground of fraud, undue influence, and want of consideration, alleged that J J—who was deaf and dumb all his life—was incapable of executing or understanding any deed, and that E J was seduced by W F, and being subject to his authority, executed the deeds without professional advice, and for insufficient consideration, consisting only of a bond of W F for securing the price. There was not sufficient evidence of J J's incapacity, nor did the deeds executed by him convey any property descendible to his heirs. The allegations of the seduction of E J, and of improper influence over her, were not sustained by the evidence, although there was some evidence of an illicit connexion between her and W F. It appeared also that A F had the benefit of the bond given to E J, and had long acquiesced in and admitted the validity of the transaction.

Held, that the bill was properly dismissed for want of sufficient proof of the charges as alleged, so as to justify the Court in setting aside concluded transactions.

Held also, that the want of parties to represent the personal estate comprised in the impeached conveyances was a fatal defect.

Semble—that by an appointment duly made of a whole estate to the uses of a marriage settlement by a party thereto, who thereby also granted and released a moiety only of the estate to the same uses, the entirety of the estate passed. *Farmer v. Farmer*, 1 H. L. Cas. 724.

An assignment by a Puisne Judge of the Supreme Court at Madras, of the sum "equal to the amount of six months' salary," directed by the 6 Geo. 4. c. 85. to be paid to the "legal personal representatives" of such Judge, in case he shall die in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge: and not being payable during the lifetime of the Judge, is not an assignment of salary within the 5 & 6 Edw. 3. c. 16. and 49 Geo. 3. c. 126, and, therefore, contrary to public policy. *Arbutnot v. Norton*, 3 Moore, In. App. 435.

The eight children of A being entitled to a fund equally in the event of their surviving B, seven of them, in pursuance of an arrangement entered into while the eighth was abroad, executed a deed by which they and he were made to covenant with each other reciprocally that in case any of them should die in B's lifetime leaving children, such children should be entitled to the parent's share, in the same manner as if such parent had survived B. The eighth child never executed the deed; but he and six others who did execute it survived B. The other left children, who claimed to be entitled to their parent's share under the deed:—Held, that the deed being made on the assumption that all the parties would execute it, was not binding even upon those who had executed it. *Peto v. Peto*, 16 Sim. 590

(C) REFORMING FOR MISTAKE.

[See *Walsh v. Trevannion*, 16 Sim. 178. See also (A) Construction of Deed.]

A party applied to the agent of an insurance office to effect an insurance on the life of his son. The agent gave to him a printed form of application, which was filled up, as to the name, age, &c. of his son, and signed, but he did not fill up the declaration as to the nature of his pecuniary interest in his son's life. The agent had inquired into these particulars, and filled them up after the insurer had left his office, with a statement which was incorrect. The insurance was effected; but, on the death of the nominee, the company refused to pay the amount of the policy, on the ground that the interest of the insurer was falsely described, and that the policy was therefore void. No evidence being produced as to the statements which were made to the agent respecting the matters inserted by him in the declaration, the Court refused to rectify it, or to grant an injunction to restrain the company from setting up the declaration as a defence to an action at law. *Parsons v. Bignold*, 15 Law J. Rep. (N.S.) Chanc. 379.

A treaty was, in 1839, entered into with the plaintiff for the purchase of an annuity for the life of P. In an interview between P's agent and the plaintiff it was agreed, subject to P's approval, that the plaintiff should give 1L. per cent. more on the purchase-money (1,800L.) than government would grant. On the same day the agent saw the defendant's solicitor, and stated to him in the course of conversation on the subject of the intended annuity, that he would obtain from a friend of his in the National Debt Office a statement as to the amount of the annuity which would be obtained from government for 1,800L. on P's life. That statement was obtained, and therewith the plaintiff expressed his satisfaction. Four years afterwards the plaintiff discovered that the amount of the annuity granted by him was much too large in amount; and that the computation of the annuity had been made on a male instead of a female life. The principle on which the amount of the annuity had been calculated was communicated to P previously to the completion of the grant of the annuity to her:—Held, that the Court could not rectify the deed granting the annuity; but on the plaintiff's waiving any account of the payments made in respect of the annuity previously to the filing of the bill to set aside the deed, the Court ordered the deed to be delivered up to the plaintiff to be cancelled, and the proper accounts to be taken of principal and interest due to the defendant, P, and the balance thereof, after deducting the costs of the suit, to be paid to P. *Carpmael v. Powis*, 16 Law J. Rep. (N.S.) Chanc. 31; 10 Beav. 36.

Previously to the marriage of the female plaintiff with H, verbal instructions were given by her to A, a solicitor's clerk, for the settlement of her property. A, who resided at a distance from B, his principal, took down the instructions in writing and forwarded them to B to this effect: that the property was to be conveyed to trustees for the separate use of the lady for life, with remainder to H for life, with remainder to the children of the marriage, and in default of children, to W (the brother of the lady)

and his children. B, who was then unacquainted with the plaintiffs, sent instructions to counsel to prepare the settlement accordingly, but directed that a general power of appointment should be limited to the lady in default of children. The draft so settled by counsel was returned to A, who procured it to be engrossed. On A tendering the engrossment to W for his execution, as a trustee, W objected to the power of appointment, and thereupon A said that the power had been inserted by mistake, and immediately drew his pen through the clause, and so W executed it. On the following day the deed was executed by the plaintiffs and the other trustee in the presence of A, and was attested in the common form without any notice of the erasure. Subsequently a second attestation clause had been added, referring to the erasure, and the draft was altered to correspond with the deed. The marriage took place in July 1841, and in March 1842 the husband and wife filed their bill against A and W and the other trustee, charging that positive instructions were given to A for the insertion of the power in question, and that it was struck out by the fraudulent collusion of A and W, and praying that the deed might be rectified according to the intention of the parties, and for the appointment of new trustees, or that the latter might be declared trustees for the appointees of the wife. The defendant A died before putting in his answer:—Held, that though the terms of the settlement alone did not furnish a ground for the relief prayed, yet those terms, taken in connexion with the circumstances, made it incumbent on W, in his position as trustee, not to allow the clause to be struck out without consulting the lady; and that an issue or an inquiry must be directed to ascertain whether, at the time of her execution, the lady was aware that no power was reserved to her of disposing of the property away from W and his children. *Harbridge v. Wogan*, 15 Law J. Rep. (N.S.) Chanc. 281; 5 Hare, 258.

(D) SCHEDULE.

The defendant, by deed reciting that he owed the plaintiff 100*l.*, assigned certain articles, generally described in the deed, to the plaintiff, to have and to hold the same assigned as per schedule to the plaintiff, &c. The deed contained a covenant on behalf of the defendant to pay the plaintiff 100*l.* on a certain day. The money not being paid, the plaintiff brought an action on the covenant. At the trial, the defendant objected that the deed could not be read for the plaintiff as evidence, unless the schedule were produced and read by him also:—Held, that the schedule formed no part of the deed, though referred to therein. *Dains v. Heath*, 16 Law J. Rep. (N.S.) C.P. 117; 3 Com. B. Rep. 938.

A deed conveyed the messuage and land called G Farm, consisting of particulars specified in a schedule and delineated in a map drawn on the schedule:—Held, that a close not included in the map and schedule did not pass by the conveyance, although it had been occupied with the specified closes and treated as part of G Farm. *Barton v. Dawes*, 19 Law J. Rep. (N.S.) C.P. 302.

(E) DELIVERY.

At the trial of a cause it was admitted that a

document "was signed, sealed and executed as it purports to be." The document, which was produced by the party who was to take a benefit under it, concluded "as witness the hands and seals of" (the parties), and the attestation was to the signing and sealing only:—Held, that it was to be inferred that the document was delivered, and amounted in law to a deed. *Hall v. Bainbridge*, 17 Law J. Rep. (N.S.) Q.B. 317; 12 Q.B. Rep. 699.

(F) REGISTRATION.

The 7 Ann. c. 20. s. 6. requires that "every memorial of a deed to be registered, in the county of Middlesex shall express or mention the honors, &c. hereditaments and premises contained in such deed, and the names of all the parishes, &c. within the county where any such honors, &c. are lying or being, that are given, granted or conveyed by any such deed, in such manner as the same are expressed and mentioned in such deed, or to the same effect;" and the deed to be registered is required to be shewn to the registrar at the time of requiring the memorial to be registered. An application was made to register a deed of assignment which was indorsed, on an indenture of lease. The assignment described the premises as "the messuage, &c. comprised in and demised by the within-written lease." The lease described the premises as "all that messuage in King Street, in the parish of Hammersmith." The registrars refused to receive and register a memorial stating the deed to be a deed of assignment, assigning a messuage situate in King Street, in the parish of Hammersmith, by the description of the messuage, &c. comprised in and demised by the within-written indenture:—Held, that the registrars had acted rightly, as the memorial was not in compliance with the statute.

Where a deed indorsed on a former deed, and importing by reference the description of the premises, is to be registered, the memorial should give the dates and parties from both deeds, together with the description of premises from both deeds, and should state that the imported description is taken from the source referred to. *R. v. Registrars of Deeds for Middlesex*, 19 Law J. Rep. (N.S.) Q.B. 537.

DEER KEEPER.

Pulling a deer keeper to the ground and holding him there while another person escapes is not a *beating* of the deer keeper within the statute 7 & 8 Geo. 4. c. 29. s. 29. A mere *battery* is not sufficient to come within this enactment. There must be a *beating* in the popular sense of the word. *R. v. Hale*, 2 Car. & K. 326.

DEODANDS.

Deodands abolished by 9 & 10 Vict. c. 62; 24 Law J. Stat. 165.

DESCENT.

[See INHERITANCE ACT.]

DESIGNS.

[See COPYRIGHT.]

DESTRUCTIVE MATTER.

Boiling water is a "destructive matter" within the 5th section of the statute 1 Vict. c. 85.

A woman poured boiling water over the face and into the ear of her husband while he was asleep, whereby he was temporarily blind and permanently deaf on one side:—Held, that she might be convicted of felony under the statute 1 Vict. c. 85. s. 5. *R. v. Crawford*, 2 Car. & K. 129; 1 Den. C.C. 100.

DETINUE.

[See TENDER.]

Where defendant, after signing an acknowledgment that certain scrip had been "lodged in his hands" by plaintiff, and was to be re-delivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, and did not re-deliver it until after action brought:—Held, that the action was rightly brought in detinue, as the term "lodged" implied that the identical scrip was to be returned; and also, that plaintiff was entitled to more than nominal damages.

But where the plaintiff suffered loss by the detention, in this, that he was thereby deprived of the means of paying up his deposits, which would have entitled him to claim an allotment of one hundred other shares:—Held, that the damage was too remote, and that the plaintiff could not recover. *Archer v. Williams*, 2 Car. & K. 26.

In detinue for the detention of certain railway scrip re-delivered to the plaintiff after action brought and before verdict, the jury may as a measure of damages take into consideration the difference between the value of such scrip at the time of the demand and their value at the time of such re-delivery.

In such action, when by reason of a re-delivery before verdict a subsequent delivery becomes impossible, the jury may find the facts specially, and so confine themselves to an assessment of damages; and in such case the form of judgment may be simply that the plaintiff do recover his said damages and costs. *Williams v. Archer*, 17 Law J. Rep. (N.S.) C.P. 82; 5 Com. B. Rep. 318.

Where C insured his life and afterwards assigned the policy to the plaintiff, who paid the subsequent premiums, but allowed the party to retain the policy, and who afterwards deposited it as a security with the defendants for a loan,—Held, in detinue, that the question for the jury was, whether the plaintiff fraudulently permitted the assured to hold the policy, and represent that he was lawfully possessed of it, and entitled to the money secured thereby, in order that he might cheat some one by borrowing money upon it; and the Judge would not ask the jury as to their finding on the issue without the word *fraudulently*; as, if the plea had

been pleaded without it, the plaintiff might have demurred to it. *Neale v. Molineux*, 2 Car. & K. 672.

To a declaration in detinue, alleging the delivery, by the plaintiff, of scrip shares to the defendant, to be re-delivered by him to the plaintiff, on request, after the payment to the defendant of a certain sum of money, averring the payment and subsequent request, and complaining that the defendant nevertheless detained the scrip; the defendant pleaded that the scrip were deposited with him as a pledge and security for a sum of money advanced by him to the plaintiff, and that, on repayment thereof to him, he, the defendant, tendered and offered to deliver up and return to the plaintiff the scrip shares, which the plaintiff then refused to accept and receive from the defendant:—Held, that the word "detain," in a declaration in detinue, means that the defendant withholds the goods, and prevents the plaintiff from having the possession of them; and therefore that the plea was bad, as being an argumentative denial of the detention.

Not only the common bailment, but any special bailment, in a declaration in detinue, is surplage, and not traversable; the gist of the action being the detainer of the plaintiff's goods, which the defendant must answer. *Clements v. Flight*, 16 Law J. Rep. (N.S.) Exch. 11; 16 Mee. & W. 42; 4 Dowl. & L. P.C. 261.

The bailment in detinue is not traversable; and the Court therefore refused to give the defendant leave to add a plea traversing the bailment stated in the declaration. *Clossman v. White*, 18 Law J. Rep. (N.S.) C.P. 151; 7 Com. B. Rep. 43.

The record in an action of detinue, after alleging judgment by default, proceeded, "therefore it is considered that the plaintiff do recover against the defendant the said cattle, goods and chattels; or, if the defendant should not render the same to the plaintiff, the value thereof, and also the damages by the plaintiff sustained by reason of the detention thereof." It then averred the award of a writ of inquiry to assess the damages and costs (but not the value), the issuing of the writ and the assessment of damages. Then followed a formal judgment, "that the plaintiff do recover against the defendant the said cattle, goods and chattels; or, if the defendant should not render the same to the plaintiff, the value of the same, and that the plaintiff do also recover against the defendant his damages, costs and charges aforesaid by the inquiry above found, and also 27*l.* 5*s.* by the Court here adjudged of increase to the plaintiff," &c.:—Held, that the judgment was final, not interlocutory; that it was erroneous for not finding the value of the goods, nor giving any means of ascertaining it; that the defect could not be cured by a fresh writ of inquiry, as the court of error had no power to issue such a writ; that if the plaintiff had entered a remittitur as to the delivery of the goods or their value in the Court below before final judgment, he might have had judgment for the costs and damages only, but that as he had not done so, the judgment must be reversed altogether. *Phillips v. Jones*, 19 Law J. Rep. (N.S.) Q.B. 374.

DEVISE.

(A) CONSTRUCTION OF, IN GENERAL.

(a) *General Limitations of Estates.*

(b) *Period of Vesting.*

(c) *Meaning of Words.*

(1) "Issue."

(2) "Estate."

(3) "Testamentary Estate."

(4) "Effects."

(5) "Survivor."

(6) "Next Heir."

(7) "Wife."

(8) "In Tail Male."

(9) "Younger Son."

(10) "Eldest Son."

(11) "Improvements."

(12) "All."

(d) *Who take as devisees.*

(B) WHAT PROPERTY PASSES BY THE DEVISE.

(a) *In general.*

(b) *Trust Estate.*

(c) *Leaseholds.*

(d) *Tithes.*

(e) *Growing Crops.*

(f) *Estate in Remainder.*

(C) PARTICULAR LIMITATIONS.

(a) *Legal or Equitable Estate.*

(b) *Trust or Beneficial Estate.*

(c) *Joint Tenancy or Tenancy in Common.*

(d) *Fee Simple.*

(e) *Estate Tail.*

(f) *Estate for Life.*

(g) *Vested or Contingent Estate.*

(D) DISCLAIMER BY DEVISEE IN TRUST.

(E) CHARGES.

(F) DEVISE FOR PAYMENT OF DEBTS.

(G) TRUST FOR SALE.

(a) *Power of Executors to sell.*

(b) *Application of Proceeds.*

(H) VOID DEVISE.

(a) *Remoteness.*

(b) *Failure of Object.*

(A) CONSTRUCTION OF, IN GENERAL.

(a) *General Limitations of Estates.*

A devised estates to B his son in strict settlement, remainder to C for life, remainder to D the son of C, if living at C's death, for life, remainder to the first and other sons of D in tail, remainder to the male heir for the time being entitled to a certain family estate, remainder to the first and other sons of such male heir, remainder to testator's own right heirs of his name, and he directed the residue of his personal estate to be laid out in lands to be conveyed to the uses of the will. B, who was his executor, did not lay out the personal estate as directed by the will of A, but by his will directed that certain real and personal estate should be conveyed and assigned to the trustees of A's will, upon the trusts of that will, as an equivalent for the residue of his father's personal estate. The real and personal estate was not conveyed or assigned to the trustees. On the death of B, without issue, C entered into possession of the real

estate devised by both wills, and of the personal estate bequeathed by the will of B. On the death of C, D entered into possession of all the same estate, and died without issue. At his death, there was no male heir entitled to the said family estate:—Held, that the ultimate limitation to the right heirs of A of his name vested at his death, and not at that of D.

That the co-heiresses of B, or parties claiming under them, were entitled to the real estate devised by the wills of A and B.

That the Court might send a case to a court of law, to try the right under both wills.

That the personalty bequeathed by B was to be deemed to be converted into and to have descended as real estate. *Wrightson v. Macaulay*, 17 Law J. Rep. (N.S.) Chanc. 54; 4 Hare, 487; 15 Law J. Rep. (N.S.) Exch. 121; 14 Mee. & W. 214.

A testator directed that an estate should be purchased by his executors, and that such estate should be made hereditary and settled upon his constituted heir. He then appointed his nephew his heir and successor, and desired that the estate should be settled upon him, and should descend to his heirs and successors in the direct male line, and in case of his nephew dying without issue, the estate to devolve upon his brother, his heirs and successors in the direct male line:—Held, that the nephew was not to take as tenant in tail in possession, but that the estate was to be settled upon him for life, with remainder to his sons in tail male, and afterwards to the next taker and his sons in like manner. *Shelton v. Watson*, 18 Law J. Rep. (N.S.) Chanc. 223; 16 Sim. 543.

A testator devised certain lands in strict settlement, with liberty to each tenant for life, in succession, to cut down timber and to get stone upon the premises, for buildings and repairs, but for no other use or purpose whatsoever; and in the latter part of his will he recited that he had already restrained, and did thereby intend to restrain, each and every such tenant for life from cutting any timber or getting any stone upon the premises, save for the purposes aforesaid:—Held, upon the whole will, that the clause was restrictive, and, consequently, a tenant for life was not entitled to get stone from quarries open at the testator's death, save for the purposes in the will mentioned. *Ferrand v. Wilson*, 15 Law J. Rep. (N.S.) Chanc. 41; 4 Hare, 344.

A testator, W, devised his real estates to trustees, upon trust to receive the rents, and on his son John arriving at the age of twenty-five years to let him into possession, but neither he nor his heirs to the third generation were to sell or mortgage the same, it being the testator's desire that the property should remain in the W name. If John should die without leaving lawful issue, it was the testator's will that his daughter Ann should have his share, subject to the same limitations. If John and Ann should die under age, or without leaving issue, the testator devised the property (after deducting a certain sum from the produce in favour of his (the testator's) daughter Elizabeth), to and for the benefit of the plaintiffs. The testator had the three children named in his will living at his death, and no more. Elizabeth died at the age of two years. Ann survived her and died at the age of

nineteen years unmarried; and John, the last survivor, died, aged thirty years, leaving children, who all died unmarried, and without issue. John, by his will, devised part of the father's real estate to the defendants:—Held, first, that the devisees of John took no estate in the hereditaments of W devised by his will; and, secondly, that the plaintiffs took the estate in the same hereditaments in such manner as given to them by the will of W.

Where there is a doubtful question as to the legal title to an estate on the construction of a will, the practice is, not to determine it on demurrer, although the inclination of the Court may be in favour of the defendant, but to overrule the demurrer without prejudice to the defendant, insisting on the same matters by way of answer. *Mortimer v. Hartley*, 3 De Gex & S. 316. [And see this case, *post*, (C) 1 (d).]

A testator gave his residuary estate in trust to his brother E, to assist him in bringing up his four nephews, the children of his brother J, and when the youngest nephew attained twenty-one, the property to be equally divided amongst his nephews or their lawful issue, share and share alike; the division, however, was not to take place, although the youngest nephew had attained twenty-one, until the decease of the testator's wife, his sister, and his brother E. One of the nephews died under twenty-one, without issue, and before the testator's wife, sister, and brother:—Held, that the testator's brother E took the legal estate in fee, subject to the trust for the nephews; that the nephews took an estate tail; and that the representatives of the deceased nephew took the share he was entitled to, and that the purport of the will required the word "or" should be read "and." *Parkin v. Knight*, 15 Law J. Rep. (N.S.) Chanc. 209; 15 Sim. 83.

A testator gave to his wife the use of all his property, both real and personal; and after her death his nephew was to be considered as heir to all his property not otherwise disposed of; but he directed that such property should be secured by his executors for the benefit of his family:—Held, that the nephew was entitled to a life estate only; that his wife was not entitled to any interest in the property; and that the real estate was to be settled after the death of the nephew upon his first and other sons successively in tail male, with remainder to his daughters as tenants in common in fee; and that the personal estate was to be divided, on the death of the nephew, among all his children as joint tenants who should attain the age of twenty-one or marry, and if they should all die under that age and unmarried (if daughters) or without issue (if sons) then to the nephew absolutely. *White v. Briggs*, 17 Law J. Rep. (N.S.) Chanc. 196; 15 Sim. 17.

Devise of lands of gavelkind tenure to trustees upon trust to sell a competent part for payment of debts, and subject thereto upon trust for P M for life, and after his decease, for the first son of P M for life, and after his decease for the first son of such first son, and the heirs male of his body, and in default of such issue for every other son of P M successively for the like interests and limitations: and in default of issue of the body of P M, or in case of his not leaving any at his decease, for T M for life, and after his decease for T G M, the eldest

son of T M, for life, and after his decease for the first son of G T M, and the heirs male of his body; and in default of issue of the body of G T M, for every other son of T M successively for the like estates and interests; and in failure of all such issue of the body of T M, in trust for him in fee, provided that if P M or T M, or any of their issue, should become entitled to the J estate, then upon trust for the next person entitled under the will, as if the person so succeeding to the J estate were dead. T M died after the date of the will, and the testator by a codicil declared a trust of the devised estates for his wife for life, and after her death upon the trusts declared by his will, subject to the proviso as to the J estate:—Held, that P M took an estate for life only: that T G M took an estate for life in remainder after P M's life estate contingent on P M not leaving issue, and determinable on his succeeding to the J estate: that the eldest son of T G M took a contingent remainder in tail after the determination of the life estate of his father. *Monypenny v. Dering*, 7 Hare, 568.

Testator gave freehold and leasehold estates to trustees on trust to settle the same, so that his six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue; and if any should die leaving issue, that the child or children of him or her so dying during the lives of his said other children and of the survivor should take the share of him or her so dying, and that on the death of all his said other children, the leaseholds to go to the issue of his said other children for their respective lives in equal shares, with benefit of survivorship; and as to the freeholds, the issue of his said children to take the rents, &c. thereof for their respective lives in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and if any of such issue of his said children should die, leaving issue, the child and children of him or her so dying during the lives of such issue of his said children and of the survivor of them should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the leaseholds, to the child and children of such issue absolutely, as tenants in common; and, as to the freeholds, in case the issue of his said children or any of them should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then as to the original and accrued shares of such child or children, whose children should so fail, to the use of the remaining children, and the heirs of the body of such remaining children, and, if more than one, equally as tenants in common, and in default of such issue of the issue of his said children to the use of the testator's right heirs. The six younger children of the testator survived him. Some of them had children at the time of his death, and some had children born after his death:—Held, that the six younger children took

life interests in both freeholds and leaseholds, with remainder as to the freeholds to their children as tenants in common in tail, with cross-remainders between them, with ultimate remainder to the testator's right heirs; and *semble* that the children of the six younger children after the decease of the last survivor of their respective parents took the leaseholds absolutely.

That the limitation to the unborn children of the testator's children was not void for remoteness.

That the word "issue" might be read "children!" in the gift over after the testator's children. *Williams v. Teale*, 6 Hare, 239.

(b) *Period of Vesting.*

A testator, after devising real estates to trustees, to the use of J D P for life, remainder to his first and other sons in tail male, with like remainders to J T P for life, and to his sons in tail male, and to several others, bequeathed real and personal chattels to the same trustees, upon trust to permit the said J D P to receive the profits for his life, and after his decease to permit each of the several other persons, to whom an estate for life in the real estates was before limited, as each of them should become seised of said real estates under the aforesaid limitations, to receive the rents and profits thereof for his and their life and lives respectively; and from and after the decease of the last of the said tenants for life as should become seised in manner aforesaid, or if none of them should so become seised, then from the decease of the said J D P, upon trust to assign and convey the chattels to such person or persons as should then become seised of the said real estates under any of the limitations aforesaid.—Held, that the chattels vested in an infant, grandson of J D P, who was tenant in tail of the real estates at J D P's death, and not in his eldest son, a prior tenant in tail, who died in J D P's lifetime. *Potts v. Potts*, 1 H.L. Cas. 671.

A testatrix gave to the eldest son of her daughter Eliza and of her husband E L, who should be living at the time of her own decease, 10*l.* 10*s.*, adding that she left him no larger sum, because he would have a handsome provision from the estates of her late husband and of his own father (who was still alive): and she gave the residue of her property to her executors, upon trust, as to one moiety thereof, to pay and divide the same unto and amongst all the children of her daughter Eliza, who were then in being or should be thereafter born, except her eldest son, or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, and the survivors or survivor, when the youngest should arrive at the age of twenty-one years. At the death of the testatrix, her daughter Eliza had five children, and the eldest son was provided for from the estates in the will mentioned, and he received the 10*l.* 10*s.* but died, without issue, before the youngest child attained twenty-one. The second, who then became an eldest son, did not succeed to the provision which had been made for the eldest son:—Held, notwithstanding, that he, being the eldest son at the time the youngest of the children attained twenty-one, was excluded from any share in the moiety of the residue. *Livesey v. Livesey*, 2 H.L. Cas. 419.

Devise of real estate to A for life, and after her death to all the children of A born at the time of her death. A had two children, both of whom died in her lifetime:—Held, that the shares in the real estate vested in them indefeasibly at their births. *Paterson v. Mills*, 18 Law J. Rep. (N.S.) Chanc. 449.

Devise and bequest of real and personal estate to trustees upon trust (subject to certain legacies and annuities) for A for life, and after his decease upon trust to convey, assure and pay the whole of the real and personal estate to and amongst the children of A and the issue of any such children. But in case A should die without issue, then to pay and distribute the same equally amongst all and every the children of B and A and the survivors of them; but in case any of such children should be then dead leaving issue of his, her or their body; or bodies; then such issue to have as well such original share as their father or mother would have been entitled to if living, as also such other share as their father might have been entitled to by survivorship or otherwise. A survived the testator and died without issue:—Held, that the period of the survivorship of the children of B and C was not to be referred to the death of the testator, but to the death of A, that being the period of distribution. *Buckle v. Fawcett*, 4 Hare, 536.

(c) *Meaning of Words.*

(1) "Issue."

Testator devised lands to his grandson, G D, to hold the same unto and to the use of the said G D, for the term of his natural life; and from his decease unto and to the use of all and every the lawful issue of the said G D, their heirs and assigns for ever, equally, as tenants in common, and not as joint tenants, when and as he or they should attain his, her, or their age or ages of twenty-one years. And testator devised all the residue and remainder of his real and personal estate and effects whatsoever and wheresoever, not before otherwise disposed of, to his daughter S D, absolutely for her own sole and separate use:—Held, that *issue* was to be construed "children," and that G D took only an estate for life, with remainder to his children as purchasers; therefore that on his dying without issue, S D took under the residuary devise, although G D had in his lifetime executed a deed of disentail; inasmuch as such deed, executed under the 3 & 4 Will. 4. c. 71, does not bar future contingent estates, unless executed by a party who was in fact tenant in tail. *Slater v. Dangerfield*, 16 Law J. Rep. (N.S.) Exch. 51; 15 Mee. & W. 263.

P J, by his will, dated in 1779, left large real estates to his wife for life; and after her death, to his daughter D, wife of Sir J E, for her life; and after her death, to her eldest son R E, for his life; and after his death, to the first and other sons of R E, severally and successively, and the heirs of their respective bodies, and in default of such issue to the testator's grandson M J E, the second son of his daughter, in case he should not become seised of certain estates (devised by M D); and after the death of M J E, the testator devised the said estates, upon the conditions aforesaid, to the first and other

sons of M J E, severally and successively, and their heirs respectively and successively; and, in default of such issue, he devised his estates, on the like conditions as aforesaid, to the third and every other son of his daughter, severally and successively, and their heirs. And the testator declared, that if the said M J E, or any son of his daughter, should at any time during his life, become seised of the real estates (devised by M D), then M J E, or such son of his daughter so becoming entitled, or any heir of his body, should not take any interest in the testator's estates, but they should go over to the next son of his daughter and his heirs, with a clause for re-vesting the estates in the son so displaced on certain contingencies. Provided always "that if it shall happen that my said daughter *shall have* no issue male of her body *living at her death*, or no such issue male as shall be entitled by the true meaning of this my will to my real estates, hereby limited and settled as aforesaid, then and in either of those cases I devise all my said real estates, subject respectively as aforesaid, to all the daughters, if more than one, of the body of my said daughter who shall be living at her death, as tenants in common, and their heirs respectively, with cross-remainders amongst them, in case of any one or more of them happening to die under the age of twenty-one years, and without issue; and if there should be but one such daughter living at my said daughter's decease, and no issue of any other such daughter then in being, then to such only surviving daughter and her heirs. Provided always, that if any such daughter or daughters of my said daughter shall happen to die in her or their said mother's lifetime, leaving issue, then my will is that such issue of each such daughter so dying, and the heirs of such issue respectively, shall have and take the same estate, or share or shares of estates, as the parent or parents of such issue respectively would have been entitled to if she or they had been living at the decease of my said daughter." The proviso then concluded by devising the estates to those persons to whom the daughter might please to leave them by will, in case she should leave no issue male at her death; and in case she should not make any will, the estates were to go to the testator's heir.

The daughter D died in 1792, in the testator's lifetime, leaving two sons R E and M J E, and several daughters. The testator died in 1796, when his widow became possessed of the estates, and died in 1810. At her death, R E became possessed of the estates until his death, which occurred in 1844; M J E died in 1841. Both died without issue.

Held, in the Exchequer, that the words in the preceding proviso "living at her death" were to be read as connected with the verb "shall have," and referred to both members of the sentence in the commencement of the proviso; and therefore the testator's daughter having issue male, at her death, entitled to the testator's estates, the daughters of the testator's daughter took no estate or interest under the wills.

But held in the Queen's Bench, that both branches of the proviso had in terms a clear meaning as they stood, and that it was unnecessary, and therefore improper, to make any alteration in the language as used. But that if any alteration were

necessary, it was to be confined to the introduction into the second branch of the verb "shall have" without the words "living at her death"; and, therefore, that the events had happened upon which the gift over to the grand-daughters of the testator took effect. *Wilson v. Eden*, 18 Law J. Rep. (N.S.) Exch. 220; 1 Exch. Rep. 772; 19 Law J. Rep. (N.S.) Q.B. 104; 12 Beav. 454.

"Lawful issue" in a will held to mean "children," and to exclude grandchildren born prior to the period of distribution. *Edwards v. Edwards*, 12 Beav. 97.

[See (2) *Estate*.]

(2) "Estate."

Where a testator, after disposing of certain real estate, gave "all the rest of my household furniture, books, linen, and china (except as hereinafter mentioned), goods, chattels, *estate*, and effects of what nature or kind soever, and wheresoever the same shall be at the time of my death to certain executors in trust to sell,"—Held, that the word "estate" did not pass real estate. *Saunderson or Sanderson v. Dobson*, 16 Law J. Rep. (N.S.) Exch. 249; 1 Exch. Rep. 141.

The word "estate" in the operative part of a will passes not only the corpus of the property, but all the testator's interest in it, unless controuled by the context: and neither do superadded words of local description more applicable to the corpus of the property, nor words apparently explanatory of the meaning of the term in the demise itself, prevent it from passing the whole interest: but where the word "estate" is not used in the operative clause of the devise itself, but is introduced in another part of the will referring to it, it cannot be construed as having the effect of extending the meaning of the operative clause, whether prior or subsequent.

A testator devised as follows:—"I give to my wife N all that house, shop, and garden now in the tenure of B, for her own sole use and purpose, and I also give to my wife N all that messuage, farm, and premises now in the holding of C, to hold to her, my said wife, during the term of her natural life; and from and after her decease I give and devise the said messuage or tenement, and also the said farm and premises, given to my said wife for her life as aforesaid, to my son John. I give and bequeath to my son George the lease of the farm I rented of L, for his own use and benefit; and I also give to my son George that one acre of copyhold land I bought of G, and also half an acre of freehold land adjoining that one acre of copyhold land." After other devises the will contained the following passage:—"And I give and bequeath and order the rents or interests that is behind, due, and unpaid shall go and be paid to that person I have left the estates and properties respectively to. As to all the rest, residue, and remainder of my property whatsoever, and of what nature or kind soever, I give, devise, and bequeath the same to be equally divided between and amongst my said wife N and her children who have issue, share and share alike":—Held, first, that the devise to George did not carry a fee in the devised lands; secondly, that the words "who have issue" meant who *have* when the will takes effect, and that the children of

N, the wife, who had no issue at the death of the testator, did not take any interest under the residuary devise. *Doe d. Burton v. White*, 17 Law J. Rep. (n.s.) Exch. 327; 1 Exch. Rep. 526.

Affirmed (in error), 18 Law J. Rep. (n.s.) Exch. 59; 2 Exch. Rep. 797.

The word "estate" occurring in a residuary gift of "all household furniture, books, goods, chattels, estate and effects, of what nature or kind soever to trustees, their executors, administrators and assigns," upon trust for sale, held to pass lands of which the testator was seised for life, with contingent remainders which failed, with reversion in himself in fee. *Sanderson v. Dobson*, 7 Com. B. Rep. 81; 10 Beav. 478.

(3) "Testamentary Estate."

A testator having, by his will, devised to J W a close of land called Four Acres, but not to be sold or mortgaged, proceeded—"also I give and devise to E S part of my household goods and chattels and testamentary estate and effects; whatsoever name and denomination (except my clock, &c. which I give, to M H); and the remainder of my household goods, chattels, and testamentary estate and effects I give and devise to the said M H and E S, share and share alike":—Held, that the remainder in Four Acres passed under the residuary clause. *Doe d. Evans v. Walker*, 19 Law J. Rep. (n.s.) Q.B. 293; 15 Q.B. Rep. 28.

(4) "Effects."

Devise—"I do dispose of *all my effects* as follows:—All my household goods, live stock, furniture, plate, wearing apparel, and other effects, at this time in my possession, or that may hereafter become my property, unto my wife. I do further bequeath to J P the sum of 200*l.*, to be paid to her at the death of my wife. But if my wife, after my decease, see good to marry, her second husband shall have no claim whatsoever, that is, to sell or dispose of any part of the property now or may be hereafter in my possession. But the above sum of 200*l.* shall be paid to J P at the time of my wife's marriage":—Held, by *Pollock, C.B. and Parke, B.*, (*Platt, B. dissentiente*), that a remainder in fee in real estate did not pass under this devise. *Doe d. Haw v. Earles*, 16 Law J. Rep. (n.s.) Exch. 242; 15 Mee. & W. 450.

(5) "Survivor."

Devise of three several estates to testator's three daughters, M, C and L, for their respective lives, remainder to their children, as tenants in common in fee, provided, "that if any or either of my said daughters shall depart this life without having lawful issue of her body or bodies, that then and in that case the property hereinbefore given to such daughter so dying shall go and accrue to the survivors or survivor of my said daughters, their heirs," &c., "in equal shares and proportions as tenants in common; and if all my daughters, except one, shall depart this life without having lawful issue, then that the share of such daughters so dying shall go to the survivor of my said daughter, her heirs and assigns for ever." C died on the 3rd of October 1841, leaving a son; and on the 25th L died without having had issue. On the 22nd of Decem-

ber M and her husband conveyed to a trustee the property devised to her for life, and also that devised to L, to hold to the use of M for the joint lives of herself and her husband, with remainder to the survivor in fee:—Held, first, that the word "survivor," in the will, must be read in its ordinary sense, and that upon the death of L the estate devised to her for life vested absolutely in M in fee. Secondly, that the son of C could not, under any contingency, become entitled to any interest in the property devised to M. Thirdly, that under the will and conveyance the husband of M, in her right, had an estate in possession during the joint lives of himself and his wife. *Lee v. Stone*, 17 Law J. Rep. (n.s.) Exch. 331; 1 Exch. Rep. 674.

A testator, after various bequests, gave to his wife, for her life only, all his remaining estates, and also gave her all his capital in trade, with the three quarters of the profits arising therefrom, for her life; but nevertheless, in trust, at her death, for his then surviving children, share and share alike, "independent of the rental of his said estates, which he gave and bequeathed to his surviving female children," to be paid to them as he directed. The testator then proceeded thus: "On the decease of any of these children, should they die without issue lawfully begotten, that share to fall to the rest, and so on to the last female child; but should they marry and have children, then their share to go to the said child or children, and from my last female child to the males of my body lawfully begotten, with the same restrictions as before expressed, and to the heirs and assigns of the last of them." One of the testator's daughters, after his death, married, and died in the lifetime of his widow, leaving children:—Held, that such children did not take any interest under the will, the word "surviving" having reference to the death of the testator's widow, and not to his own. *Wordsworth v. Wood*, 1 H. L. Cas. 129.

(6) "Next Heir."

A testatrix, in 1786, devised her real estate to her brother-in-law T K and her sister A K, his wife, for their lives, and from and after their decease to her nephew, J G K, son of the said T K and A K, his heirs and assigns for ever. But in case the said J G K should not survive T K and A K, and should die without an heir lawfully begotten, then and in such case the testatrix devised the same to the next heir of the said T and A K, their heirs and assigns for ever. J G K died an infant in the lifetime of his parents; but soon after his death, another son of T and A K was born, who was also called J G K. A K died in 1795. The second J G K married, and had issue a son, J K, who died in 1823. T K died in 1842:—Held, that the words "next heir" meant the person who should fill the character of true heir of T and A K; and that, therefore, the executory devise over took effect only on the death of T K, the surviving devisee for life, when the estate vested in J K, the lessor of the plaintiff, who then filled the character of heir of T and A K. *Doe d. Knight v. Chaffey*, 17 Law J. Rep. (n.s.) Exch. 154; 16 Mee. & W. 656.

(7) "Wife."

A testator, by his will of November 1845, devised

an estate to his "dear wife Caroline;" he had been twice married,—in 1834 to Mary, in 1840 to Caroline; they both survived him, and he lived with the latter up to the time of his death in November 1845:—Held, that the words "dear wife" were not inapplicable to Caroline, and that she was entitled as devisee. *Doe d. Gains v. Roast or Rouse*, 17 Law J. Rep. (N.S.) C.P. 108; 5 Com. B. Rep. 422.

(8) "In Tail Male."

A testator devised freehold estates to trustees in trust to settle and convey them to the use of G R for life, with remainder to his issue in tail male in strict settlement, and in default of such issue the estates to go over. G R had no son, but had several daughters, all born after the testator's death:—Held, that the words "in tail male" were descriptive, not of the issue, but of the interest they were to take, and that the daughters were entitled to take, under the limitation in remainder, as tenants in common. *Trevor v. Trevor*, 1 H. L. Cas. 239.

(9) "Younger Son."

In construing a will, the words "younger son" used by the testator in a proviso for the shifting, in certain events, of an estate thereby devised, are to be taken in their plain and ordinary sense, as meaning "younger in order of birth," unless it satisfactorily appears from other parts of the will that they were used by the testator in another sense. *Wilbraham v. Scarisbrick*, 1 H. L. Cas. 167.

(10) "Eldest Son."

A testator devised his real estate in these terms:—"I give all my real estate to my eldest son John J L, as aforesaid, for his life, and to his eldest legitimate son, after his death, and, in default of such issue, I give it in like manner to my son Richard; and in case that he has no legitimate issue, I then give it in like manner to the offspring about to be born from my dearest wife B, and in default of such issue to my own right heirs for ever." "I have not provided for my son Richard, if his brother John lives, because I know he is otherwise provided for":—Held, that the words "eldest son John" were words of limitation, and that John took an estate in tail male. *Lewis v. Puxley*, 16 Law J. Rep. (N.S.) Exch. 216; 16 Mee. & W. 733.

(11) "Improvements."

Testator devised his estates in trust, after deducting out of the rents, taxes, repairs, improvements, &c. and all other necessary outgoings, to divide the surplus between A B and other persons for life:—Held, that an expenditure for new farm buildings not stated to be with a view of improving the rents, or to secure the continuance of the old tenants, was not within the term "improvements." *Walpole v. Boughton*, 12 Beav. 622.

(12) "All."

The Court will construe a will so as to reconcile words which are *prima facie* repugnant.

Therefore, where a testator devised a messuage and other freeholds by name to his wife for life, remainder to A in fee; and also devised to his wife in fee "all his real and personal estates both freehold and copyhold, and now surrendered to the uses of

my will":—Held, that the word "all" was to be read "all the residue," to satisfy the intention of the testator, and that A on the death of the wife took the remainder in fee in the estates first devised. *Doe d. Snape v. Nevell*, 17 Law J. Rep. (N.S.) Q.B. 119; *nom. Roe d. Snape v. Nevill*, 11 Q.B. Rep. 466.

(d) Who take as Devisees.

Testator devised "to the male heirs, if such there be, of William Angell, father of my great-grandfather John Angell, and their heirs male for ever; and if there be no male heir or descendants of the same William, then I give those estates, as specified, to the heirs male of the first William, of Northamptonshire; and if there be none of them, I then give all my estates, &c. to W B, grandson of Mrs. Frances, the wife of B B, Esq. who was an Angell, and his heirs male for ever; and if it should so fall out that the heirs of the B's should cease and fail, then my will is, that the male heir of my great aunt M, &c. shall successively take:—Held, that, under this devise a person who traced his descent from one of the younger sons of J. Angell, the eldest son of W. Angell, entirely through males, would be entitled in preference to W B mentioned in the devise, and who, although the heir-general both of the testator and of the first-mentioned W. Angell, traced his descent through the above-mentioned Mrs. Frances, a female. *Doe d. Angell v. Angell*, 15 Law J. Rep. (N.S.) Q.B. 193; 9 Q.B. Rep. 328.

A testator devised lands upon trust for his son and daughter J and E and their respective assigns for the term of their respective natural lives, equally to be divided between them, share and share alike, with remainder to a trustee to preserve contingent remainders, and from and after the decease of his said son and daughter, or either of them, to the use of all and every the children of his said son and daughter respectively, and their several and respective heirs and assigns, to be equally divided among them, share and share alike, as tenants in common, and not as joint tenants; and if there should be only one such child of his said son and daughter, to the use of such child, his or her heirs and assigns, and for default of such issue of his said son and daughter, the testator gave the premises to his son T and his heirs and assigns for ever. The testator's son J died, leaving issue born after the death of the testator, and leaving his sister E surviving:—Held, first, that J and E were tenants in common, and that on the death of J his moiety passed to his children and not to E either by survivorship or implied cross-remainder; secondly, that J's moiety was, at his death, divisible among all his children, the shares of those who had pre-deceased him going to their proper representatives. *Doe d. Patrick v. Royle*, 18 Law J. Rep. (N.S.) Q.B. 145; 13 Q.B. Rep. 100.

A testatrix devised her real estates as follows:—"I give and devise the same to my husband's nieces, Martha S and Jane S G, to hold to them and their heirs and assigns, for ever, but in case the said Martha S and Jane S G should both die without issue, then I give and devise the same premises to E H and A G, to hold to them their heirs and assigns for ever, as tenants in common:—Held, that Martha S and Jane S G were joint tenants for life, with several inheritances; that therefore on the death of Martha S, Jane S G became entitled to the

property during her life, and that after her death without issue the plaintiffs, who were the daughter and grandson of Martha S, became entitled. *Forrest v. Whiteway*, 18 Law J. Rep. (N.S.) Exch. 207; 3 Exch. Rep. 367.

Testator gave real and personal property to his wife for life, and at her death, if he left issue, to the child or children he might have at his decease; but if he died without leaving issue, he gave all his property in equal proportions to his brothers and sister, Thomas, Anthony, John and Jane; and if any of them should die without leaving issue, he gave their shares to the survivors, but if leaving issue, to their children. The testator died without issue. John died a bachelor in his lifetime. Jane died in the lifetime of the widow, leaving one child and several grandchildren, the issue of a deceased child. Thomas survived the widow, and died leaving children. Then Anthony died a bachelor.—Held, that John's share went absolutely to Thomas, Anthony and Jane; that Jane's share went to her child; Thomas's to his children; and Anthony's to his real and personal representatives. *Benn v. Dixon*, 16 Sim. 21.

A testator directed all his real and personal estate to be divided among his three sisters or their children, as his mother should appoint. The mother died without making any appointment:—Held, that the three sisters and their children were entitled to have the estates divided among them *per capita*. *Penny v. Turner*, 17 Law J. Rep. (N.S.) Chanc. 133; 2 Ph. 493.

Testator gave houses in trust for M for her separate use for life, and on her decease to apply the rents for the maintenance of her children then living, and when they should all attain twenty-one in trust to sell and divide the proceeds among them equally; and, in case M should die without leaving issue, to divide the produce among such of the testator's grandchildren thereafter named as should be living at her decease. The testator, by separate clauses, gave other houses in trust for his granddaughters C S and H, for their separate use for their lives, and repeated after each clause, "and after her decease in trust for the issue of her body in the same manner and subject to the same conditions and limitations as hereinbefore expressed in the bequest to my grand-daughter M." He afterwards declared that if *all* his said grand-daughters should die without leaving issue all the houses should fall into the residue of his estate. C died leaving issue. H died without issue.

Held, that the houses given in trust for H went over to M and S, as being the only grandchildren living at her death. *Doughty v. Saltwell*, 15 Sim. 640.

(B) WHAT PROPERTY PASSES BY THE DEVISE.

(a) *In general.*

Testator devised the messuage or dwelling-house with the outbuildings, orchard and appurtenances occupied by A B, situate on the west side of the town of M, and a close of land adjoining, being the close at the north corner of the town of M aforesaid, and opposite the pond, and containing, with the garden and orchard, 3 acres 5 perches, more or less, to C in fee.

By a codicil, in which the testator recited that he

had devised to C (amongst other hereditaments) "a close situate at M, being the close opposite the pond, and containing, &c., and now in my own occupation," he declared that he "revoked the devise of the said close to C, and devised the same with the appurtenances to D," in fee.

The quantity of land which, together with the garden and orchard, made up the 3 acres 5 perches, and which formed one purchase by the testator, included two pieces of land adjoining the close opposite the pond, &c., but separated from it by posts and rails, but these two pieces of land were not in the occupation of the testator at the date of the will or codicil:—Held, that they did not pass to D by the codicil. *Doe d. Renow v. Ashley*, 16 Law J. Rep. (N.S.) Q.B. 356; 10 Q.B. Rep. 663.

Devise of all that messuage and lands I now live in:—Held, to pass land bought at the same time as the house, but which testator had ceased to occupy a year previous to date of will, he not occupying any other land. *Nightingall v. Smith*, 1 Exch. Rep. 879.

A testator devised all my five freehold messuages, tenements and dwelling-houses and premises, with their appurtenances, in the occupation of J P and his under-tenants. The estate consisted of five cottages, with gardens and outbuildings inclosed, and behind three acres of land. J P was tenant of the whole, but occupied the land only:—Held, that the whole estate, both cottages and land, passed under the will. *Doe d. Heming v. Willelts*, 18 Law J. Rep. (N.S.) C.P. 240; 7 Com. B. Rep. 709.

Devise (before the 7 Will. 4. & 1 Vict. c. 26.) of lands to certain persons, and of pits and veins of clay under the same lands to other persons,—the latter devise passed only the pits and veins of clay open at the date of the will—*semble*.

Whether, since the statute, such a devise would pass pits or veins open at the death of the testator—*quare*. *Brown v. Whiteway*, 8 Hare, 150.

The testator, a Scotchman, domiciled in England, by his will, gave all his real, personal and mixed estate, which he might be seised or possessed of, or entitled to at the time of his decease, upon trusts, under which his heir-at-law took a benefit. The testator, at the time of his death, was entitled to a sum of 6,000*l.*, being a debt due in respect of mercantile dealings in England, and secured by a heritable bond upon lands in Scotland, executed to the testator after the date of the will. The heir-at-law having recovered the money, held, that the bond did not pass by the will; that the heir-at-law was not a trustee for the personal representatives of the testator; and that he was not put to his election. *Allen v. Anderson*, 15 Law J. Rep. (N.S.) Chanc. 178; 5 Hare, 163.

A library of books held to pass upon a general intention that the testator's house should not be dismantled, but kept up for his family. *Ouseley v. Anstruther*, 10 Beav. 462.

A testator devised the residue of his estates "whereof I am now seised" to trustees upon certain trusts, and afterwards devised "all such trust estates, freehold, copyhold and leasehold, as are now vested in me, or as to the leasehold premises as shall be vested in me at the time of my death:—Held, that the testator had himself put a construction upon the word "now," and that property contracted

to be purchased by him after the date of his will did not pass by it. *Cole v. Scott*, 17 Law J. Rep. (n.s.) Chanc. 423; 16 Sim. 259: affirmed, 19 Law J. Rep. (n.s.) Chanc. 63; 1 Hall & Tw. 477; 1 Mac. & Gor. 518.

(b) *Trust Estate.*

A devise of all real estates whatsoever and wheresoever charged with 50*l.* to J W, does not pass trust estates. *Rackham v. Siddell*, 16 Sim. 297.

(c) *Leaseholds.*

A, by his will, devised his freehold farm called Wick, in the occupation of W E, to two devisees in moieties. Two parcels of what was called Great Hill Ground were at the date of the will occupied as part of Wick farm, to which they had formerly belonged, but had been conveyed to the president and scholars of Magdalen College, who had redemised them to the testator for twenty-one years. He further devised "all my leasehold farm-house, homestead, lands and tenements at Heddington, containing about 179 acres, held under Magdalen College, Oxford, and now in the occupation of T B as tenant to me." T B held the farm at Heddington, which was leased to A from Magdalen College, Oxford, but had never occupied the two parcels of Great Hill Ground.

It having been held by Vice Chancellor Knight Bruce (1 *Coll. C.C.* 47), that the two parcels did not pass under the first devise, because they were leasehold, the Court of Exchequer held that they did not pass under the second devise, because they were not in the occupation of T B, and that devise would only include lands that were in Heddington, leasehold under the college, and in the occupation of T B. *Morrell v. Fisher*, 19 Law J. Rep. (n.s.) Exch. 273; 4 Exch. Rep. 591.

A testator, after charging his debts, funeral and testamentary expenses, and pecuniary legacies on his real and personal estate, but directing his personal estate not specifically bequeathed to be the primary fund for payment, and charging the annuities given by his will on his real estates, and directing certain charity legacies to be paid out of his personal estate only, and the duties payable on his legacies and annuities to be paid out of his personal estate, gave the residue of his personal estate to his brother V J D absolutely. Then followed a devise of the testator's manors, lordships, rectories, advowsons, messuages, lands, tenements, tithes and hereditaments situate at A, B, C, and D, in the counties of Durham and York, and of his other real estates in those counties and elsewhere in Great Britain, upon certain trusts for the benefit of M J D and his issue, with remainder to W E in fee simple. The testator died seised of freehold estates and also possessed of considerable leasehold estates. The freeholds and leaseholds were not intermixed, but adjoined each other, and, in some instances, parts of the freehold and parts of the leasehold estates were let to the same tenant, at one undivided sum:—Held, that the leaseholds did not pass under the devise of the testator's manors, lands, &c., but belonged to the testator's next-of-kin as part of his personal estate.

Held, also, that the devise was not affected by the Wills Act (7 Will. 4. & 1 Vict. c. 26). *Wilson*

v. Eden, 17 Law J. Rep. (n.s.) Chanc. 459; 11 Beav. 237.

(d) *Tithes.*

Testator devised certain tithes to D W for life and at the expiration thereof to the uses after expressed concerning his real estates. He then devised *all his real estates of what kind or nature soever* and wheresoever situate, subject to payment of his debts, to his niece and her sons in strict settlement. By a codicil made after the niece had a son, he gave all his *real estates of what nature or kind soever* to that son for life, with limitations to his first and other sons in tail male, and on failure of such issue he devised all his said real estates in the manner mentioned in the will, and declared that the devisees thereinbefore made should take precedence of the devisees of his real estates contained in his will:—Held, that the words "real estates" in the will did not include the tithes, but that those words in the codicil did include them. *Evans v. Evans*, 17 Sim. 86.

(e) *Growing Crops.*

A testator devised an estate of which he was in possession to B for life, with divers remainders over; he subsequently bequeathed to his executors all his live and dead stock, household furniture and effects, and all his personal estate whatsoever and wheresoever, upon various trusts:—Held, that the growing crops passed to the executors, and that they did not belong to the devisee of the estate. *Rudge v. Wimmall*, 18 Law J. Rep. (n.s.) Chanc. 469; 12 Beav. 357.

(f) *Estate in Remainder.*

A testator entitled to a copyhold estate in remainder expectant on the determination of the life estate of his wife, by his will gave the income of all his property wherever situate or of whatsoever kind to his wife for her life, and at her decease he gave all the property then left by him, and of which she was to have the income for her life, to his children, and on his wife's death or second marriage he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of and to apply the same in the maintenance of his children until the youngest should attain twenty-one:—Held, that the interest of the testator in remainder in the copyhold estate passed by his will. *Ford v. Ford*, 6 Hare, 486.

(C) PARTICULAR LIMITATIONS.

(a) *Legal or Equitable Estate.*

A testator made and published a testamentary paper in 1839 in the following words:—"This is the last will and testament of me, the undersigned, A B, relating to all my freehold and copyhold lands, tenements, hereditaments, and all my real estate whatsoever, which I hereby give, devise and bequeath to the intent that the rents, issues and profits thereof may be divided into three equal shares and proportions, one-third whereof I give and devise to Caroline, the daughter of C D, for her natural life, independent of any husband she may hereafter marry, and for which her receipts alone shall from time to time, notwithstanding her

coverture, be a sufficient discharge, subject, nevertheless, to an annuity of 50*l.* per annum, payable to her mother, during her life, independent of her present or any other husband, payable quarterly, and for which her receipt alone, notwithstanding her coverture, shall from time to time be a sufficient discharge. Then, as to the other two-thirds of the said rents, issues and profits, I hereby direct the said annual rents and profits to be paid to all the children of W W, or that he be permitted to receive the annual rents, issues and profits of my said freehold and copyhold estates for the use and maintenance, education and putting forth in the world of all his said children until their arrival at the age of twenty-one years. I appoint the said W W executor of this my will, so far as the same is necessary to the performance of the trusts relating to my real estate."

The testator died, leaving the persons named in this will and four children of W W surviving. He also left other instruments, prior in date to this will, duly executed and uncancelled, by which he devised the whole legal and beneficial interest in his estate:—Held, first, that the instrument of 1839 alone was valid as a disposition of the legal estate of the testator. Secondly, that it operated as a devise to W W of the legal estate in one undivided third of the real estate, and a devise to him of a chattel interest during the minority of his children in the other two-thirds, determinable as to the respective shares of his children in the said two-thirds on their respectively attaining the age of twenty-one years, and, subject thereto, a devise of the said two-thirds to his children as joint-tenants in fee. As to the beneficial interest in one-third after the decease of Caroline—*quere*. *Plenty v. West*, 17 Law J. Rep. (N.S.) C.P. 316; 6 Com. B. Rep. 201.

A testator, by his will, directed his trustees to pay and discharge his debts, &c., and subject thereto gave and devised a freehold messuage, &c. to them, in trust to permit and suffer his wife to live and reside therein during her life free from rent, and after her decease he gave and devised the same unto his said executors and trustees, and the survivor of them, his executors and administrators, in trust to permit and suffer his daughter to receive and take the rents thereof for and during the term of her natural life, free from the debts, controul, or engagements of her then or any future husband. And after her decease he gave and devised the same unto his said executors and trustees, &c. upon trust to pay and apply the rents thereof to and for the use and benefit of his grandson I M, the eldest son of his said daughter, in the event of his not having attained the age of twenty-one at the time of her decease, and from and immediately after his attaining that age he gave and devised the same unto the said I M for and during the term of his natural life. Then, after certain contingent devises to the trustees which never took effect, he devised and bequeathed the residue of his property unto and between his said wife and his said daughter "in equal shares and proportions, share and share alike, the share of my said daughter also independent of the debts, controul or engagements of her present or any future husband in manner aforesaid":—Held, that the co-heirs of the testator's daughter

took a legal estate under the residuary devise. *Doe d. Müller v. Claridge*, 18 Law J. Rep. (N.S.) C.P. 105; 6 Com. B. Rep. 641.

Testator gave his real and personal estate to trustees, their heirs, executors, &c. for ever, upon trust, for his wife to receive the rents for life; and after her decease upon trust to pay and divide the rents among his children as they attained twenty-one, and after their decease to pay the principal of their respective shares to their legal representatives, their executors, &c. He gave power to the trustees to sell, with power of maintenance out of the rents, and advancement out of the principal of their shares; and in case any of his freehold estates should not be sold by his trustees, then from and after the decease of his children he devised the same to their respective heirs and assigns, as tenants in common; and he directed that the receipts and conveyances of his trustees should be good discharges and assurances to any purchaser:—Held, that the trustees took the legal fee, and that the children took equitable estates for life, with equitable remainders to their heirs, which united gave the equitable estates in fee. *Reynell v. Reynell*, 10 Beav. 21.

A testator gave and bequeathed all his stock in trade, book debts, securities for money, money in the funds, and all his household goods, &c. to his wife. He also gave and bequeathed whatever money he had in the Bank, or invested on any security, and also all the residue of his personal and testamentary estate, goods, chattels and credits to his trustees upon certain trusts therein mentioned:—Held, that the legal estate in certain messuages, which were conveyed to the testator upon trust to pay himself a sum of 300*l.*, and to pay the surplus to the person conveying the same, did not pass by the will. *In re Gorfe's trust*, 19 Law J. Rep. (N.S.) Chanc. 173.

Devise to A and B and their heirs to the use of testator's son for life, remainder in trust that the trustees or the survivor should pay and apply the rents, &c. or so much as they should think proper for the maintenance of his son's younger children during their minorities, and after they should all have attained twenty-one, to the use of them, their heirs and assigns:—Held, that A and B did not take the legal estate in fee; but that the son took the legal estate for life with remainder to A and B for a chattel interest, with remainder to the younger children in fee. *Tucker v. Johnson*, 16 Sim. 341.

A testator devised real estate unto and to the use of three trustees, their heirs and assigns, upon trust, to pay the rents to a married woman, for her separate use for her life, and, after her death, in trust for all her children who, being sons, should attain twenty-one, or being daughters should attain that age or marry, and their heirs and assigns for ever:—Held, that the trustees took the whole legal fee, and that all the children of the tenant for life living at her death, minors and not minors, took vested interests in equity in the estate, subject, as to the share of any minor, to be divested in the event of his or her dying under twenty-one. *Riley v. Garnett*, 19 Law J. Rep. (N.S.) Chanc. 146.

Devise to trustees and their heirs upon divers trusts in succession, some requiring the legal estate to remain in the trustees, and others which in them-

selves would not do so,—the whole legal fee remains in the trustees. *Brown v. Whiteway*, 8 Hare, 145.

By the will of W S real estate was devised unto and to the use of W T, his heirs and assigns, for ever, upon trust, to pay M S an annuity during her life, and to apply the surplus during the life of M S for the testator's daughter C N; and after the death of M S the testator directed that the premises should be and remain unto W T, his heirs and assigns, to the use of the said C N and her assigns for her life, with remainder to W T, to support contingent remainders; and after the decease of C N to the use of B N and his assigns during his life, with remainder to W T to support contingent remainders; and after the decease of B N, in case he should survive C N, to the use of all and every the child and children of C N, with cross-remainders between them, with the ultimate remainder to the testator's cousin in fee. The will contained a power to W T, his heirs and assigns, to sell the trust premises at the request of B N and C N, or the survivor of them, and directed the proceeds to be laid out in the purchase of other estates, to be settled to the same uses:—Held, taking into consideration the various duties prescribed by the will to be performed by W T, that the intention was manifest, and the words were large enough to give to W T a legal estate in fee. *Rackham v. Siddall*, 1 Mac. & Gor. 607; 2 Hall & Tw. 244.

(b) Trust or beneficial Estate.

A testator devised freehold and copyhold estates to trustees and their heirs, upon trust, for the use and benefit of his three natural boys. The rents, &c. to be paid for the maintenance and education of the said before-mentioned boys, or the survivors or survivor of them, share and share alike:—Held, that there was no resulting trust, and that the sons were entitled absolutely as joint tenants. *Moore v. Cleghorn*, 16 Law J. Rep. (n.s.) Chanc. 469; 10 Beav. 423: affirmed, 17 Law J. Rep. (n.s.) Chanc. 400.

A testator devised a share in the New River Company to A, upon such trust as he should afterwards declare; but never made any declaration of trust as to it. The testator died without leaving any heir-at-law:—Held, that A, and not the Crown, was entitled to it.

A testator made a general devise of all his property to A, upon trust, for purposes or legacies he should make in any codicil he might add to his will; and afterwards made a codicil, which was unattested:—Held, that A was not entitled in his own right to the property, but was a trustee for the heir-at-law of the testator. *Davall v. New River Co.*, 18 Law J. Rep. (n.s.) Chanc. 299.

A testator directed that all his property should be at the disposal of his wife, for herself and her children:—Held, that the wife was either a trustee with a large discretion as to the application of the fund, or had a power in favour of the children, subject to the life estate in herself.

Held, also, (reversing the decision, 16 Law J. Rep. (n.s.) Chanc. 214; 5 Hare, 326,) that the children were not entitled to a present interest in possession.

The wife had executed a deed, by which she

directed the income of the testator's property to be paid to herself for life, with certain trusts in remainder for the benefit of the children; and by a decree made in a supplemental suit, the children had been declared entitled to the benefits of the deed, and that decree was not appealed from. The Lord Chancellor, therefore, refused to make any declaration as to the rights of the parties under the will, independently of the deed and the decision in the supplemental suit; their interests being in a great measure decided by that suit and the decision in it. *Crockett v. Crockett*, 17 Law J. Rep. (n.s.) Chanc. 230.

(c) Joint Tenancy or Tenancy in common.

The words "share and share alike" will be controuled by circumstances denoting that they are not used to create a tenancy in common.

Estates vested in trustees for the benefit of three persons, with a direction to apply the income for the maintenance of the *cestuis que trust*, or the survivors or survivor, share and share alike,—Held, to create a joint tenancy. *Moore v. Cleghorn*, 16 Law J. Rep. (n.s.) Chanc. 469; 10 Beav. 423: affirmed, 17 Law J. Rep. (n.s.) Chanc. 400.

(d) Fee Simple.

A testator devised as follows:—"I give and bequeath to my son R A my moiety of the house which he now lives in, and all my personal property now in his keeping":—Held, that the above words carried the fee simple in the moiety of the house. *Doe d. Atkinson v. Faucett*, 15 Law J. Rep. (n.s.) C.P. 244; 3 Com. B. Rep. 274.

A testator devised as follows:—"I give, devise, and bequeath all my real and personal estate, monies, securities for money, and all other my real and personal estate, of what nature or kind soever, and wheresoever the same may be, which I am now possessed of, or which at any time hereafter I may be possessed of, or entitled unto, subject to the payment of all my just debts, funeral and testamentary expenses, and the expense of proving this my will, unto my dear wife, to and for her sole and separate use and benefit":—Held, that, under the above words, the devisee took an estate in fee in the lands of the testator. *Doe d. Roberts v. Williams*, 17 Law J. Rep. (n.s.) Exch. 51; 1 Exch. Rep. 414.

A testator devised as follows:—"I give unto my wife E, to W H, and J C, their heirs, executors and administrators, all my real and personal estate, upon trust to pay the rents, interest and produce unto my said wife during her life, and after her decease to pay and apply the rents, issues and profits towards the maintenance of my children during their lives, without benefit of survivorship, and after their decease I give and devise the share of her so dying unto the children of his or her heirs as tenants in common. I give, ordain, direct and appoint unto my said wife E, to W H, and J C, their heirs, executors and administrators, power and authority to sell, dispose and mortgage, lease or otherwise in all manners manage my estate, both real and personal, as if I were living; I appoint my said wife E and the said W H and J C executors of this my will, and also guardians of my said children." The testator died in 1825, leaving his widow E (one of

the plaintiffs) and three unmarried daughters of the ages of seventeen, fourteen, and eleven; the youngest died in 1844, and the eldest in 1832 married, and had several children living at the date of the hereinafter mentioned contract of sale, and still living. J C never acted under the will, but in 1833 executed a deed disclaiming all interest under the will. The other trustee W H died in 1840. In 1845 the plaintiffs W and E contracted to sell to the defendant an estate, of one moiety of which the plaintiff W was seised in fee, and of the other moiety the testator at the date of his will and at the time of his death was also seised in fee:—Held, that the plaintiff E took an estate in fee simple in the moiety devised by the testator, and was capable of making a good title in fee simple to a purchaser. *Watson v. Pearson*, 18 Law J. Rep. (N.S.) Exch. 46; 2 Exch. Rep. 581.

J. Westerman bequeathed certain personal property and appointed trustees who were to deal with his real estate as directed until his son John attained twenty-five years: and proceeded thus:—"I will that my son John, having attained twenty-five years of age, be let into possession of all my property, real and personal, which remains, on this express condition, that neither he nor his heirs to the third generation shall have power to sell or mortgage any part of the freehold estate now in my own occupation, or in the occupation of E; but if the trustees do not sell or mortgage the estate, I empower John or his heirs to sell it to pay off the mortgage, but not otherwise; and in like manner I debar him and his heirs from selling or transferring those cottages, with cart-house, &c. now in the occupation of R. Metcalf and others, it being my desire that they should be kept in the *Westermans'* name. Twelfthly, if it should happen that my son John die without leaving lawful issue, it is my will that my daughter Ann have his share, subject to the same restrictions, limitations and exceptions under which he has it. Thirteenthly, if it should please God to take away both Ann and John under age or without leaving lawful issue, I give and bequeath to my brother Joseph and his heirs for ever all those cottages and cart-house, &c. occupied by R. Metcalf and others. Fourteenthly, all that is left to be immediately sold, &c. (the residue was then disposed of). Ann survived her father and died unmarried, under twenty-one. John survived his father, attained twenty-five years of age and died, leaving two children who died in infancy. He left a will disposing of his real estates.

Held, first, that the devisees of John took an estate in fee simple in all the hereditaments devised or affected by the will of his father; secondly, that in the events that happened, Joseph, the testator's brother, took no estate under the 13th clause in the cottages, &c. therein mentioned; and, thirdly, that in the events that happened, no person other than the devisees of John had any power of selling or appointing, or any estate in the hereditaments devised or affected by the will of his father. *Mortimer v. Hartley*, 19 Law J. Rep. (N.S.) C.P. 153; 3 De Gex & S. 316; 6 Com. B. Rep. 819.

A devise was in these terms:—"I give to B and S, their heirs, executors, &c., my freehold and leasehold estates at Reading, and give full power and authority to B and S, and their heirs, to accept sur-

renders of all present and future leases, and grant new leases. I give to B and S all my other real estate, in trust, out of the rents and profits thereof to pay to my wife the jointure of 700*l.* settled by me on her; and also to pay out of the rents and profits of my freehold estates unto F B during her life, an annuity of 100*l.*, and thereout also to pay C during the joint lives of her and F B an annuity of 300*l.*; and after the decease of F B, if C should survive her, to pay C an annuity of 400*l.*; and after the decease of C, in case she shall have only one child, then in trust to pay out of the rents and profits of my said estates the yearly sum of 200*l.* for the maintenance of such child until he or she shall attain the age of twenty-five years, and after that in trust to raise the sum of 1,000*l.* to pay to him or her at that age. And my will is, that so much as my residuary personal estate shall fall short of paying my debts and legacies hereby given shall be, by my trustees raised and paid out of the rents and profits of my several estates, and by mortgage of all or any part thereof; and after payment of the interest of the money so to be borrowed, and the expenses of keeping my estates in repair, and all such costs as my trustees shall expend by means of the trusts, in trust to pay out of the overplus rents and profits thereof, 60*l.* yearly for the maintenance of the eldest son of B until he shall have attained the age of twenty-three years; and I hereby give full power to my said trustees, and I do order and direct that they shall settle a jointure on any woman such eldest son shall marry of 60*l.* per annum; and in trust to apply the overplus rents and profits of my estates in paying off the money so to be borrowed on mortgage; and after payment thereof to pay the rents and profits of my said estates to B, during his life, to his own use; and after his decease then my trustees shall stand seised of my real estates to, for, and upon the uses following (that is to say), to the use of J B, the eldest son of B, during his life, and after the determination of that estate, to the use of M and his heirs during the life of J B, upon trust to preserve contingent remainders; and after his decease, to the use of the son of J. B, and the heirs male of his body; and, in default of such issue, to the use of the second, third, fourth, and all other sons of J B, successively in remainder, and the several heirs male of the bodies of such sons. There were other limitations over of the same kind in default of issue, and a gift to trustees to support contingent remainders followed each life estate.

Held, that the trustees took an estate in fee simple in the property devised. *Blagrove v. Blagrove*, 19 Law J. Rep. (N.S.) Exch. 414; 4 Exch. Rep. 550.

A devised to B, her heirs, executors and administrators, all that dwelling-house, No. 3, Tavistock Street, in the borough of Plymouth, and further devised to B for her life other premises, describing them, and adding "the whole of which premises are in the borough of Plymouth;" and in case B died without issue "the said premises" were to go over to the children of C. There was also a legacy of 100*l.* to be paid to E out of the "before-mentioned premises." All the premises were in the borough of Plymouth:—Held, that B took an estate in fee in the first-mentioned house, and upon her death without issue the children of C took only the other premises.

Doe d. Bailey v. Sloggett, 19 Law J. Rep. (N.S.) Exch. 220; 5 Exch. Rep. 107.

A testator devised real estate to A, his heirs, executors and administrators; but directed that, if A should die without issue, the estate should go in the manner therein mentioned; and that, if A should die leaving issue, such issue should take the estate. A survived the testator:—Held, that the words “in the lifetime of the testator” were not to be supplied after the words “issue” and “issue,” in the latter part of the will; and, consequently, that A did not take the fee simple. *Gee v. the Town Council of Manchester*, 19 Law J. Rep. (N.S.) Chanc. 151.

A testator devised his estates to trustees, to pay the rents equally between his nephew James Wilson and other nephews and nieces for life, and upon the decease of the survivor he devised all his said estates “to a son of James Wilson in marriage, his heirs and assigns.” All the tenants for life died. James Wilson had two sons by his first marriage, who died infants and unmarried, and a third son by a second marriage, who survived:—Held, that the devise was to the first son of James Wilson in fee simple, and his heirs were consequently entitled. *Ashburner v. Wilson*, 19 Law J. Rep. (N.S.) Chanc. 330.

(c) Estate Tail.

Devise before 1 Vict. c. 26, to A for life, and after his decease to his first son lawfully issuing, and for default of such issue, over to the other sons in tail, and in default of such issue over:—Held, that the first son of A took an estate tail. *Doe d. Harris v. Taylor*, 10 Q.B. Rep. 718.

A testator made his will as follows:—“I devise to my son Stephen a small field and all that dwelling-house, barn, and granary, at, &c., to hold to my said son Stephen for and during the term of his natural life; and from and after his death I devise the same to the issue of his body, lawfully begotten; if more than one, equally amongst them; and in case he shall not leave any issue of his body lawfully begotten at the time of his death, then I devise the same to my heir or heirs-at-law.” The testator died in 1797, and Stephen, the son, enfeoffed certain persons of the premises named in the will (under whom the defendants claimed) in 1798, and died in 1831, leaving two sons (lessors of the plaintiff), the eldest of whom was born in the lifetime of the testator:—Held, that Stephen, the son, took an estate tail under the terms of the will of the testator; that the feoffment operated as a discontinuance, and the lessors of the plaintiff could not maintain ejectment. *Doe d. Cannon v. Rucastle*, 19 Law J. Rep. (N.S.) C.P. 100; 8 Com. B. Rep. 376.

A testator gave his residuary real and personal estate to his son H A for life, and to the heirs of his body lawfully begotten, for ever; and in case his said son should be without children, then over:—Held, that H A took an estate tail in the premises. *Abram v. Ward*, 16 Law J. Rep. (N.S.) Chanc. 293; 6 Hare, 165.

A testator bequeathed 1,000*l.* to trustees, upon trust for his son A for life, with remainder to the children of A. He then gave the residue of his estate and effects to his trustees, upon trust, for all his children in equal shares, and the heirs of their respective bodies. The following words were then added in a parenthesis: “except as to my son A

and his children, whose share, in consequence of the 1,000*l.* set apart for him and them as aforesaid, shall be rated at 1,000*l.* less than that of any other child.” The will then declared that in case of a failure of issue of any child, the share of him or her whose issue should fail should be held on the trusts therein mentioned. The testator left freehold estates and personality applicable to the trusts declared of the residue:—Held, first, that the words in the parenthesis did not cut down A’s interest in the residue to a life estate; and, secondly, that the words “failure of issue” were not made by the 29th section of the Wills Act to mean failure of issue at the death of A. *Green v. Green*, 18 Law J. Rep. (N.S.) Chanc. 465.

(f) Estate for Life.

A devised lands in trust for J B, a reputed son, for his life, and, after his decease, for and to his first and every other son successively in tail male, and in default of such issue to his daughter or daughters, to hold to them, if more than one, and their heirs, as tenants in common; and, in default of issue of the said J B, to and for the testator’s right heirs:—Held, that J B took only an estate for life, and that no remainder in tail to him could be implied after the limitation to the daughters. *Baker v. Tucker*, 3 H. L. Cas. 106.

A testator after charging certain lands with an annuity to his wife for life, and giving them successively to several persons for life, devised them in the following terms:—“I give and devise the same (but subject and charged as aforesaid) to such person or persons as at the time of my decease shall be the heir or heirs-at-law of W H, formerly of P, Esq., deceased”:—Held, that the words “heir or heirs-at-law” were a *designatio personae*, and not words of limitation; and that the heir of W H took an estate for life only.

A devise of an indefinite estate, without words of limitation, *prima facie* is a devise for life only; and a previous charge on the estate without any charge on the devisee in respect of it will not enlarge it into a devise of an estate in fee. *Doe d. Sams v. Garlick*, 15 Law J. Rep. (N.S.) Exch. 54; 14 Mee. & W. 698.

A testator by his will devised certain lands to his son for life, with remainders in strict settlement to his issue, with remainder to the testator’s grandson Thomas for life, with remainder in strict settlement to his issue, and for default of such issue to the use of his grandchildren, W, S, A and H, if living at his decease, for their lives and the life of the survivor, as tenants in common; and after their several deceases and the decease of the survivor, to the use of the son and sons, &c. of W, S, and H lawfully to be begotten severally and successively, and in remainder as they shall be in priority of birth and seniority of age, and of the several heirs of their body as tenants in common; and in default of such issue to the daughters of the said grandchildren in like settlement. “And in case either of my said grandchildren W, S, A, and H shall happen to die, leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten in manner aforesaid;” and in

failure of issue of either of their bodies, then over. S, one of the grandchildren, was the survivor:—Held, that the words “in manner aforesaid” imported a clear reference to a previous clause of the devise, and incorporated it with the second clause; and that as the previous clause gave only an estate for life to the grandchildren, the second clause was controlled by it, and gave an estate for life only. *Doe d. Woodall v. Woodall*, 16 Law J. Rep. (n.s.) C.P. 28; 3 Com. B. Rep. 349.

A testator, who died in 1790, after giving his estate at S to John P in fee, devised as follows:—“I give to John P the meeting-house and appurtenances if it is not made freehold, to save the expense of so many fines, but my will is for John to let E and M have equal shares with him the same as if it was freehold and given amongst them. I give all the land I bought of B to John, E and M, as likewise the meeting-house, if it is made free, share and share equally amongst them; if John refuse to let them have share of the meeting, he to forfeit all his estate to be divided amongst them”:—Held, that the devisees took only life estates in the lands bought of B, and that the clause of forfeiture of the S estate was not by way of equivalent for the meeting-house, but by way of penalty on John in the event of his disobeying the testator's expressed will as to the meeting-house. *Doe d. Payne v. Plyer*, 19 Law J. Rep. (n.s.) Q.B. 29.

Real estates were devised to T B for life, remainder to his first and other sons in tail, remainder to his daughters in tail, and in default of all his issue to H D B for life, remainder to his first and other sons in tail, remainder to his daughters in tail, and in default of all such issue remainders over; and copyholds were devised to H D B for life, with remainder to his first and other sons in tail, remainder to all the daughters in tail, and in default of such issue to R D in fee; and by a codicil the testator declared that after the several limitations of his real estate in favour of T B should be spent, he had limited the same in the same manner to H D B, and declared that the said T B should, after the limitations in favour of H D B in the copyhold estate, have precisely the same estate therein before the limitation to R D as the said H D B had in the real estates:—Held, that T B had an estate for life in the copyholds, with remainder to his issue in tail. *Grover v. Burningham*, 5 Exch. Rep. 184.

Testator gave his four daughters legacies after the death of his wife should she so long continue his widow. He then gave two estates at A and B to his sons, but they were not to be put in possession as long as his wife continued his widow. He then gave his personal estate to his sons, to be divided between them at the death of his wife, or should she not continue his widow. Should his wife give up the farm at C then occupied by him, he directed that his sons should out of the estates at A and B allow her 25*l.* a year. In a suit to administer the real and personal estate of the testator,—Held, that the widow, while she continued unmarried and in the possession of the farm at C, was entitled to a life estate in all the testator's property, by implication; without prejudice to any question as to the construction of the will in the

events of her giving up the farm at C, or marrying again. *Cockshott v. Cockshott*, 15 Law J. Rep. (n.s.) Chanc. 131; 2 Coll. C.C. 432.

S G granted and devised to trustees certain freehold property for the term of ninety-nine years, at a peppercorn rent, upon trust, to permit his wife and such persons as she should by will bequeath the same, to take to his, her, or their own use and benefit the rents, &c. of the said lands for the said term of ninety-nine years, exclusively of any husband of his said wife. The wife, after her husband's death, conveyed her interest in the property to certain persons represented by the defendant, and subsequently made her will, giving the property to the plaintiff:—Held, that the wife of S G took the property for the whole term of ninety-nine years, and not merely a life estate, with remainder to such persons as she should appoint by will; and that she had conveyed away all her interest to the defendant. *Glover v. Hall*, 18 Law J. Rep. (n.s.) Chanc. 305; 16 Sim. 568.

A testator, by will, directed his debts, &c. to be paid, and then gave, devised, and bequeathed all and every his estate and effects, whatsoever and wheresoever, to his wife M A C for her sole separate use and benefit; and further gave, willed, and directed that, at her death, whatever remained of his said estate and effects should go to the persons therein named:—Held, that M A C was not absolutely entitled to the testator's property. *Constable v. Bull*, 18 Law J. Rep. (n.s.) Chanc. 302.

(g) Vested or contingent Estate.

The testator devised all his residuary property to his wife for life, and then to such of the children of his sisters as might be living at the decease of his wife, and the issue of such of them as might be then dead, in equal shares and proportions; such issue, however, only to take the share which their parents would have been entitled to if living:—Held, that the issue of the children of the testator's sisters who died after their parents, but before the widow, took vested interests in the property under this devise. *Lyon v. Coward*, 15 Law J. Rep. (n.s.) Chanc. 460; 15 Sim. 287.

Testator gave the residue of his real and personal estate to trustees in trust for his three nephews, their heirs, &c. as tenants in common, with cross-remainders and benefit of survivorship in case any of them should die before their shares should become vested, which he desired might not be shared until his youngest nephew attained twenty-four; and he directed his trustees to maintain and educate them out of the income of the property during their minorities. The nephews were infants at the testator's death:—Held, nevertheless, that they took vested interests under the will. *Parkin v. Hodgkinson*, 15 Sim. 293.

(D) DISCLAIMER BY DEVISEE IN TRUST.

A devisee in trust, on the reading of the will, after the testator's death, stated that he ought to have had 5*l.* for being trustee:—Held, that these words were so ambiguous that they ought not to have been left to the jury as evidence of his assent to the devise.

Quære—Whether a verbal assent to a devise is

sufficient to prevent the party from afterwards disclaiming the devise.

Quære—Whether a devisee in trust can disclaim by deed after previous assent to the devise in words. *Doe d. Chidgey v. Harris*, 16 Law J. Rep. (N.S.) Exch. 190; 16 Mee. & W. 517.

(E) CHARGES.

A devise of an estate which was subject to a mortgage to A B, "he paying the mortgage thereon," amounts to a direction that he should pay the mortgage, or take the estate subject to it. *Lockhart v. Hardy*, 9 Beav. 379.

Testator devised freeholds and copyholds to his son for life, and after his decease to his first and other sons, paying 10*l.* a year to M C for life:—Held, that this created a charge, and not a trust. *Hodge v. Churchyard*, 16 Sim. 71.

A testator devised a copyhold estate to trustees upon trust for A for life, and after his death to sell and divide the proceeds among the children of A. He also gave his residuary estate to the trustees upon other trusts, but charged with debts and the costs and charges of proving and executing his will:—Held, that the fines payable on the admission of the devisees in trust to the copyhold estate were not "costs and charges of executing the will," and that such expenses ought to be borne by the copyhold estate so devised. *Cole v. Jealous*, 5 Hare, 51.

A, as surety for his sons B and C, mortgaged real estate to M, to secure to M the payment of 2,500*l.* due from B and C; and B and C gave A a bond to indemnify him in respect of the mortgage. A, by will, devised the mortgaged estate to B, and gave the residue of his estate to trustees, on trust to pay his funeral and testamentary expenses and all his debts, and in particular all sums which might be charged upon the property devised to B:—Held, that the testator took the debt on himself, and that the 2,500*l.* was payable out of his estate so as to exonerate the principal debtors. *Musket v. Cliffe*, 17 Law J. Rep. (N.S.) Chanc. 269; 2 De Gex & S. 243.

A testator having mortgaged an estate for 1,500*l.*, for payment of which his eldest son was surety to the mortgagee, devised the estate to his eldest son in tail, with remainders over, under which the plaintiff became tenant in tail. The testator devised another estate to trustees, upon trust to sell, and out of the proceeds to pay his mortgage and other debts, and gave the residue to his eldest son, whom he appointed executor and residuary legatee. The trustees did not act, but the son entered into possession of all the testator's estates and property. The mortgage was transferred, the son entering into a new covenant for payment of the 1,500*l.* and interest at a different rate, with a new proviso for redemption, and he covenanted for payment of the 1,500*l.* and interest accordingly:—Held, that the plaintiff was entitled to have the entailed estate exonerated from the mortgage out of the son's personal estate. *Bruce v. Morrice*, 2 De Gex & S. 389.

By a marriage settlement an estate was settled on the husband for life, with remainder to his wife, for life. This estate was sold under a power, and the purchase-money lent to the husband on mort-

gage of estates in M, belonging to him. By his will, he devised his estates in M to trustees, on trust, to pay the wife 600*l.* a year, until his son attained twenty-five, and then to pay her 200*l.* a year for her life. By a codicil, he directed that the interest of the mortgage debt should form a part of the annuities of 600*l.* and 200*l.*; and by another codicil directed that, when his wife should be entitled to the 200*l.* a year, a part of his personal estate, which he had given to her by his will, should go to the possessor of his estates in M:—Held, that during the life of the wife the estates at M ought to bear the mortgage debt; but that, after her death, the devisees had a right to have it paid out of the general personal estate of the testator. *Sargent v. Roberts*, 17 Law J. Rep. (N.S.) Chanc. 117. [See Estate for Life. *Doe d. Sams v. Garlick*.]

(F) DEVISE FOR PAYMENT OF DEBTS.

Testator gave all his real property to trustees, upon trust (subject to payment of debts and the annuities and legacies thereafter bequeathed), to his son for life. After giving certain annuities and legacies, and an annuity out of his real and personal estate, he gave his son all his personal property after his mother's decease, except some plate:—Held, that the personal estate was not exonerated from the payment of debts, &c. *Ouseley v. Anstruther*, 10 Beav. 453.

The testator in the cause having, under a power in his marriage settlement, granted a lease for lives of real estate comprised therein, with a covenant for quiet enjoyment, made his will, whereby he devised all his real estates, subject to the payment of his debts. The lessee being evicted after the death of the lessor, which took place in 1825, brought an action on the covenant against his executors, and recovered damages. The personal estate being insolvent, it was held that the damages constituted a debt of the testator within the meaning of the charge in the will, and that such damages and costs were recoverable against the real estate in the hands of the devisees, with interest thereon from the time of the judgment. *Morse v. Tucker*, 15 Law J. Rep. (N.S.) Chanc. 162; 5 Hare, 79.

A testator directed payment of his debts, in the first place, out of his personal estate, exclusive of leaseholds; and if not sufficient, he charged his real estates with the payment; he then gave divers specific articles to his son:—Held, that the specific legacies were liable for payment of the testator's debts before the real estates. *Bateman v. Hotchkiss*, 16 Law J. Rep. (N.S.) Chanc. 514; 10 Beav. 426.

A testator gave certain portions of his real and personal estate to trustees, for payment of his debts; and he specifically gave several portions of his real and personal estate to different parties "freed from his debts;" and also bequeathed his residuary personal estate "freed from his debts." One of the devised estates was subject to a mortgage. The funds primarily applicable being insufficient to discharge all the debts, the property which passed under the residuary clause was held to be the next fund which ought to be resorted to for that purpose; and the devisee of the mortgaged estate was declared to be entitled to have the mortgage paid off out of the residuary estate. *Brooke (Lord) v. Warwick*

(*Earl*), 18 Law J. Rep. (N.S.) Chanc. 137; 2 De Gex & S. 425; 1 Hall & Tw. 142.

(G) TRUST FOR SALE.—[See CONVERSION AND RECONVERSION.]

(a) *Power of Executors to sell.*

A testator, by his will, gave to his wife 2,000*l.* Bank stock to give by will among any of his cousins most agreeable to her, but, if not disposed of, it was to be added to the general fund, and as residue go, share and share alike, between all his first cousins. The testator then gave to his wife for her life all the rest and remainder of his "property," real and personal, and all the money he had in the public funds, &c. with power to vary the same; and he gave his wife and executors power to renew or grant leases to the best advantage for herself and his heirs; and he gave his executors power to sell any of his estates, and fund the money, with power to give receipts. The testator then gave to "each" of his twelve first cousins 100*l.* stock; he named eleven, and said "as my cousin W A B has departed this life, I desire the same legacy may be transferred or paid between his children, share and share alike; hence I have allotted 1,200*l.* stock from my 5*l.* per cents. to be paid to my twelve first cousins." The testator then gave several other legacies, and after the death of his wife, said, "I give full power to my executors, their heirs or assigns, to collect all my property together, and sell the houses and other estates, and to convert into money all my funded property," and then to pay some legacies to several persons named. "Then the whole of the remainder of my property is to be divided share and share alike to my aforesaid twelve first cousins and their children." The testator appointed his wife and C. and M. executors of his will. He afterwards made a codicil to his will, and revoked the legacy given to Mrs. B, one of the first cousins, if she did not comply with a request he had made, but he declared that he did not thereby mean to exclude her children from the benefit she might thereafter possess in the final division of his property after the decease of his wife. At the decease of the tenant for life all the first cousins were dead, some had left children and others had died without having disposed of their interests.—Held, that the executors had power to sell the real estates, and that it was a conversion of the whole into personality; that the interest of the twelve first cousins, including the first cousin who had died, vested immediately on the death of the testator as if all had been named; that the division was postponed till the death of the tenant for life; that the interest of each first cousin who died in the lifetime of the tenant for life, leaving children, was divested, and the children of such first cousin, including the children of the first cousin who had died in the lifetime of the testator, took their parent's share by way of substitution. *Burrell v. Baskerville*, 18 Law J. Rep. (N.S.) Chanc. 422; 11 Beav. 525.

(b) *Application of Proceeds.*

A testator devised all his real estate to trustees in trust to sell; and directed them to stand possessed of the purchase monies, in the first place, to pay all debts due from him at his decease, and

then to retain all costs, charges, and expenses attending the execution of the trusts, and then to pay a legacy of 500*l.* to a daughter of his heir-at-law, and to invest 500*l.* for the benefit of C for life, and after her decease for D. And as to all his ready money and securities for money, and all other his personal estate, he gave the same to D. He declared that the trustees should be allowed to retain to themselves all charges and expenses they might be put unto in the execution of his will, or in relation thereto; and appointed his trustees to be his executors. He did not give any legacy to his heir:—Held, first, that the produce of the real estate, after paying the charges which ought to be imposed on it, was undisposed of and went to the heir:—and, secondly, that the testator's debts were not thrown on the real estate in exoneration of the personal estate. *Collis v. Robins*, 16 Law J. Rep. (N.S.) Chanc. 251; 1 De Gex & S. 131.

A testatrix by will gave real estate to trustees in trust to sell, and to stand possessed of the proceeds as a fund of personal and not real estate, and declared that such proceeds, or any part thereof, should not in any event lapse for the benefit of her heir-at-law. After giving several legacies out of such proceeds, the testatrix declared that the trustees should pay and apply the residue to such persons and for such uses as she should by any codicil direct. The testatrix died without making any codicil to her will:—Held, in an administration suit by the next-of-kin, that the declaration that such proceeds should be personal estate, and the exclusion of the heir-at-law, raised no gift by implication in favour of the next-of-kin; and, consequently, that the heir-at-law was entitled to the surplus proceeds as undisposed of by the will. *Fitch v. Weber*, 17 Law J. Rep. (N.S.) Chanc. 361; 6 Hare, 145.

A testator gave all his real and personal estate to trustees, upon trust, to permit his wife to have the enjoyment of the rents, issues, and profits thereof, for her life, or otherwise, with her consent and approbation in writing, to sell the real and personal estate, and invest the monies to arise from the sale of his real and personal estate on government or real security, and pay the interest to her for her life, and after her decease to pay two legacies of 50*l.* each, and divide the residue of the monies to arise from his real and personal estate between his nephews and nieces living at the death of his wife. The real estate was not sold during the life of the widow:—Held, that the nephews and nieces were entitled to the produce of the real estate. *Waddington v. Yates*, 15 Law J. Rep. (N.S.) Chanc. 223.

(H) VOID DEVISE.

[See THELLUSSON ACT.]

(a) *Remoteness.*

[*Walker v. Petchell*, 5 Law J. Dig. 257; 1 Com. B. Rep. 652.]

Devise of lands to P M, testator's brother, for life, remainder to use of the first son of P M for life; remainder to use of the first son of the said first son and his heirs male; and in default of such issue, to the use of all and every other the son and sons of P M severally and successively for the like interests and limitations as he had before

directed with respect to the first son of P M and his issue; and in default of issue of P M, or in case of his not leaving any at his decease, then over. P M never had issue:—Held, that all the limitations subsequent to that to the use of the first son of P M were void for remoteness; and that if P M had had sons they would not by the application of the doctrine of *cy-pres* have taken an estate tail, inasmuch as by such a construction the estate would devolve in a line of succession different from that expressly designated by the testator. *Mony-penny v. Dering*, 17 Law J. Rep. (N.S.) Exch. 81; 16 Mee. & W. 418.

Devise of real estate to trustees, upon trust, to pay the rents and profits to the testator's daughter for life, and after her decease to convey the property unto and equally between and among all and every her children "who should live to attain twenty-three years of age," and to their heirs and assigns for ever; and if there should be but one such child, then to such only child, &c.; and in case there should be no such child or children, or being such, all of them should die under twenty-three, without lawful issue, then over; with power to the trustees to apply the interest of each child's share for his maintenance, notwithstanding such share should not then be absolutely vested:—Held, that the attainment of the age of twenty-three years was part of the description of the devisees; and the devise being to a class, after a life in being, the limitations over were too remote. *Bull v. Pritchard*, 16 Law J. Rep. (N.S.) Chanc. 185; 5 Hare, 567.

A testator devised his real estate to his executors, upon trust, to pay the rents for the support of his wife, and his present or future grandchildren during the life of his wife, and upon her decease on trust to convey the property to his present or future grandchildren, as they should attain the age of twenty-five, to hold the same unto his said grandchildren, their heirs and assigns for ever, as tenants in common:—Held, that the devise was void for remoteness. *Blagrove v. Hancock*, 18 Law J. Rep. (N.S.) Chanc. 20; 16 Sim. 371.

A testator gave his real and personal estate to trustees, on trust to pay the proceeds to his eldest grandson for life, with remainder to his children who should attain twenty-five, but if he should die without having any children, then to his other grandchildren. The eldest grandson died without issue:—Held, that although the gift to the children of the eldest grandson was void for remoteness, the subsequent limitation to the younger grandchildren was good. *Goring v. Howard*, 18 Law J. Rep. (N.S.) Chanc. 105; 16 Sim. 395.

(b) Failure of Object.

Testator devised all his houses to trustees, upon trust, after his wife's death to convey one of them whichever she might think proper, to M, and to convey all the others to C. M died in the testator's lifetime, but C survived him:—Held, that no choice having been made by M, the gift to C failed, and a general demurrer to a bill by the heir to have all the houses conveyed to him was overruled. *Boyce v. Boyce*, 16 Sim. 476.

DISSENTERS.

Penalties and disabilities in regard to religious opinions removed by 9 & 10 Vict. c. 59; 24 Law J. Stat. 161.

DISTRESS.

[See DOCK COMPANY—FRIENDLY AND BENEFIT SOCIETIES—LANDLORD AND TENANT—RATE—RENT—STAMP, Agreement—TRESPASS—TROVER.]

- (A) WHO MAY DISTRAIN.
- (B) WHAT MAY BE DISTRAINED.
- (C) EXCESSIVE DISTRESS.
- (D) DAMAGE FEASANT.

(A) WHO MAY DISTRAIN.

A tenant by *elegit* has a right to distrain without attornment. *Lloyd v. Davies*, 18 Law J. Rep. (N.S.) Exch. 80; 2 Exch. Rep. 103.

(B) WHAT MAY BE DISTRAINED.

Perishable commodities, such as the flesh of animals, which are incapable of being restored in the same condition within a reasonable time, are not distrainable for rent at common law. *Morley v. Pincombe*, 18 Law J. Rep. (N.S.) Exch. 272.

(C) EXCESSIVE DISTRESS.

In an action for an excessive distress for taking the goods of the plaintiff, it appeared that of the goods taken part belonged to the plaintiff and part to a third party:—Held, that the declaration might be amended by stating the illegal distress to have taken place with respect to the goods of the plaintiff and of the third party, and that the plaintiff would be entitled to recover some amount of damages, and that the other party whose goods were taken would also be entitled to maintain an action and recover damages.

Semle—that no joint action for excessive distress could be brought by the plaintiff and the third party. *Bail v. Mellor*, 19 Law J. Rep. (N.S.) Exch. 279.

(D) DAMAGE FEASANT.

To a declaration in trespass for seizing seven horses and selling two of them, the defendant pleaded that he distrained the seven horses damage feasant, and impounded them, that he supplied the seven horses so impounded with food, and that he sold the two horses under the authority of the statute 5 & 6 Will. 4. c. 59, and applied the produce of the sale in discharge of the value of the food so supplied, and of the expenses attending the sale:—Held, after verdict for the defendant, that as the statute authorizes the party to sell only so many as may be necessary to indemnify himself, the plea was bad for not shewing that it was necessary to sell more than one horse. *Layton v. Hurry*, 15 Law J. Rep. (N.S.) Q.B. 244; 8 Q.B. Rep. 811.

DIVORCE.

[See MARRIAGE.]

- (A) GROUNDS FOR.
- (B) WHEN BARRED.
 - (a) *In general.*
 - (b) *Condonation.*
- (C) PLEADING, EVIDENCE, AND PRACTICE.

(A) GROUNDS FOR.

Extreme familiarities of a wife with an articulated pupil of the husband, inconsistent with the relative position of each, coupled with *confessions* of the wife of her criminality,—Held, sufficient to found a sentence of divorce by reason of adultery. *Noverre v. Noverre*, 1 Robert. 428.

An allegation was admitted on behalf of a wife, responsive to a libel for a restitution of conjugal rights, pleading, in bar thereto, cruelty, and praying a divorce:—Held, reversing the decision of the Court of London, that the facts, as detailed in evidence on that allegation, did warrant the conclusion "that she could not return home with safety and without a reasonable apprehension of a repetition of the violence deposed to." In consequence, a sentence of divorce in favour of the wife was pronounced. *Dysart v. Dysart*, 1 Robert. 470.

Answers to an allegation pleading in general terms a denial of acts of cruelty charged in a libel must, like the allegation, be general and not specific. Spitting in a wife's face, accompanied with pushing and dragging her about a room, and the admission by the husband that he had once slapped her face,—Held, to be sufficient for a divorce by reason of cruelty. Affectionate letters from a wife to her husband are not necessarily inconsistent with cruelty on his part. *Saunders v. Saunders*, 1 Robert. 549.

An allegation "in part responsive" to a wife's libel for a divorce, by reason of the husband's adultery, pleading some contradictions to the libel, but not denying the adultery charged, was *rejected*, on the ground that it in substance admitted so much of the charge as, if proved by the wife, would entitle her to a divorce, and that nothing was pleaded which in law amounted to connivance or condonation on her part. *Angle v. Angle*, 1 Robert. 634.

(B) WHEN BARRED.

(a) *In general.*

A petitioner for a divorce bill held excused for not having brought an action for damages against the adulterer, upon the statement of his witnesses, that they did not find him until three years after the discovery of the adultery, and that the petitioner was not able to pay the expenses of an action.

A lapse of sixteen years from the adultery not made an objection to the application for divorce at the end of that time. *In re Martin's Divorce Bill*, 1 H.L. Cas. 79.

The wife's general bad conduct was admitted as an excuse for the husband omitting to bring an action against the adulterer. A lapse of eight years from the discovery of the wife's adultery till the petition for a divorce was presented, was held to be sufficiently accounted for by the husband's inability

to bear the expenses of a divorce bill. *In re Brook's Divorce Bill*, 1 H.L. Cas. 159.

The acceptance, by the petitioner in a divorce bill, of an offer of a certain sum upon a writ of inquiry to assess the damages, after judgment by default in an action of *crim. con.* against the wife's paramour,—Held, under the circumstances, not to be a bar to the bill. *In re Heneage's Divorce Bill*, 1 H.L. Cas. 496.

(b) *Condonation.*

Husband and wife separated by mutual consent, in consequence of the conduct of the husband towards the wife, which in itself amounted to legal cruelty. The wife afterwards sued in the Arches Court for restitution of conjugal rights, and by virtue of a decree of that Court, the parties again cohabited, when the husband renewed his acts of cruelty towards the wife, who continued to cohabit with him notwithstanding for six months. Upon a suit brought by the wife for a divorce, by reason of cruelty, such divorce decreed; the Judicial Committee, in affirming the sentence of the Arches Court, holding that the former cruelty was revived by the subsequent acts, and was not condoned by the cohabitation enjoined by the sentence for restitution of conjugal rights. *Wilson v. Wilson*, 6 Moore P.C. 484.

(C) PLEADING, EVIDENCE, AND PRACTICE.

The enforcement of the standing order of the House, requiring the petitioner in a divorce bill to present himself for examination at the bar, may be dispensed with on account of the state of his health. *In re Heneage's Divorce Bill*, 1 H.L. Cas. 496.

In a suit for a divorce, *a mensâ et thoro*, a decree of confrontation was issued for the wife, who had eloped to America, to appear to be identified, when her proctor tendered a defensive allegation. The Arches Court of Canterbury rejected the allegation, as she was in contempt by reason of her non-appearance to the decree of confrontation. Such rejection affirmed, on appeal, by the Judicial Committee of the Privy Council.

A divorce *a mensâ et thoro*, on the ground of adultery, pronounced for, upon the evidence of a single witness as to the cohabitation of the wife after her elopement, there being corroborating circumstances. *Curtis v. Curtis*, 5 Moore P.C. 252.

An interlocutory sentence of divorce was pronounced before the bond required by the 107th Canon was given, and there was an appeal from that sentence asserted *apud acta*; but subsequently the bond was given. Before the inhibition was served, the Court was moved to *sign* the sentence in writing to remove the nullity by the 108th Canon of the former sentence; after argument, the Court, holding that it has power before the service of an inhibition to correct an error, *signed* the sentence. *Dysart v. Dysart*, 1 Robert. 543.

An attempt was made upon the suit of a wife for a divorce, to serve the husband with a citation taken out in October 1848, at his last known place of residence, which was within the jurisdiction of the Court. It subsequently appeared he had left that residence in March 1847. A decree by ways and means was, on the return of the citation, executed at that house, and at the parish church. On the 5th of

February 1849, he was personally served in the the West Indies. The Court on motion pronounced husband in contempt "for the purpose of carrying on the proceedings, and placing the evidence on record."

It was stated there was no jurisdiction in the West Indies to enable the wife to institute a suit; and eventually a sentence of divorce was pronounced. The proceedings throughout were *in poenam*. *Dasent v. Dasent*, 1 Robert. 800.

A party, in her personal answers to a libel, is not bound to answer to articles which, though not on the face of them criminatory, may, by possibility, furnish a link in the evidence against herself. *King v. King*, 2 Robert. 153.

DOCK COMPANY.

[See HARBOURS.]

By the 6 Will. 4. c. xxxi. the St. Katharine's Dock Company are empowered to receive for all goods, &c. deposited on their premises, rates not exceeding those usually paid in the port of London for wharfrage, &c. of such goods, &c., and in case default is made in payment of the said rates, or any part thereof, it shall be lawful to the collectors of the company to retain and sell all or any part of such goods, &c., and out of the monies thence arising to retain and pay the rates payable in respect of such goods, &c., returning the overplus, &c. to the party entitled; and in case such goods, &c. shall be removed before the rates payable in respect of the same shall be fully paid, it shall be lawful for the said company to take and distrain or sell any goods, &c. of the owner, &c. thereof, in manner before mentioned. Certain rates payable in respect of goods belonging to A, which had previously been removed from the premises of the company, being unpaid, the company claimed to distrain certain other goods of A then on the premises until payment of the rates due in respect of both those sets of goods. A had applied to have the goods then on the premises delivered up to him, and was informed by the company that no more goods would be delivered to his order until his debt was paid or reduced:—Held, that the statute enabled the company to distrain and sell any goods in their possession for the recovery of rates payable in respect of other goods of the same owner.

Held, also, that the above facts amounted to a distraining and detaining within the act.

Quære.—Whether evidence to prove a customary right of general lien in the company was inadmissible, by reason of the act having conferred a specific remedy for the recovery of rates. *Green v. the St. Katharine's Dock Co.*, 19 Law J. Rep. (n.s.) Q.B. 53.

DOMICILE.

[See PRACTICE, IN EQUITY, Decrees and Orders.]

Domicile must be *de facto* not *de jure*. Therefore the fact of a party resident in France, but represented by an attorney in England, will not create a constructive domicile, so as to entitle a party to set up as a discharge to a mortgage, a plea of prescription of ten years *entre presens*. *Beaucé v. Muter*, 5 Moore P.C. 69.

DONATIO MORTIS CAUSA.

F, about two years before his death, in the presence of J C, deposited in a box a wrapper, inclosing a written paper, and ten Dutch bonds. The wrapper was indorsed, "Private, to J C. This parcel to be delivered as above, unopened, and with care." This paper stated that F had given to J C and his sisters various gifts by a will then void, and contained a partition of the bonds between J C and his sisters. It also contained a note by F to J C that F had adopted that procedure to avoid legacy duty, and recommended perfect silence on the subject. After this deposit J C kept the key, and F the box; and the box was periodically opened, in order to cut off the coupons, for the payment of the dividends on the bonds, which were received by F. F, about a month before his death, sent the box to J C, with a message that the box and contents belonged to J C:—Held, that, under these circumstances, there was no effectual disposition of the bonds to J C and sisters during the life of the testator. *Farquharson v. Cave*, 15 Law J. Rep. (n.s.) Chanc. 137; 2 Coll. C.C. 356.

DOWER.

The number of acres mentioned in a count in dower is not material; and under a plea alleging the lands to be subject to a term it is enough to shew that all the defendant's lands in the parishes mentioned in the count are subject to the term, although such lands are not of the same extent as mentioned in the count.

The surrender of a term assigned to attend the inheritance ought not to be presumed except there has been a dealing with the estate in such a manner as reasonable men of business would not have dealt with it, unless the term had been put an end to.

The owner of an estate, a term in which has been assigned to a trustee to attend the inheritance, is, while in possession of the land, tenant at will to the trustee.

It is only on the determination of a tenancy at will that there is such a vested right of entry as is contemplated by the 2nd section of the Statute of Limitations, 3 & 4 Will. 4. c. 27.

The 3rd section of the statute does not apply to the case of a *cestui que trust* in possession under a trustee. *Garrard v. Tuck*, 18 Law J. Rep. (n.s.) C.P. 338; 8 Com. B. Rep. 231.

To a bill for dower, the defendants in possession denied the widow's title, alleging that her husband had not been seised of an estate of inheritance in the premises; the allegation being founded on information as to the time of his death believed to be correct, but afterwards found to be erroneous.—The Court decreed the dower and arrears for six years before filing the bill, but without costs.

Semble.—If the defence to a bill for dower be groundless or founded on facts which the defendant knew, or with reasonable diligence might have known, to be untrue, the decree would be with costs. *Bamford v. Bamford*, 5 Hare, 203.

DRAINAGE.

[See RATE; RETROSPECTIVE RATE.]

Advances of public money, to promote drainage of lands, authorized, 9 & 10 Vict. c. 101; 24 Law J. Stat. 267.

The 9 & 10 Vict. c. 101, altered and amended by 10 Vict. c. 11; 25 Law J. Stat. 22.

Drainage of lands facilitated by 10 & 11 Vict. c. 38; 25 Law J. Stat. 148.

The 9 & 10 Vict. c. 4, extended and amended by 10 & 11 Vict. c. 80; 25 Law J. Stat. 232.

The form of certificates authorizing the advance of money for drainage simplified by 11 & 12 Vict. c. 119; 26 Law J. Stat. 310.

Further provisions as to drainage made by 12 & 13 Vict. c. 100; 27 Law J. Stat. 201.

Further provisions made by 13 & 14 Vict. c. 31; 28 Law J. Stat. 41.

Order of Court, regulating applications under 8 & 9 Vict. c. 56; 15 Law J. Rep. (n.s.) Chanc. 119.

By an act for the drainage of certain lands in Lincolnshire, it was provided that the lords or ladies of three manors for the time being, or in their absence their respective agents appointed in writing, according to a specified form, should be commissioners for executing the act; that no person should act as a commissioner or agent of a commissioner until he had made and subscribed a declaration in the form given by the act; and that no act of the commissioners should be valid, unless done at some public meeting. The three lords of the manors never made or subscribed the declaration, and a few days after the statute passed (being all then in England, but absent from Lincolnshire) they by separate instruments in the form given by the act, and executed by them apart from each other, appointed the defendants their respective agents. The defendants respectively made and subscribed the declaration before they did any act as commissioners:—Held, that the effect of the act was to make the agents duly appointed themselves commissioners during the absence of the lords; and that such appointment, when once made, continued in force till superseded by the actual presence of the respective lords. That the lords not being themselves commissioners, it was not necessary for them to make the declaration, or to appoint the defendants at a public meeting.

By the statute it was provided that if the commissioners required land for the purposes of the act, they should give a notice of their intention, stating the particulars of the land required, and if the amount of compensation were disputed the commissioners were to issue their warrant to the sheriff to summon a jury to assess compensation, and the sheriff was to give judgment for the sum so assessed:—Held, that the warrant and inquisition need not refer to the notice, or give any particulars of the land required, in order to give the sheriff and jury jurisdiction to inquire into the question of compensation. *Ostler v. Cooke*, 18 Law J. Rep. (n.s.) Q.B. 185; 13 Q.B. Rep. 143.

ECCLESIASTICAL COMMISSIONERS.

The acts relating to the Ecclesiastical Commissioners for England amended by 13 & 14 Vict. c. 94; 28 Law J. Stat. 261.

Previously to the passing of the act 3 & 4 Vict. c. 113, an *ex officio* information had been filed by the Attorney General, at the suggestion of the Charity Commissioners for the administration of the property vested in the governors of the revenues, &c. of Wimborne Minster Grammar School. By that act it was enacted (amongst other things) that so much of the property belonging to the collegiate church of Wimborne Minster as should, upon due inquiry, be found legally applicable thereto, should, by the like authority (*i. e.* the ratification of a scheme by the Queen in Council) be applied for the purpose of making a better provision for the cure of souls in the parish of Wimborne Minster. A portion of the property so vested in the governors, who were defendants to the information, was alleged to belong to the collegiate church and to be applicable to the cure of souls within the parish of Wimborne Minster. The Ecclesiastical Commissioners appointed under the act presented a petition in the suit, seeking liberty to attend before the Master under a decree touching the settlement of a scheme for the disposition of the charity funds:—Held, that the Ecclesiastical Commissioners had no special jurisdiction in the charity in question, and could not sustain such a petition, nor could they be deemed to be parties to the suit; but permission was given them to attend the Master at their own costs, the Attorney General consenting thereto:—Held, that the Ecclesiastical Commissioners acting under the act 3 & 4 Vict. c. 113, have no jurisdiction whatever over or in conflict with this or any other Court, nor have they vested in them any such trust as can be recognized in this court; having no estate or interest in the matters in question, the subject of the suit. *Attorney General v. Wimborne School*, 16 Law J. Rep. (n.s.) Chanc. 313; 10 Beav. 209.

ECCLESIASTICAL COURTS.

The law as to ecclesiastical jurisdiction amended by 10 & 11 Vict. c. 98; 25 Law J. Stat. 270.

The remedies of sequestrators of ecclesiastical benefices extended by 12 & 13 Vict. c. 67; 27 Law J. Stat. 93.

Admission of Proctors.

The lawful admission of proctors depends upon the usage and practice of the court into which they are admitted.

A decree of a Judge of a diocesan court for the admission of proctors, contrary to the usage and practice of his court, reversed, on appeal. *Fell v. Bond*, 1 Robert. 740.

Jurisdiction, Conclusiveness of Sentence.

A marriage between A and B was declared void by the ecclesiastical court. Some years afterwards a child of A and B *en ventre sa mère* at the date of the sentence claimed property as heir of A:—Held, that he was bound by the sentence, though he might

avoid its effect by shewing fraud and collusion between the parties to the proceedings; and that proof that the costs of the unsuccessful party had been agreed to be paid, and that some witnesses were not examined, and that difficulties were not interposed which might have been, did not amount to proof of such fraud and collusion.

Semble—the child could not by any means shew that the sentence was erroneous. *Perry v. Meddowcroft*, 10 Beav. 122.

ECCLESIASTICAL DISTRICTS.

The law relative to the assignment of ecclesiastical districts amended by 11 & 12 Vict. c. 37; 26 Law J. Stat. 71.

EJECTMENT.

[See EVIDENCE—LANDLORD AND TENANT.]

(A) WHEN MAINTAINABLE.

- (a) *Right of Re-entry under 4 Geo. 2. c. 28.*
- (b) *Title by Possession.*
- (c) *Attendant and Outstanding Terms.*
- (d) *Notice to quit and Demand of Possession.*
- (e) *Against Married Women.*
- (f) *By one Executor.*
- (g) *By Tenants in Common.*
- (h) *Confession of Entry in Consent Rule.* [See (d) *Notice to quit.*]
- (i) *Disclaimer of Title* [See (d) *Notice to quit.*]
- (k) *Surrender, when not presumed.* [See (c) *Outstanding Terms.*]

(B) DECLARATION AND NOTICE.

- (a) *Form of.*
- (b) *Amendment of.*
- (c) *Service of.*
 - (1) *In general.*
 - (2) *Constructive Service.*
 - (3) *When Notice without Date.*
 - (4) *On one Executor.*
 - (5) *On Tenant in Possession.*
 - (6) *On Wife of Tenant.*
 - (7) *On Servant of Tenant.*
 - (8) *On Manager of a Firm.*
 - (9) *On Railway Company.*

(C) CONSENT RULE.

- (a) *Effect of Delivery of without Attorney's Signature.*
- (b) *Amendment of when Title adverse.*
- (c) *Administrator's Right to Costs upon.*

(D) STAYING PROCEEDINGS.

(E) PARTICULARS.

(F) RIGHT TO BEGIN.

(G) JUDGMENT.

- (a) *Against the Casual Ejector.* [See (B), (c).]
- (b) *Setting aside.*
- (c) *Motion for, under 4 Geo. 2. c. 28.*

(H) RECOGNIZANCE.

(I) TRESPASS FOR MESNE PROFITS.

(A) WHEN MAINTAINABLE.

(a) *Right of Re-entry, under 4 Geo. 2. c. 28.*

In ejectment brought upon a right of re-entry, under the 4 Geo. 2. c. 28. s. 2, it must appear that the landlord had a power to re-enter, *in respect of the non-payment of half a year's rent*, at the time of affixing the declaration and notice upon the premises. *Doe d. Dixon v. Roe*, 7 Com. B. Rep. 134.

(b) *Title by Possession.*

B having entered into possession of premises as tenant at will to his father in 1815, continued to hold them till 1834, when he died, leaving his widow, the lessor of the plaintiff, in possession, and a son and other children. The widow continued to hold them till 1847, when she was turned out of possession by the defendant, who claimed under a mortgage made in 1829:—Held, first, that the possession of the lessor of the plaintiff, in connexion with that of the husband, though a defence to an action of ejectment by virtue of stat. 2 & 3 Will. 4. c. 27, was not a title to recover in such an action.

Secondly, that the possession of the husband of the lessor of the plaintiff was *prima facie* evidence as against her of title in his heir-at-law. *Doe d. Carter v. Barnard*, 18 Law J. Rep. (N.S.) Q.B. 306.

By the statute 32 Geo. 2. c. 2. s. 1, the Duke of B was authorized and empowered to supply a certain canal with water, and for that purpose, in, upon, or through the lands, &c. of the King's Majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate, to dig, cut, trench, &c. for the making, using, maintaining and repairing the said canal. By section 3. he was empowered to enter upon the lands, &c. of the said several persons, bodies politic, &c. through which the said canal was intended to be made, in order to survey and set out the same: making satisfaction for damage. By section 4. bodies politic, corporate, &c. were empowered to convey to the Duke the lands so set out; and it was provided, that all contracts should be enrolled by the clerk of the peace for the county. Sect. 6. provided, that in certain cases the sums to be paid for the absolute purchase of such lands, &c., or the recompence to be made for damages, should be assessed by juries, whose verdicts, and the judgment thereupon pronounced, should be binding and conclusive against the King's Majesty, his heirs, &c., and against all bodies politic, corporate, &c., and all persons whatsoever, and should be recorded with the clerk of the peace. The powers given by this statute to the Duke of B were continued and extended by subsequent statutes, namely, the 33 Geo. 2. c. 2, the 2 Geo. 3. c. 11. and the 6 Geo. 3. c. 96, none of which, however, conferred on the Duke of B any further rights to the ownership of the soil of such lands, &c. The canal was made seventy years ago, and forty-three years ago an opening was made from a certain pool, called the Big Pool: by means of which the Big Pool communicated with and fed the canal. About ten years before the trial the defendants, who claimed under the Duke of B, erected some lime-kilns, some of which stood on the water-way, over which the water of the Big Pool flowed over, into, and fed

the canal. At the time of the passing of the statutes the whole of the land was the property of the Crown. In ejectment by the lessee of the Crown to recover the land covered with the water of the Big Pool, and also, that on which the limekilns stood, there being no evidence of any conveyance from the Crown to the Duke of B, made and enrolled, under the power of the statute or otherwise,—Held, that as the statute gave him no more than such user of the soil as was necessary for the purposes of the canal, and which user was consistent with the Crown's retaining the freehold in the soil, he would not be considered as having acquired the right to the soil of so much of the land sought to be recovered in the action, as had been taken and used for the purposes of the canal.

And, therefore, secondly, that there had been no adverse occupation on the part of the defendants as against the Crown.

And, lastly, assuming the erection of the limekilns to be a user of the land by the defendants which cannot be considered to have been for the purpose of the canal, that such erection having taken place within ten years, no title could be considered as having been acquired as to them by adverse possession. *Doe d. Regina v. the Archbishop of York*, 19 Law J. Rep. (N.S.) Q.B. 242.

The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed:—Held, that these acts were not sufficient to disturb the defendant's possession, under the 3 & 4 Will. 4. c. 27. s. 10. *Doe d. Baker v. Combes*, 19 Law J. Rep. (N.S.) C.P. 306.

(c) *Attendant and Outstanding Terms.*

Where a term has been assigned to a trustee to attend the inheritance more than twenty years before action brought, and no possession has accompanied the legal estate, the right to recover, in respect of that term, is barred by 3 & 4 Will. 4. c. 27. ss. 2, 3. *Doe d. Jacobs v. Phillips*, 16 Law J. Rep. (N.S.) Q.B. 269; 8 Q.B. Rep. 158.

A, being tenant for life, under a power of leasing created in 1763, demised to the defendant in 1826. The lease was not a good execution of the power, and in 1844, after the death of A, B the reversioner brought an ejectment against the defendant, the demise being laid by B only. It appeared at the trial that in 1708 a term of a thousand years was created in the property in question for certain purposes, and to attend the inheritance, and that in an indenture of the 1st of March 1757, the indenture creating the term was recited, and the executor of the surviving trustee of the term was required to assign it to attend the inheritance:—Held, that the action being brought and tried before the 31st of December 1845, when the 9 & 10 Vict. c. 112. came into operation, the term could not be presumed to be surrendered; and that B could not recover on his own demise.—Held, secondly, that the defendant was not estopped from setting up the

term, as he did not thereby deny the general title of B, but protected his own lease which was consistent with such title.

At the trial, neither the deed creating the term nor the indenture reciting it was produced after notice, but an abstract, which had been compared with the deeds, was in court in the hands of the solicitor of a person who had lately negotiated with B for an exchange of the property, such treaty having gone off. This solicitor stated that he had not received permission from his client to produce them, but that he was ready to do so. The Judge decided that the abstract ought to be received in evidence:—Held, that he was right. *Doe d. Earl of Egremont v. Langdon*, 18 Law J. Rep. (N.S.) Q.B. 17; 12 Q.B. Rep. 711.

(d) *Notice to quit and Demand of Possession.*

A (tenant in tail) made a lease for years to B not conformable to the provisions of 32 Hen. 8. c. 28. A died, and C, the next tenant in tail in remainder, applied to B to attorn, and demanded rent from him. B did not attorn, and after some negotiation, refused to pay any rent, on the ground that D was entitled to the estate:—Held, that B did not become tenant to C, and that C could maintain ejectment against B without serving him with any previous notice to quit; that the confession of entry in the consent rule was sufficient foundation to support the ejectment; and that setting up the title of D amounted to a disclaimer of the title of C. *Doe d. Phillips v. Rollings*, 17 Law J. Rep. (N.S.) C.P. 268; 4 Com. B. Rep. 188.

H T, being seised in fee of certain premises, devised the same to his son W T for life, with remainder to the issue of W T as tenants in common in fee. In April 1845 W T died, having by will appointed executors, who managed the estate for the infant children of W T, and, in the years 1845 and 1846, received rent from the defendant, who had been in possession prior to the death of W T:—Held, that the acts of the executors did not bind the infant children, and that the latter might maintain ejectment against the defendant without any previous notice to quit or demand of possession. *Doe d. Thomas v. Roberts*, 16 Mee. & W. 778.

Several brothers and sisters divided certain property between them at their mother's death, supposing it to have been hers, and verbally allotted a house to a sister. The property really had been their deceased father's:—Held, in ejectment by the father's devisee (one of those brothers), that he could not recover without a demand of possession; and the demand of possession being after the day of the demise, the Judge would not allow an amendment by altering the day of the demise, as the arrangement was equitable.

In ejectment, evidence that the shutters of the house claimed were repaired, and a washhouse built on the premises, and that this was paid for by W L, is evidence to go to the jury of the seisin of W L. *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448.

(e) *Against married Women.*

The nominal plaintiff in ejectment may recover against a married woman who has entered into the common consent rule, though it appear on the trial

that the lessor of the plaintiff is, and was at the time of the demise laid in the declaration, the defendant's husband. *Doe d. Merigan v. Daly*, 8 Q.B. Rep. 934.

(f) *By one Executor.*

Two of three co-executors may recover in ejectment on a demise in the names of both. *Doe d. Stace v. Wheeler*, 16 Law J. Rep. (N.S.) Exch. 312; 15 Mee. & W. 623.

(g) *By Tenants in Common.*

A, seised in fee of a moiety of certain premises, and entitled to the equity of redemption in the other moiety, of which B was mortgagee, joined with B in demising the entirety of the premises to the defendant, by a lease which stated that B was mortgagee of one moiety, and that he demised by the direction of A; the rent was reserved to A and B jointly, and a joint right of re-entry by them was provided for breach of the covenants. In ejectment, on the joint demise of A and B,—Held, by *Coleridge, J.* and *Wightman, J.*, that being tenants in common the legal effect of the lease was to pass several interests, and that the lessors of the plaintiff should have severed in their demises. By *Lord Denman, C.J.* and *Erle, J.*, that the lessors of the plaintiff were entitled to recover against the defendant who took under the deed containing a joint demise, and providing for a joint right of re-entry by them. By *Erle, J.*, that a tenant in common claiming by a several title, as where he separately demised his portion, ought to declare in ejectment on his own demise; but if tenants in common claim upon a joint right of re-entry reserved to them, they ought to join in their demises.

And, *semble*, that in other cases tenants in common may join or sever at their option. *Doe d. Campbell v. Hamilton*, 19 Law J. Rep. (N.S.) Q.B. 99.

(h) *Confession of Entry in Consent Rule.*

[See (d) *Notice to quit*.]

(i) *Disclaimer of Title.*

[See (d) *Notice to quit*.]

(k) *Surrender, when not presumed.*

[See (c) *Outstanding Terms*.]

(B) DECLARATION AND NOTICE.

(a) *Form of.*

Where a declaration in ejectment was entitled of "Trinity term, 9th (instead of 8th) Vict., and the notice was not dated, but called on the tenant to appear in "next Michaelmas term," the Court granted a rule for judgment. *Doe d. Gyde v. Roe*, 15 Law J. Rep. (N.S.) Exch. 8; 14 Mee. & W. 788; 3 Dowl. & L. P.C. 309.

The Court will not grant a rule *nisi* for judgment against the casual ejector in a country cause, where the notice required the defendant to appear on "the first day of the term," instead of in "the term." *Doe d. Burton v. Roe*, 16 Law J. Rep. (N.S.) C.P. 86; 3 Com. B. Rep. 607.

A notice in ejectment to a tenant in possession to appear in the next term but one is insufficient. *Doe d. Love v. Roe*, 17 Law J. Rep. (N.S.) C.P. 176; 5 Com. B. Rep. 512.

The notice served with the declaration upon the

tenant in possession in a country ejectment, required him to appear on the first day of the following term, and not generally during the term:—Held, *Coleridge, J. dubitante*, that the notice was bad, and a good ground for discharging a rule *nisi* for judgment against the casual ejector. *Doe d. Todd v. Roe*, 19 Law J. Rep. (N.S.) Q.B. 204.

(b) *Amendment of.*

Where ejectment was brought by the representatives of a mortgagee against the heir-at-law of a mortgagor, to recover the mortgaged premises, and in consequence of negotiations for a settlement having taken place, the cause was not taken down to trial until after the term of years laid in the declaration had expired, the Court amended the declaration and issue, by extending the term in the declaration, although twenty years had elapsed from the original mortgage. *Doe d. Rabbits v. Welsh*, 15 Law J. Rep. (N.S.) Q.B. 312; 4 Dowl. & L. P.C. 115.

(c) *Service of.*

(1) *In general.*

Where a subsequent acknowledgment by the attorney of the tenant is relied on to aid an insufficient service of the declaration and notice in ejectment, the affidavit must distinctly shew that the party is the tenant's attorney in the matter. *Doe d. Reynolds v. Roe*, 1 Com. B. Rep. 711.

Where several houses were comprised in one lease, service as to some of them, by affixing copies on the outer doors, the premises being unoccupied, and by serving two persons claiming to be assignees respectively of part, and the attorney of one of them, held sufficient. *Doe d. Chippendale v. Roe*, 7 Com. B. Rep. 125.

To a rule calling on the tenant in possession to shew cause why service of a declaration and notice in ejectment on his daughter, on the premises, should not be deemed good service, it is no answer that the notice was not read over or explained to the party served, and that the service took place at 10 o'clock of the night preceding the first day of term; unless it is sworn that the tenant was not acquainted with the nature and meaning of the proceedings before the first day of term. *Doe d. Kendrick v. Roe*, 5 Dowl. & L. P.C. 578.

(2) *Constructive Service.*

In motions for judgment against the casual ejector where a constructive service of the declaration and notice on the tenant in possession is relied upon, the affidavit must state that the deponent served the tenant in possession, by delivering or leaving a copy of the declaration and notice with the persons upon whom the service was actually made, and under the circumstances which occurred. *Doe d. Piggott v. Roe*, 15 Law J. Rep. (N.S.) Q.B. 311; 4 Dowl. & L. P.C. 88.

(3) *When Notice without Date.*

A party is entitled to a rule for judgment against the casual ejector where the notice to appear is properly served, although it bears no date. *Doe d. Woodhouse v. Roe*, 18 Law J. Rep. (N.S.) Exch. 73; 3 Exch. Rep. 131.

(4) *On one Executor.*

Service on one of two co-executors who were in possession of the premises,—Held, sufficient for judgment against the casual ejector. *Doe d. Strickland v. Roe*, 4 Dowl. & L. P.C. 431.

(5) *On Tenant in Possession.*

The Court requires the same strictness of service of a declaration in ejectment, where the tenant in possession is an attorney, as in the case of any ordinary tenant. *Doe d. Fowler v. Roe*, 4 Dowl. & L. P.C. 639.

Service of a declaration and notice upon the tenant, by shewing him the same *off the premises*, and attempting to serve him with a copy, and to explain the same to him, and subsequently leaving a copy with a servant of the tenant on the premises, and explaining it to him,—Held, sufficient. *Doe d. Hope v. Roe*, 3 Com. B. Rep. 770.

(6) *On Wife of Tenant.*

In ejectment, service of the declaration on the wife of the tenant in possession is not sufficient unless it appear that she is on the premises at the time she receives it. *Doe d. Royle v. Roe*, 16 Law J. Rep. (N.S.) C.P. 249; 4 Com. B. Rep. 256.

On motion for judgment against the casual ejector, service on the wife of the tenant in possession, by delivering a copy of the declaration and notice to her, and reading the same over to her, is sufficient. *Doe v. Roe*, 17 Law J. Rep. (N.S.) Exch. 176.

(7) *On Servant of Tenant.*

The Court refused to grant a rule *nisi* for judgment against the casual ejector, upon an affidavit stating a service on a servant of the tenant upon the premises on the 8th of January, and an acknowledgment stated to be made by the tenant "a few days afterwards," that the declaration, &c. had reached him. *Doe d. Watson v. Roe*, 5 Com. B. Rep. 521.

(8) *On Manager of a Firm.*

Where the premises were held on lease by several persons trading as a firm, service upon the manager of the works upon the premises, and personal service on one of the firm, held sufficient, the affidavit stating them to be joint tenants of the premises. *Doe d. Bennett v. Roe*, 7 Com. B. Rep. 127.

(9) *On Railway Company.*

In ejectment against a railway company, personal service of the declaration upon the secretary of the company is good, under 8 & 9 Vict. c. 16. s. 135. *Doe d. Bayes v. Roe*, 16 Law J. Rep. (N.S.) Exch. 273; 16 Mee. & W. 98.

(C) CONSENT RULE.

(a) *Effect of Delivery of without Attorney's Signature.*

A consent rule delivered without the signature of the defendant's attorney is a nullity, and the lessor of the plaintiff may sign judgment against the casual ejector, notwithstanding an appearance has been in fact entered at the Master's office. *Doe d. Poole v. Willes*, 18 Law J. Rep. (N.S.) Q.B. 24.

(b) *Amendment of, when Title adverse.*

Where two parties delivered separate consent rules claiming to defend, the one for the whole of the premises in the declaration and the other for part, the Court directed the consent rules to be amended by confining them respectively to such part of the premises as each party really defended for. *Doe d. Lloyd v. Roe*, 15 Law J. Rep. (N.S.) Exch. 283; 15 Mee. & W. 431.

(c) *Administrator's Right to Costs upon.*

In an action of ejectment, in which the ordinary consent rule had been entered into, the defendant obtained a verdict. In March 1846, a rule *nisi* for a new trial was obtained, and discharged in January 1847. The defendant died intestate in November 1846, and C. H. the defendant's son, was appointed administrator in March 1847. Afterwards, in the same month, judgment in the action was ordered by a Judge at chambers to be signed as of the 21st of April 1846, and on the 24th of April 1847, a rule *nisi* was obtained, calling upon the lessor of the plaintiff to pay to C. H. the defendant's administrator, the taxed costs of the action:—Held, that the consent rule in ejectment is a personal undertaking only; that the statute 1 & 2 Vict. c. 110. s. 18, does not alter its personal character, and therefore the right to costs upon such rule does not survive to the personal representatives of the successful party. *Doe d. Harrison v. Hampson*, 17 Law J. Rep. (N.S.) C.P. 147; 5 Dowl. & L. P.C. 484; 4 Com. B. Rep. 745.

(D) STAYING PROCEEDINGS.

[*Doe d. Wyatt v. Byron*, 5 Law J. Dig. 271; 1 Com. B. Rep. 623.]

In ejectment brought by A and his wife, claiming as devisees under a subsequent will of J S, against B, who claimed as devisee under a prior will of J S, the Court stayed the proceedings until the costs were paid in a former ejectment brought by C (brother of B and claiming under the same prior will) against A and a third party, who claimed under the same subsequent will, and in which judgment had been entered for the plaintiffs; the validity of the same wills being the question in both actions. *Doe d. Brayne v. Bather*, 18 Law J. Rep. (N.S.) Q.B. 2; 12 Q.B. Rep. 941.

(E) PARTICULARS.

In ejectment brought by remainderman against lessee of the late tenant for life, on the ground that the lease was granted under a power not properly executed, the Court will, on motion, order the lessor of the plaintiff to give particulars of the alleged defects in the execution. *Doe d. Earl of Egremont v. Williams*, 7 Q.B. Rep. 686.

(F) RIGHT TO BEGIN.

In ejectment the lessor of the plaintiff claimed under a will of the testator, dated the 23rd of September 1844. The defendant claimed under a subsequent will of the same testator, dated the 30th of December 1844. The defendant admitted that the will of the 23rd of September was a perfect will in every respect, and upon that admission claimed the right, and was allowed by the Judge, to begin at

the trial:—Held, that the admission of the defendant was not an admission of the whole of the plaintiff's case, and therefore the right to begin had been improperly conceded to the defendant.

If it appears to the Court that the party entitled to begin at the trial has been deprived of that right, and that his cause has been thereby substantially prejudiced, a new trial will be granted. *Doe d. Bather v. Brayne*, 17 Law J. Rep. (N.S.) C.P. 127; 5 Com. B. Rep. 655.

(G) JUDGMENT.

(a) *Against the casual Ejector.*

[See *ante*, (B) Declaration and Notice, (c) *Service of*]

(b) *Setting aside.*

[*Doe d. the Trustees of Bedford Charity v. Payne*, 5 Law J. Dig. 269; 7 Q.B. Rep. 287.]

The Court will not, before appearance by the tenant in an action of ejectment, entertain an application to set aside the judgment signed against the casual ejector on the ground of irregularity. *Doe d. Williamson v. Roe*, 15 Law J. Rep. (N.S.) Q.B. 39; 3 Dowl. & L. P.C. 328.

(c) *Motion for, under 4 Geo. 2. c. 28.*

Quære—Whether upon a motion for judgment against the casual ejector, under 4 Geo. 2. c. 28. s. 2, an affidavit stating that an amount *exceeding half a year's rent* was in arrear, and that there was "no sufficient distress to be found upon the premises, countervailing the *said arrears of rent then due*," is sufficient; or whether the affidavit should state that the property upon the premises was insufficient to countervail *half a year's rent*.

Where judgment had been obtained upon an affidavit which the party was apprehensive might be held to be defective in this respect, the Court allowed such judgment to be superseded, and another judgment to be signed upon an amended affidavit.

Semble—that no special ground for setting aside the first judgment was necessary. *Doe d. Grettton v. Roe*, 4 Com. B. Rep. 576.

In an ejectment under the 4 Geo. 2. c. 28, where the premises are kept locked, and access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not, the affidavit stating those facts is sufficiently positive, if it state a *belief* only that there is no sufficient distress on the premises. *Doe d. Cox v. Roe*, 5 Dowl. & L. P.C. 272.

(H) RECOGNIZANCE.

The recognizance in ejectment under the 1 Geo. 4. c. 87. s. 1, is to be taken for one year's value of the premises, and a reasonable sum, to be settled by the Master, for the costs of the action. *Doe d. Levi v. Roe*, 6 Com. B. Rep. 272.

(I) TRESPASS FOR MESNE PROFITS.

A declaration in trespass for mesne profits stated the entry and expulsion to have taken place on the 10th of December 1844, and the expulsion and taking of the profits to have continued till the 10th of March 1846. Plea, that the closes in which, &c., were not nor were any part of them the plaintiff's

modo et forma. Replication to the whole plea by way of estoppel, a recovery by the plaintiff against the casual ejector on a declaration in ejectment alleging the demise to have been on the 14th of October 1845 for a term of twenty years, concluding with a prayer of judgment if the defendant during that term ought to be admitted against the said recovery, record, and proceeding, to plead that plea:—Held, on special demurrer, that the replication was bad, as applying only to a portion of the time of the trespass.

Quære—Whether judgment by default against the casual ejector can be pleaded by way of estoppel; and if it can, whether such a replication to a plea like the above, containing no new matter, is good. *Doe v. Wellsman*, 18 Law J. Rep. (N.S.) Exch. 277; 2 Exch. Rep. 368.

ELECTION

[See PARLIAMENT.]

Under a marriage settlement. See *Davies v. Ashford*, 14 Law J. Rep. (N.S.) Chanc. 473; 5 Law J. Dig. 709.

ELEGIT.

[See DISTRESS; Who may distrain.]

- (A) MUST FOLLOW THE JUDGMENT.
- (B) METES AND BOUNDS.
- (C) EFFECT OF AS AN EVICTION.

(A) MUST FOLLOW THE JUDGMENT.

A writ of *elegit* cannot be sued out for part only of the sum recovered by a judgment, unless it shews on the face of it that the residue of the judgment has been satisfied or otherwise disposed of. *Sherwood v. Clark*, 15 Mee. & W. 764.

Where one of the plaintiffs, the official assignee, in a personal action, died after judgment:—Held, that a writ of *elegit* might issue without a *scire facias* or suggestion of the death or of the appointment of a successor; but that the affidavit was bad in not shewing in precise terms that the appointment took place *before* the issuing of the *elegit*. *Rolt v. the Mayor, &c. of Gravesend*, 7 Com. B. Rep. 777.

(B) METES AND BOUNDS.

Since the 1 & 2 Vict. c. 110. s. 11, an *elegit* need not describe the lands to be extended by metes and bounds; it is sufficient to describe them in any manner by which they may be identified. *Sherwood v. Clark*, 15 Mee. & W. 764.

(C) EFFECT OF AS AN EVICTION.

In an action of covenant, on a lease, the defendant pleaded, that before the making of the lease one P impleaded the plaintiffs, and had judgment of *elegit* of the plaintiffs' lands; that the plaintiffs were found by the inquisition to be seised of the demised premises, which were then leased to T B for seven years, subject to two mortgages; that the sheriff delivered the premises aforesaid to P to hold until the damages should be fully levied; that before

any rent became due, P, by virtue of the said delivery to him, ejected, expelled, and put out the defendant therefrom. The plaintiffs traversed the eviction in the words of the plea. It was proved at the trial that P demanded rent of the defendant, and threatened if he did not pay, to turn him out, whereupon the defendant paid P three-quarters of a year's rent and attorned to him without the plaintiffs' knowledge:—Held, that P, having merely a reversion expectant on the determination of the mortgage terms, had no title to evict the defendant; that the attornment was immaterial, and the plaintiffs were entitled to succeed on that issue; the expulsion, as pleaded, not having been established by the evidence.

Semble—that where a party, being entitled to evict another in occupation of premises, proceeds to exercise his right, upon which the tenant consents to change the title under which he holds, and attorns to the claimant, that is equivalent to an expulsion. *Mayor, &c. of Poole v. Whitl.*, 16 Law J. Rep. (N.S.) Exch. 229; s. c. 15 Mee. & W. 571.

EMBEZZLEMENT.

[See LARCENY.]

A, an assistant overseer of the Preston Union, indicted as servant to the guardians of the union, for embezzling the monies of the guardians.—Held, under the circumstances, not liable under stat. 7 & 8 Geo. 4. c. 29. s. 47, it not appearing that he received the monies "for, or in the name, or on the account of" the guardians, but of the overseers. *R. v. Townsend*, 1 Den. C.C. 167; 2 Car. & K. 168.

A prisoner was indicted as servant to the guardians, &c.—Held, first, that the admission by him contained in the condition of his bond for the performance of his duties as treasurer, coupled with an act of parliament specifying those duties, was sufficient evidence of the nature of his appointment, viz. that he was to receive money for the guardians, and account to them for his receipts. Secondly, that the not accounting for a portion of such receipts was an embezzlement, although no precise time could be fixed at which it was the prisoner's duty to pay over the money alleged to be embezzled. *R. v. Welch*, 1 Den. C.C. 199; 2 Car. & K. 296.

In a parish in which there were two overseers and two churchwardens, the prisoner was employed by the two overseers as their servant to collect the poor-rates. As such collector, he demanded from the landlord of certain premises the amount of the rate which was assessed in the rate-book on his tenant the occupier. The landlord, who was in the habit of paying his tenants' poor-rates, paid the amount to the prisoner, who embezzled it:—Held, that although the overseers could not have enforced this payment from the landlord, the money was received by the prisoner by virtue of his employment, and on account of his masters; and that being so received by him, it was sufficient to describe it in an indictment for embezzlement as the property of the two overseers; and that it was not necessary to allege it to be the property of the overseers and churchwardens jointly. *Regina v. Adey*, 19 Law J. Rep. (N.S.) M.C. 149; 1 Den. C.C. 571.

The prisoner had, as a servant, in the course of his duty, received from a fellow-servant money paid to that servant for his master, by another servant who had received it from the customers. It was the duty of the prisoner, after such receipt, to hand the money to another servant (the cashier) of his master; but instead of handing it over, he fraudulently retained it:—Held, that this was embezzlement. *Regina v. Masters*, 18 Law J. Rep. (N.S.) M.C. 2; 1 Den. C.C. 332.

A, a brewer, sent his drayman, B, out with porter, with authority to sell it at fixed prices only. B sold some of it to C at an under price, and did not receive the money at the time. A heard of this, and, unknown to B, told C to pay B the amount, which C did, and C, when asked for it by A, denied the receipt of the money:—Held, to be sufficient evidence of embezzlement. *R. v. Aston*, 2 Car. & K. 413.

An indictment which contains three charges of embezzlement should not only aver that the monies which are the subject of the charges were received within six months, but should also aver that they were embezzled within six months. *R. v. Noake*, 2 Car. & K. 620.

ERROR.

- (A) WHEN AND BY WHOM IT LIES.
- (B) PROCEEDINGS AND PRACTICE.
 - (a) *Quashing and setting aside the Writ.*
 - (b) *Death of Parties.*
 - (c) *Where Ground of Error a Mistake.*
 - (d) *Effect of Plea, In Nullo est Erratum.*
 - (e) *Where Writ allowed after Execution.*
 - (f) *Striking out Pleas.*

Certificate of recognizance to prosecute writ of error in misdemeanours to be a warrant for defendant's discharge, 9 & 10 Vict. c. 24; 24 Law J. Stat. 70.

(A) WHEN AND BY WHOM IT LIES.

A writ of error will not lie on a judgment on a feigned issue directed under the Interpleader Act —per Lord Brougham. *King v. Simmonds*, 1 H.L. Cas. 754.

No writ of error lies upon a judgment of a superior court upon a feigned issue brought under the provisions of the statute 6 & 7 Will. 4. c. 71. s. 46. (the Tithe Commutation Act).

And a writ of error having been brought upon such judgment, the Court of Exchequer Chamber ordered the writ to be quashed. *Thorpe v. Plowden*, 17 Law J. Rep. (N.S.) Exch. 235; 2 Exch. Rep. 387.

However desirous the Court may be of enabling the parties to take the opinion of a court of error, they will not give judgment against their own opinion because there is no other mode of raising the question on the record.

Semble—There is no mode by which the defendant can take the opinion of a court of error as to his right to costs under 43 Geo. 3. c. 46. *Ricketts v. Noble*, 18 Law J. Rep. (N.S.) Exch. 408; 4 Exch. Rep. 260.

A writ of error may be brought by one of several defendants in an indictment. *Wright v. Regina*, 16 Law J. Rep. (N.S.) Q.B. 10.

The administrator of the suppliant in a petition of right may bring error on a judgment given against his testator.

Error on a judgment for the Crown in a petition of right may be brought in the Exchequer Chamber, the Crown being bound in this respect by stat. 11 Geo. 4. & 1 Will. 4. c. 70. s. 8. *Baron De Bode v. Regina*, 13 Q.B. Rep. 364.

(B) PROCEEDINGS AND PRACTICE.

(a) *Quashing and setting aside the Writ.*

If a writ of error does not lie in a particular case, the Court of error may properly, upon a rule obtained for that purpose, order the writ to be quashed.

A writ of error alleged error in the judgment in "an action on promises." The transcript of the record shewed that the judgment was given, not in an action on promises, but on a feigned issue:—Held, that this was a fatal variance, and that the court of error was warranted in quashing the writ. *King v. Simmonds*, 1 H.L. Cas. 754.

Under 8 & 9 Vict. c. 68. s. 5. it is not necessary to rule the defendants to assign errors, previous to a motion to quash the writ of error for delay in the prosecution thereof.

The affidavit on which such a motion was made stated, that since the filing of the writ of error "no process or other proceeding has been had or taken by or on behalf of the said defendants to prosecute the same":—Held, a sufficient statement that error had not been assigned. *Regina v. Broome*, 17 Law J. Rep. (N.S.) Q.B. 208; 5 Dowl. & L. P.C. 607.

The Court of Exchequer Chamber has no jurisdiction to set aside a writ of error upon a judgment of the Court of Common Pleas, on the ground that it has issued contrary to good faith. The power to set aside the writ belonged to the Court of Chancery previous to the statute 12 & 13 Vict. c. 109, and is by section 39. of that act conferred upon the Courts of Queen's Bench, Exchequer and Common Pleas, and the Judges thereof respectively. *Garrard v. Tuck*, 19 Law J. Rep. (N.S.) C.P. 232; 8 Com. B. Rep. 258.

[See *Thorpe v. Plowden*, (A) When it lies.]

(b) *Death of Parties.*

On the 4th of June the Court gave judgment for the defendant, who died on the 12th. In August an order to enter up judgment *nunc pro tunc* was obtained; and on the 9th the defendant's attorney communicated the name of the executor, in order to bring a writ of error, but the death of the defendant was not suggested on the record. The writ of error was allowed, and served on the 13th of October; the return was made on the 3rd of November; and the following day the writ and transcript were lodged with the clerk of the errors of the court of error. On the 22nd of November notice of a *scire facias quare executionem non* was sued out in the name of the executors, returnable on the 13th of January. On the 12th of December judgment of *non pros.* was signed under the rule of Hilary

term, 4 Will. 4. pl. 10, 11, no assignment of errors having been delivered:—The Court of Exchequer Chamber considered that as a writ of error does not abate by the death of the defendant below, the judgment signed was irregular, and they allowed the judgment to be set aside, and the plaintiff to assign error, only on payment of costs. *St. Katherine's Dock Co. v. Higgs*, 16 Law J. Rep. (N.S.) Q.B. 390; 10 Q.B. Rep. 641.

(c) *Where Ground of Error a Mistake.*

Where it appeared to the House that a mistake, committed by an officer of the Court below, in entering the judgment of that court, was made the ground of a writ of error, the arguments on the writ of error brought on such judgment were stopped, and the case was ordered to stand over, to allow the parties to apply to the Court below to amend the error.

The House made this order after referring to the report of the opinions of the Judges of the Court below, as stated in the printed reports of the decisions of that Court. *Gregory v. the Duke of Brunswick*, 2 H.L. Cas. 415.

(d) *Effect of Plea, In Nullo est Erratum.*

By a Court of Requests Act it was provided that a plaintiff suing in any of the courts at Westminster, for a cause of action recoverable in the court of requests, should not be entitled to any costs if he succeeded:—Held, on error brought on a judgment in the Court of Queen's Bench for debt and costs, the fact of the defendant being resident within the jurisdiction of, and liable to be sued in the court of requests being assigned as error, and the plea being *in nullo est erratum*, that the judgment, so far as regarded the costs, was erroneous. *Newton v. Banks* or *Banks v. Newton*, 17 Law J. Rep. (N.S.) Q.B. 137; 11 Q.B. Rep. 340.

(e) *Where Writ allowed after Execution.*

On writ of error on a judgment in an inferior court, where the execution has been levied before the allowance of the writ, but not paid over till after,—this Court has no power to order the sum levied to be paid into court, to abide the result of the writ of error. *Spencer v. Haggadur*, 5 Dowl. & L. P.C. 66.

(f) *Striking out Pleas.*

In assumpsit upon articles of agreement, and a memorandum of the same date indorsed thereon, explaining and varying the terms of the agreement, and expressly referring to it, the consideration for the defendant's promise was alleged to be the making of the articles and memorandum, and the undertaking by the plaintiffs that they would perform everything in the articles and memorandum contained on their part to be performed. The agreements were in two parts. To prove the promise, and that it was made upon the consideration alleged, the plaintiffs called for and proved the part signed by them and produced by the defendants. They then offered in evidence their part signed by the defendants and their agent respectively; and having proved the memorandum indorsed, by proof of the signature and agency, the memorandum was read. They then proposed to read the "within-mentioned

agreement," referred to by the memorandum, without calling or accounting for the absence of a witness who had attested it; but the evidence was rejected:—Held, upon bill of exceptions that the agreement was admissible upon proof of the execution of the memorandum indorsed thereon, and referring to it.

Where defendants in error severed in pleading, and pleaded in addition to the joinder in error, respectively, that there was no record of the bill of exceptions, that the Chief Justice did not seal the bill of exceptions, and that he did not acknowledge his seal,—The Court, on motion, ordered the respective pleas pleaded by each, except the joinder in error, to be struck out with costs. *The Wardens and Commonalty of Fishmongers v. Robertson*, 18 Law J. Rep. (N.S.) C.P. 55; 6 Com. B. Rep. 896.

ESCHEAT.

A party, seised in fee simple of freeholds, entered into a contract for sale, and died, without having performed the contract, intestate, and without an heir, so that the estate escheated to the Crown:—Held, that the case was within the 4 & 5 Will. 4. c. 23, and that the Court could, upon a petition, appoint a person to convey to the purchaser, without directing a suit to be instituted, as required by 1 Will. 4. c. 60. *Ex parte Lowe*, 17 Law J. Rep. (N.S.) Chanc. 430.

ESTOPPEL.

[See DEED—EJECTMENT, Trespass for Mesne Profits—EVIDENCE, Admissions—PARTNERS—LEASE—USE AND OCCUPATION.]

In Pais.

An estoppel *in pais* in general need not be pleaded to make it obligatory, and it binds the jury as well as the parties, whatever be the form of pleading.

Where a person wilfully makes a representation intended to induce another to act upon the faith of it, or where (whatever be his intention) a reasonable man, in the situation of that other, would believe that it was meant that he should act upon it; and, in either case, that other does act upon it as true and alters his position, there is an estoppel *in pais*, to conclude the former from averring against the latter a different state of things as existing at the same time; and conduct by negligence or omission, where there is a duty cast upon the person to disclose the truth, may often have the same effect. But unless the statement was intended to induce the other to act on the faith of it, or was such that a reasonable person would act on the faith of it, there is no estoppel, although the other did in fact believe the statement, and was in fact induced to alter his position accordingly. The language used by the Court of Queen's Bench in *Pickard v. Sears* and *Gregg v. Wells* must be understood with this qualification. *Freeman v. Cooke*, 18 Law J. Rep. (N.S.) Exch. 114; 2 Exch. Rep. 654; 6 Dowl. & L.P.C. 191.

By Recital in Deed.

Where a recital in a deed is a statement which all the parties have mutually agreed to admit as true, it is an estoppel upon all; but where it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.

An indenture made between the defendant of the first part, R B of the second part, and the plaintiff of the third part, recited a bond conditioned for the payment by O to R B of such sums as he should from time to time advance for certain specified purposes, with interest, and also a warrant of attorney to secure payment of the same sums; that by certain articles of agreement between O, R B, and the defendant, reciting that the defendant had agreed to advance certain sums to R B, to be by him applied to the said purposes, O and R B agreed not to do any act in reference to the said purposes without the consent of the defendant; that by an indenture made between R B and the defendant (reciting the bond, warrant of attorney, and articles of agreement) R B assigned to the defendant the said bond and warrant of attorney, and judgment entered thereon, upon trust out of the monies thereby received to retain all sums advanced by him to R B as aforesaid, together with interest, and to pay any surplus to R B; that the defendant had since the date of the said indenture of assignment advanced for the purposes therein recited various sums amounting to 269*l.*, which were still owing to the defendant, with interest, and that the defendant was still interested in the said bond to the extent of the said amount; that the plaintiff had advanced 200*l.* to O, and that it was agreed that the defendant should assign to the plaintiff, for the purpose of securing such advance, all his interest in the said bond, &c., which had been so assigned to the defendant. It then witnessed, that in consideration of the said agreement, &c., the defendant bargained and assigned, &c. to the plaintiff the said bond, &c. and all monies thereby secured, and all his interest, &c., to hold the same to the plaintiff, in trust out of the monies thereby realized to retain the said sum of 200*l.* and interest, and to pay to the defendant such sums as he had advanced to the said R B, and to pay the surplus to the said R B and the defendant, according to their respective interests. And the defendant thereby covenanted with the plaintiff that he (the defendant) had done no act to impeach or charge the said several securities, or any estate or interest therein, and that the said sum of 269*l.* then was and remained due and owing and unsatisfied and payable, on and by virtue of the said thereinbefore recited securities. In an action of covenant on the above indenture, the breach assigned was, that the defendant had not advanced the said sum of 269*l.* or any part thereof, nor was such sum or any part thereof at the time of making the said indenture owing to the defendant, nor was the defendant ever interested in the said bond, &c. to the said amount or any part thereof:—Held, that the plaintiff was not estopped from denying that the defendant had made any advances, as the recital on which the breach was founded was intended to be the statement of the

covenantor (the defendant) only, to whom the estoppel would be confined. *Stroughill v. Buck*, 19 Law J. Rep. (N.S.) Q.B. 209.

By Payment into Court.

To an action against the defendants for unskillfully erecting a kitchen range in the plaintiff's house, they pleaded that the plaintiff ought not to be admitted to allege that they did not use due skill in constructing the range, because, after the supposed grievances, the now defendants commenced an action against the now plaintiff, for work and labour in constructing the range and for the price thereof, and that the now plaintiff pleaded payment into court of 42*l.*, which the now defendants took out of court in full satisfaction:—Held, on demurrer, that the plea did not amount to an estoppel, and afforded no answer to the action. *Rigge v. Burbidge*, 15 Law J. Rep. (N.S.) Exch. 309; 15 Mee. & W. 598; 4 Dowl. & L. P.C. 1.

EVIDENCE.

[Proof of Postmark, see BILL OF EXCHANGE, Notice of Dishonour.—And see INFORMATION—LIBEL—PAYMENT—PRACTICE, IN EQUITY, Accounts—PRODUCTION AND INSPECTION OF DOCUMENTS—SLANDER—WITNESS.]

(A) GENERAL POINTS.

- (a) *Construction of written Documents.*
- (b) *Identity of Persons.*
- (c) *Foreign Law.*
- (d) *Existence of Agreement in Writing.*
- (e) *Necessary and admissible Evidence.*
- (f) *Waiver of Objections to Evidence.*
- (g) *Proof of Handwriting.*

(B) RECORDS AND LEGAL PROCEEDINGS.

(C) PUBLIC DOCUMENTS.

(D) PRIVATE WRITINGS.

- (a) *Deeds.*
- (b) *Entries.*
- (c) *Agreements.*
- (d) *Bills of Sale.*
- (e) *Bills of Exchange.*

(E) SECONDARY EVIDENCE.

- (a) *Copies and Duplicates.*
- (b) *After Notice and Subpœna to produce.*
- (c) *Where Original lost or destroyed.*

(F) PAROL EVIDENCE.

(G) HEARSAY EVIDENCE AND DECLARATIONS.

- (a) *In general.*
- (b) *In Cases of Pedigree.*
- (c) *Entries in the Course of Business.*
- (d) *In Proof of Manorial Boundaries.*

(H) PRIVILEGED COMMUNICATIONS.

(I) PRIMA FACIE AND PRESUMPTIVE EVIDENCE.

(K) ADMISSIONS.

(L) DEPOSITIONS AND FORMER EVIDENCE.

(M) CONFESSIONS.

(N) PRACTICE, IN EQUITY.

(A) GENERAL POINTS.

(a) *Construction of written Documents.*

The plaintiff was engaged by the defendant, who lived in London, as managing clerk at Southampton, by the year, and the business was conducted by correspondence. In July 1847 the plaintiff wrote to the defendant for 140*l.*, to pay certain debts incurred in the business, including 30*l.* the amount of the plaintiff's salary then due. The defendant inclosed him in a letter 100*l.* for "business purposes." The plaintiff retained 30*l.* for his salary, contending that that was a business purpose, and expended the remainder in paying some of the debts. The defendant dismissed him, upon which the plaintiff brought an action of assumpsit. The defendant pleaded a justification of the dismissal, on the ground that the plaintiff wrongfully misappropriated money, and acted contrary to orders. There were many letters between the parties put in as evidence in the cause. The learned Judge left it to the jury to say upon all the documents and evidence before them, whether the plaintiff misappropriated the money, and whether he wilfully disobeyed the orders of the defendant:—Held, that the jury were rightly directed on both points. Where a document produced in evidence is ambiguous on the face of it, the ambiguity is to be explained by the Judge. But where an expression in a document produced in evidence becomes ambiguous by reason of extrinsic evidence, it is for the jury to construe that ambiguity. *Smith v. Thompson*, 18 Law J. Rep. (N.S.) C.P. 314; 8 Com. B. Rep. 44.

(b) *Identity of Persons.*

In support of a plea of coverture, alleging the marriage of the defendant with one J G, a copy of the marriage register was put in evidence, and a witness was called who stated that he was acquainted with one J G, that he had inspected the original register, and that one of the signatures to it was in the handwriting of the J G whom he knew:—Held, that this was evidence of the identity of J G, without the original register being produced. *Sayer v. Glossop*, 17 Law J. Rep. (N.S.) Exch. 300; 2 Exch. Rep. 409.

In an action against S it was proved that a witness went to a tavern and asked a waiter if S was there; and on a person coming out to the witness, the latter asked him who he was, and he said his name was S. The witness had not known the defendant before, and had never seen him since:—Held, that this was some proof that this person was S, and that the conversation between the witness and this person was receivable in evidence. *Reynolds v. Staines*, 2 Car. & K. 745.

(c) *Foreign Law.*

In order to prove the foreign law at Cologne, a witness was called, who stated that he was a juriconsult, and adviser to the Prussian consul in England; that he had studied law at the University of Leipsic, and knew from his studies there that the Code Napoléon was in force at Cologne:—Held, that he was incompetent to prove the law at Cologne.

The Courts in this country do not take notice of the revenue laws of another country, unless where the contract itself is made void by them.

In order to prove that a certain company for working mines in Westphalia had never been finally constituted, the plaintiff gave general evidence that nothing had been done in this country towards such final constitution:—Held, that in the absence of any evidence on the part of the defendant to the contrary, the jury were warranted in finding that the company never was finally constituted. *Bristow v. Sacqueville*, 19 Law J. Rep. (N.S.) Exch. 289; 5 Exch. Rep. 275.

(d) *Existence of Agreement in Writing.*

In debt for use and occupation, one of the plaintiff's witnesses on cross-examination stated that he had heard from the plaintiff's attorney, that there was an agreement in writing:—Held, that this was no evidence of the existence of an agreement, so as to render its production by the plaintiff necessary. *Watson v. King*, 3 Com. B. Rep. 608.

(e) *Necessary and admissible Evidence.*

Where a paper purports to be a receipt, and, as such, requires a stamp, but also purports to be an agreed statement of accounts, which does not require a stamp, it may be given in evidence to shew the agreed state of accounts only, though it has not been previously stamped.

Its admissibility under such circumstances is restricted to this extent:—so far as it relates simply to proving the statement of account, and is not produced for the purpose of proving the receipt of money. It cannot be used for the purpose of proving the receipt of money in any way.

If a document which is unstamped, but requires a stamp, is offered in evidence, and, if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. If it would be of no benefit when stamped, it may, though unstamped, be received in evidence.

In an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum. In an action for work and labour this paper was offered in evidence by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in contest between the parties, but in order to shew what was the admitted state of accounts at a particular time:—Held, (reversing an interlocutor of the Court of Session), that it was admissible for that purpose. *Matheson v. Ross*, 2 H.L. Cas. 286.

The law of the country where a contract is to be enforced, not that of the country in which it is made, governs the question of admissibility of evidence on a trial arising out of such contract. *Bain v. the Whitehaven and Furness Junction Rail. Co.*, 3 H.L. Cas. 1.

Whether conditions precedent to the admissibility of evidence have been fulfilled is a question for the Judge. *Doe d. Jenkins v. Davies*, 16 Law J. Rep. (N.S.) Q.B. 218; 10 Q.B. Rep. 314.

To prove what passed by a deed of conveyance, a preliminary agreement made four years before, in which the *locus in quo* was expressly named as

part to be sold:—Held, not admissible. *Williams v. Morgan*, 15 Q.B. Rep. 782.

The proper proof that a prisoner was in lawful custody under a sentence of imprisonment passed at the assizes is by the proof of the record of his conviction; and neither the production of the calendar of the sentences, signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *Regina v. Bourdon*, 2 Car. & K. 366.

In an action on a bond, the defendant pleaded that he was induced to execute it by the fraud, covin, and misrepresentation of A and B, the plaintiffs, and D, in collusion with them. It appeared that the money for which the bond was given was part of the property included in the marriage settlement of H, the defendant's brother, which was advanced to H by the plaintiffs, the trustees. For the defendant, it was proposed to put in the answer of A in Chancery, to shew that D had committed a breach of trust with respect to some other of the trust money:—Held, that the answer could not be given in evidence for this purpose. *Courtenay v. Haworth*, 2 Car. & K. 1018.

Adulterine bastardy—evidence necessary and admissible. *Hargrave v. Hargrave*, 9 Beav. 552.

Evidence as to heirship of daughter. *Heming v. Spiers*, 15 Sim. 550.

Proof of a negative. *Stiles v. Guy*, 16 Sim. 230.

(f) *Waiver of Objections to Evidence.*

Under the usual notice and order to admit, an objection to the reception in evidence of a deed, because of an interlineation appearing in it, is waived.

Therefore, a deed of transfer of a mortgage term, containing an interlineation in the power of sale, was held to have been properly received in evidence, although in the attestation clause no notice was taken of the interlineation, and there was no evidence to shew that it had been made before the execution of the deed. *Freeman v. Steggall*, 19 Law J. Rep. (N.S.) Q.B. 18.

(g) *Proof of Handwriting.*

A document purported to be a certificate of a marriage at Bristol, in 1761, written and signed by W D, curate of St. James's:—Held, that the handwriting of W D might be proved by the opinion of a witness, formed by comparing it with various signatures of W D, in the original register of St. James's, by which he appeared to have been the officiating curate in 1761, without any proof of his death, or of search for witnesses who might have seen him write. *Doe d. Jenkins v. Davies*, 16 Law J. Rep. (N.S.) Q.B. 218; 10 Q.B. Rep. 314.

To prove the handwriting of a defendant, named F W, to a letter, a clerk of a banker stated that a person of that name kept an account with the banker, and had signed his name in a book and drawn cheques, which the witness had paid, and that he believed the letter to be of the handwriting of that person. The defendant's attorney proved that the defendant had desired him to address him at No. 12, Tower Street; and another witness proved that he had written two letters to "Mr. F W, 12, Tower Street," and had received answers,

and that he believed the letter offered in evidence to be of the same handwriting as the answers he had received to his letters:—Held, sufficient proof that the letter offered in evidence was in the defendant's handwriting. *Murieta v. Wolfhagen*, 2 Car. & K. 744.

(B) RECORDS AND LEGAL PROCEEDINGS.

Where a patent of peerage cannot be found, entries on the Journals of the House of Lords, shewing the limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received. *The Barony of Saye and Sele*, 1 H.L. Cas. 507.

Copy of the record of a patent of peerage admitted in evidence.

Entry of grant to licence received in place of the missing register. *Earl of Lanesborough's claim*, 1 H.L. Cas. 510, n.

In a claim to an ancient Scotch dignity, if no patent or other instrument of creation can be produced, it may be presumed that the dignity was created by patent or charter, limiting it in the manner in which it has been actually enjoyed. And if that enjoyment be shewn to have been confined to heirs male, in exclusion of nearer heirs female, the dignity must be held to be a male honour, always descendible to the heirs male of the body of the first grantee.

Ancient documents of a public character, brought from the proper repository, are, in the absence of patents or parliamentary records, admissible as evidence of the creation and existence of peerages: And, *semble*, that, by the law of Scotland, contemporaneous history is admissible for the same purpose.

An ancient patent without the seal, but with the attestation thereof duly verified, is admissible evidence.

An ancient Scotch dignity might, before the Union, be conveyed by the possessor, together with the territory thereto annexed, to another branch of the family, or even to a stranger, with the king's authority; or it might be resigned to the king, to be re-granted by a new patent, with different destinations and with its old precedence.

A witness, brought to prove a copy of an old document, should be able to read and understand the original when he compared the copy with it. *The Crawford and Lindsay Peerages*, 2 H.L. Cas. 534.

A was indicted for perjury, on occasion of making an affidavit to hold C to bail for 50*l*. At the trial of the indictment it was proved that A had prosecuted the action against C; that, at the trial, a verdict was taken for A, subject to a reference; and that the arbitrator awarded in favour of C:—Held, that the award was not admissible against A on the trial of the indictment. *Regina v. Fontaine Moreau*, 17 Law J. Rep. (n.s.) Q.B. 187; 11 Q.B. Rep. 1028.

An insolvent's schedule which was offered in evidence as containing an admission by the insolvent of a debt, consisted of several sheets, each of which was signed by the insolvent, and the first one only (which was not the sheet containing the admission) was also signed by an attesting witness:—Held, that the attestation applied to the signature

of all the sheets, and that the schedule was not admissible without the evidence of the attesting witness. *Streeter v. Bartlett*, 17 Law J. Rep. (n.s.) C.P. 140; 5 Com. B. Rep. 562.

Under 7 Geo. 4. c. 57. s. 19, the production of a certified copy of the assignment is sufficient evidence of the title of the assignee. *Doe d. Heming v. Willetts*, 18 Law J. Rep. (n.s.) C.P. 240; 7 Com. B. Rep. 709.

A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity be shewn, but is only admissible to prove that a suit was instituted, and the subject-matter of it. *Boileau v. Rutlin*, 5 Exch. Rep. 665.

An averment in a bill that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of a trust, is sufficiently proved by production of such letters of administration, although they appear to have been granted on a date subsequent to the institution of the suit. *Bateman v. Margerison*, 6 Hare, 496.

(C) PUBLIC DOCUMENTS.

A witness on a trial stated that he went to K for the purpose of comparing a certificate of burial with the parish register, and was directed to the clerk's house, and there saw a person who said he was parish clerk, and who produced to him a book containing entries of burials with which he compared the certificate:—Held, that as statute 52 Geo. 3. c. 150. directs the parish registers to be kept by the clergyman, and as no explanation was given of the book being in the possession of the clerk, it had not been produced from the proper custody, and that the evidence was inadmissible. *Doe d. Arundel v. Fowler*, 19 Law J. Rep. (n.s.) Q.B. 151.

The master of a foreign vessel arriving in the port of London delivered to the Custom House officers a report of the burthen of his ship, and the number of his crew; and it was filed at the Custom House:—Held, that the provisions of stat. 8 & 9 Vict. c. 86. ss. 2, 7, 18. did not give this the character of a public document so as to make it evidence of the burthen of the ship.

A certificate was produced from the Custom House, where it had been filed, signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage:—Held, (it not being shewn that this was an act prescribed by statute) that the certificate could not be received in evidence as a public document to prove the burthen of the ship. *Huntley v. Donovan*, 15 Q.B. Rep. 96.

A certified copy of the register of a death under the seal of the General Registry Office, accompanied by an affidavit of identity is sufficient evidence of the death. *Parkinson v. Francis*, 15 Sim. 160.

(D) PRIVATE WRITINGS.

(a) Deeds.

[See FINES AND RECOVERIES.]

Documents more than thirty years old are admissible in evidence without proof of execution, if produced from custody which may be reasonably

accounted for, though not the strictly proper legal custody.

A in 1767 assigned a term of years in lands to H in trust to attend the inheritance. A afterwards devised the lands to E for life, and after her death to her children. In 1843, the administrator of H brought ejectment on behalf of B, who claimed to be a child of E, against the defendants who claimed to be the only children of E. The clerk to the attorney for the lessor of the plaintiff produced the deed of assignment of 1767, from the office of his master, and stated, that from correspondence which he had seen in the office, he believed his master to be the attorney of B.—Held, that this was *prima facie* proof that the deed came from proper and reasonable custody, and that it was receivable in evidence accordingly. *Doe d. Jacobs v. Phillips*, 15 Law J. Rep. (N.S.) Q.B. 47; 8 Q.B. Rep. 158.

On trial of an issue, a bond to indemnify parish officers against the charge of a bastard was offered in evidence. It was dated in 1716, and was brought from a chest, kept in the workhouse of an union comprehending the parish, in which chest were kept muniments belonging to the union. There was no direct evidence how it was placed in the chest; but it was proved that in 1842 several documents were brought in a cart to the workhouse by a pauper and placed in a chest.—Held, that enough appeared to satisfy the rule of proving deeds to be brought from a proper depository, and that the evidence was admissible. *Slater v. Hodgson*, 9 Q.B. Rep. 727.

The agent of the lessor of the plaintiff not being in the assize town when a deed was required material to the proof of his title, his carpet bag, which was identified, was cut open in court, and the deed produced from it by the attorney for the lessor of the plaintiff, who also identified the deed.—Held, that there was sufficient *prima facie* evidence of proper custody. *Doe d. the Earl of Shrewsbury v. Keeling*, 17 Law J. Rep. (N.S.) Q.B. 199; 11 Q.B. Rep. 884.

The following memorandum signed by the plaintiff, was indorsed upon the registered copy of a deed of settlement produced by the defendant: "We do hereby certify that the within written deed is the deed of settlement of the Universal Gas-light Company, and that, to the best of our knowledge, the particulars therein contained are correctly set forth":—Held, that the copy was primary evidence against the plaintiff of the contents of the deed. *Boulter v. Peplow and Boulter v. Brooke*, 19 Law J. Rep. (N.S.) C.P. 190.

Evidence that a week before the trial, the parents of an attesting witness to a deed were asked where he was, and stated that he was in America, is reasonable evidence that he is without the jurisdiction of the Court, so as to let in proof of his handwriting to the attestation of the deed. *Austin v. Rumsey*, 2 Car. & K. 736.

(b) Entries.

A paper, signed by a deceased steward, charged him with the receipt of a gross sum. In the same box was found an ancient rental, in the same handwriting, but unsigned, containing an account of items which, added together, made up the gross sum with which the deceased steward so debited

himself:—Held, admissible in evidence. *Musgrave v. Emmerson*, 16 Law J. Rep. (N.S.) Q.B. 174; 10 Q.B. Rep. 326.

Where claims to allotments which were by the act directed to be in writing, were entered by a deceased clerk of the Commissioners in a book and were marked as allowed, by their initials,—Held, that upon proof of negative search and of the clerk's death, the entries were admissible to shew the nature of the claim.

Where the claim made was "as for life interest,"—Held, that such claim with the award made in the same terms, was admissible to shew the claimant's interest to be less than the fee, and if such claim had expressed it as for his own life, it would be *prima facie* evidence that it ceased to exist at his death; *secus*, if only for life, which might be consistent with an interest for his own or for another life, or of another conjointly with his own. And the act directing the surplus rate to be divided among the landowners, which was done according to a return rate made by the Commissioner, according to the interest of the possessioners for life or years, or as reversioners, and the party, being of advanced age, had received a sum calculated as a life interest, it not appearing that he had any knowledge of the rate,—Held, that such return rate was not admissible to cut down his interest to less than a fee. *Doe d. Welsh v. Langfield*, 16 Mee. & W. 497.

Evidence of usage is admissible to explain an ambiguous grant; and the construction of such a grant is for the jury and not for the Judge.

Admissions in the court rolls of a manor "pro pasturâ bosci et sub-bosci," and for "the pasture, wood, and underwood, of &c." are sufficient to pass the land.

Entries in the ancient rolls of a manor of items in the accounts rendered by the reeve of the manor, by which he charges himself with the receipt of money, are admissible in evidence; but entries in the same accounts of disbursements of the money so received, discharging the reeve, are not admissible unless they are referred to by the charging items, or are necessary to explain them.

Entries made by a deceased person in the ordinary course of business, but not contemporaneously with the fact entered, are not admissible in evidence.

Semble—that where an account of the reeve of a manor in the court rolls contains a "*quietus*," the whole account is admissible in evidence, on the ground that the "*quietus*" discharging the reeve is an admission of the whole by the lord against his own interest. *Doe d. Kinglake v. Bewiss*, 18 Law J. Rep. (N.S.) C.P. 128; 7 Com. R. Rep. 456.

In ejectment for twenty-two acres, parcel of the manor of H, it appeared that the whole manor was settled on the Earl of A, in 1559, when a release of it was granted to Lord L for 100 years; and that an act of parliament passed restraining the Earls of A from alienating their property. In 1825 an act was passed to enable the Duke of N, the heir of the Earls of A, to sell, and the manor of H was then sold to the lessors of the plaintiff. In order to shew that the lands here sought to be recovered were identical with those included in the lease of 1559 (there being no trace of any original deeds dealing with the property later than that of 1559), a book found in the muniment room of the Duke of N was

tendered, purporting to be that of one S, a steward of the Earl of A in 1610 and 1620, in which, under the former date, was a copy of a lease from S and L to one H, of these lauds, and a minute by S, that "H's widow hath assigned to Sir E C, who yet claimeth ten years to come;" the said Sir E C being the ancestor under whom the defendant held possession:—Held, that the minute was not evidence in the cause, either as a matter of reputation of the extent of the manor, or as an entry made by a deceased party in discharge of his duty, and against his own interest, or as professing to be a copy of a deed seen by the writer. *Doe d. Padwick v. Skinner*, 18 Law J. Rep. (n.s.) Exch. 107; 3 Exch. Rep. 84.

Where a book was kept privately by the defendant, and was made up from certain slips of paper on which the daily transactions of his business were entered, and there was no proof that these were accurately copied by him,—Held, that the book was not admissible as evidence for the defendant. *Ellis v. Cowne*, 2 Car. & K. 719.

Accounts between master and servant, tradesmen and shopmen, and banker and customer, may under special circumstances and from the necessity of the case be admitted as evidence in favour of the party writing them. *Symonds v. the Gas Light and Coke Company*, 11 Beav. 283.

(c) Agreements.

There was a subscribing witness to an agreement which was produced, on notice, by the defendant:—Held, that as the defendant claimed an interest under the agreement, it was not necessary to call such subscribing witness. *Fuller v. Patrick*, 18 Law J. Rep. (n.s.) Q.B. 236.

(d) Bills of Sale.

A bill of sale transferred to the plaintiff "all the goods, fixtures, household furniture, plate, china, and effects of whatever kind belonging to us, and in and about the messuage, tenement, or premises, where he now resides, and being No. 2, Park Road, Old Kent Road, in the county of Surrey, and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed." The schedule being inadmissible in evidence, by reason of its not being annexed,—Held, that the bill of sale was admissible without the schedule. *Dyer v. Green*, 16 Law J. Rep. (n.s.) Exch. 239; 1 Exch. Rep. 71.

(e) Bills of Exchange.

Where, in order to prove that a former bill had been made payable at a particular place, a banker's clerk was called, who, without producing the bank book, stated he had ascertained the fact from an entry therein in his own writing; but independently of that he had no recollection of the fact:—Held, that this was not evidence of such fact. *Beech v. Jones*, 5 Com. B. Rep. 696.

(E) SECONDARY EVIDENCE.

[*Waite v. Gale*, 5 Law J. Dig. 286; 2 Dowl. & L. P.C. 925.]

(a) Copies and Duplicates.

A copy of an entry made from a certificate of baptism by a chaplain of a British minister at a

foreign court, is not sufficient evidence of birth and parentage. *Lord Dufferin and Claneboye's Claim*, 2 H.L. Cas. 47.

By a joint and several bond, A and B became sureties for the payment of any balance, not exceeding a given amount, due from C. The defeasance provided that it should be void if A and B, or either of them, should pay such balance within one calendar month next after notice in writing, requiring payment, should have been given to A and B, or their representatives:—Held, in an action against the executors of A, upon a replication denying notice to them and B, that a duplicate of the notice served upon B was not admissible, and that B should have been subpoenaed to produce the original he received, or it should have been shewn to have been lost or destroyed. *Robinson v. Brown*, 16 Law J. Rep. (n.s.) C.P. 46; 3 Com. B. Rep. 754.

(b) After Notice and Subpœna to produce.

In covenant upon a lease, executed on behalf of the lessor under power of attorney, there being notice to the defendant to produce the power, but no *subpœna duces tecum* to the party who executed the lease,—Held, that the power of attorney was the property of the party who executed the lease under its authority, and that secondary evidence of its contents was not admissible.

An attorney, who has been served with a *subpœna duces tecum* to produce a title-deed, being privileged from producing it, secondary evidence of its contents is receivable.

Though he is not compellable to state its contents, yet if he willingly does so, his evidence is admissible. *Hibberd v. Knight*, 17 Law J. Rep. (n.s.) Exch. 119; 2 Exch. Rep. 11.

The plaintiff, on the 25th of March 1846, wrote and sent to the defendant's house at Bombay, a letter, which arrived in that country whilst the defendant was there:—Held, that a notice to produce that letter at the Spring Assizes, 1848, served on the 28th of January 1848 upon the defendant, who had come to this country in 1847, leaving his partners at Bombay, did not entitle the plaintiff to give secondary evidence of its contents. *Ehrenspurger v. Anderson*, 18 Law J. Rep. (n.s.) Exch. 132; 3 Exch. Rep. 148.

Where the attorney of a person not a party to the action, brought a book into court in obedience to a *subpœna duces tecum*, but refused to produce it on the ground of his client's privilege, and the client being present as a witness under a common *subpœna*, also objected to its production,—Held, that secondary evidence might be given of the contents of the book, although the client had not been served with a *subpœna duces tecum*.

Per Maule, J.—Where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. *Newton v. Chaplin*, 19 Law J. Rep. (n.s.) C.P. 374.

Where notice to produce a document had been given to the defendant, and there was *merely evidence to go to the jury* that such document was in his possession:—Held, that the document not having been produced when called for, the plaintiff might give secondary evidence thereof. *Kobb v. Starkey*, 2 Car. & K. 143.

A, a plaintiff in a cause in the county court, was indicted for perjury there, in respect of a paper which was produced on the trial there. Mr. M, his then attorney, was subpoenaed to produce this paper on the present trial; he stated that he had received it from A, for the purpose of conducting that cause as A's attorney, but that he claimed a lien on it:—Held, that he ought not to produce it, and that his possession of it was the possession of A.

A, and Mr. C, his present attorney, both lived at a distance from H, the assize town. At noon, on the commission day, Mr. C was served at H with notice to produce this paper. The trial came on the next morning; but in the notice to produce, further notice was given, (as the fact was) that the paper was then in H, in the possession of Mr. M, who was then at the G Hotel, in H:—Held, that sufficient notice to produce had been given, and secondary evidence of the paper was received. *Regina v. Hankins*, 2 Car. & K. 823.

(c) *Where Original lost or destroyed.*

Upon a plea of *non acceptavit*, in an action by indorsee against acceptor of a bill of exchange, the plaintiff having proved that the bill was destroyed, —Held, that secondary evidence of its contents was admissible. *Blackie v. Pidding*, 6 Com. B. Rep. 196.

Where proof is given of the loss of a written instrument by a document which itself shews that such instrument was originally insufficiently stamped, the Court will not presume that the instrument was ever properly stamped, nor admit secondary evidence of its contents. But the Court received as secondary evidence the draft of such written instrument produced at the hearing, with such a stamp as the instrument itself required, although the instrument appeared to have been only lost by the party sought to be charged, and was not proved to have been fraudulently destroyed. *Blair v. Ormond*, 1 De Gex & S. 428.

Evidence of the loss of a deed. *Green v. Bailey*, 15 Sim. 542.

(F) PAROL EVIDENCE.

[See GUARANTIE.]

In an action on a written contract for the delivery of "ware potatoes," it appearing that the term "ware" applied equally to all kinds of potatoes, and meant the best or largest of any kind,—Held, that evidence to shew that a particular sort called "Regent's wares" were intended, was not admissible. *Smith v. Jeffries*, 15 Law J. Rep. (n.s.) Exch. 325; 15 Mee. & W. 561.

The plaintiff, an actress, having been engaged by the defendant, the manager of a theatre, for "three years at a salary of 5*l.*, 6*l.*, and 7*l.* per week in those years respectively:—"Held, that this contract being ambiguous, parol evidence was admissible to shew that under such a contract it was the theatrical usage to pay a proportion of salary for those nights only during which the theatre was open for performance. *Grant v. Maddox*, 16 Law J. Rep. (n.s.) Exch. 227; 15 Mee. & W. 737.

In an action against the defendant for not accepting linseed bought by him of the plaintiff, under a contract which stipulated that fourteen days were to be allowed for the delivery of the linseed from the time of the ship being ready to discharge,—Held,

that the contract not being ambiguous in its terms, the Judge was right in rejecting evidence of its meaning. *Sotilichos v. Kemp*, 18 Law J. Rep. (n.s.) Exch. 36; 3 Exch. Rep. 105.

Plaintiff sold wool to defendant "to be paid for by cash in one month, less 5*l.* per cent. discount":—Held, first, that the vendee was entitled to a delivery of the wool within the month without payment of the price.

Secondly, that evidence was inadmissible to shew that, by the usage of the trade, vendors were not bound under similar contracts to deliver wool without payment; for that such evidence sought to annex to the contract an incident inconsistent with its terms. *Spartali v. Benecke*, 19 Law J. Rep. (n.s.) C.P. 293.

The defendant having ordered goods by letter which did not mention any time for payment, the plaintiffs sent the goods and an invoice:—Held, that evidence to shew that the order was given on the terms of six months' credit was admissible, the letter not being a valid contract within the Statute of Frauds. *Lockett v. Nicklin*, 19 Law J. Rep. (n.s.) Exch. 403; 2 Exch. Rep. 93.

In an action for the price of tobacco sold, evidence is admissible to shew that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. *Syers v. Jonas*, 2 Exch. Rep. 111.

(G) HEARSAY EVIDENCE AND DECLARATIONS.

(a) *In general.*

To support a claim for payment of 4*d.* a wey for all coals gotten within a manor and seignory and exported to sea, a book was produced from the custody of the plaintiff, purporting to be a survey taken in the year 1650, after the manor and seignory had been granted to Oliver Cromwell by the authority of parliament, and purporting to be taken by virtue of a commission to certain persons named in the survey, given by the Right Honourable Oliver Cromwell, Lord General of the Parliament Forces. After specifying certain rents, it stated "that the jury present," &c., *inter alia*, 4*d.* due unto the lord for every wey of coals that is transported out of the lordship. No commission was proved, nor was it signed by the jury:—Held, that this survey was inadmissible either as a public document or as evidence of reputation.

Quare—as to the correctness of *Evans v. Taylor*, 7 Ad. & E. 617; s. c. 7 Law J. Rep. (n.s.) Q.B. 73, upon the inadmissibility of a presentment of a jury as matter of reputation.

Certain variations in old entries of accounts as to a manorial customary payment, extending over three centuries, and uniform in amount,—Held, to be no objection to the validity of the claim.

The 34 & 35 Hen. 8. c. 26. s. 101. did not interfere with the private rights claimed by the lords marchers of Wales, as lords of manors or owners of the land. *Duke of Beaufort v. Smith*, 19 Law J. Rep. (n.s.) Exch. 97; 4 Exch. Rep. 450.

Where the legitimacy of a party was the question in dispute, and a witness deposed to certain expressions of the mother, tending to bastardize the child,—Held, that the evidence was admissible. *Hargrave v. Hargrave*, 2 Car. & K. 701.

The deposition of an accountant containing a statement of the result of his examination of partnership account books, refused to be received at the hearing where the books were not in evidence; but, *semble*, if the books had been in evidence it would have been receivable as the evidence of a person of skill. *Johnson v. Kershaw*, 1 De Gex & S. 260.

(b) *In Cases of Pedigree.*

Whether conditions precedent to the admissibility of evidence have been fulfilled, is a question for the Judge who tries the cause. Thus, where declarations on the question of pedigree by a deceased member of the family are tendered in evidence, it is for the Judge to decide whether the declarant has been proved to be a member of the family; and it makes no difference that the legitimacy of the declarant happens to be, also, the only question in issue for the jury.

Where the declaration was, that the declarant had received a document from her mother, who had told her it was her marriage certificate,—Held, that this declaration was admissible.

Declarations of relationship are not inadmissible, on the ground that the parties have an interest in establishing the relationship, there being no *lis mota* at the time. *Doe d. Jenkins v. Davies*, 16 Law J. Rep. (n.s.) Q.B. 218; 10 Q.B. Rep. 314.

Discussion of the principles on which hearsay evidence is admissible in cases of pedigree.

Quere—Whether the reasons and grounds on which births and times of births, marriages, deaths, legitimacy, &c. are allowed to be proved by hearsay in a controversy merely genealogical are not applicable to declarations made by a deceased person as to where his family came from, where he came from, or of what place his father was designated. *Shields v. Boucher*, 1 De Gex & S. 40.

(c) *Entries in the Course of Business.*

[See COMPANY, Calls.]

An entry in the diary of a solicitor's clerk, who had become lunatic, not allowed to be read in evidence of a matter concerning which it was not the duty of the clerk to have made such entry. *Coleman v. Mellersh*, 2 Mac. & G. 309.

(d) *In Proof of Manorial Boundaries.*

Evidence of reputation is admissible to prove the line of boundary of a reputed manor. *Doe d. Molesworth v. Sleeman*, 15 Law J. Rep. (n.s.) Q.B. 338; 9 Q.B. Rep. 298.

The sea shore between high and low water may be part of the adjoining manor; and where by an ancient grant of the manor its limits were not defined,—Held, that modern usage was admissible to shew that such sea shore was part of the manor. *Duke of Beaufort v. the Mayor of Swansea*, 3 Exch. Rep. 413.

On a question between the lord of the manor of O and the owner of a freehold estate within the manor, whether a certain close was part of the lord's waste or part of the adjoining estate of the defendant, after proof having been given that there were very many lands and tenements held of the manor, the tenants whereof in respect of those lands had always exercised rights of common for all their

commonable cattle on the waste of the manor, evidence was offered, on the part of the lord, of declarations *ante litem motam* of deceased persons who had been such tenants and had exercised such rights, that the close was parcel of the waste. Similar declarations made by deceased residents within the manor not being tenants were also tendered. No evidence was given of any exercise of any rights of common on the close:—Held, that the want of evidence of acts of enjoyment would not affect the admissibility of evidence of reputation; and that declarations by residents within a manor were as receivable as declarations by tenants of the manor; but that these declarations were not admissible in evidence, since there is no common law right for all tenants of a manor to have common on the waste of the manor, but that each tenant who has the right of common appendant, has it as an incident by law attached to his particular grant, and that the numerous private rights of common of the several tenants do not compose one public right so as to render evidence of reputation as to the boundary of the waste admissible. *Earl of Dunraven v. Llewellyn*, 19 Law J. Rep. (n.s.) Q.B. 388.

(H) PRIVILEGED COMMUNICATIONS.

[See EJECTMENT; When Maintainable, Attendant and outstanding Terms.]

Where an agreement is made by two parties, in the presence of their respective attorneys, the communications made by one party to his attorney, in the hearing of the others, are not privileged. *Weeks v. Argent*, 16 Law J. Rep. (n.s.) Exch. 209; 16 Mee. & W. 817.

At the trial of an ejectment to recover land claimed as parcel of the glebe of a rectory, a book describing the lands, subject to tithes, and a map stating the glebe lands, were produced by an attorney, who stated that he had received them from a former rector, who was also owner of the advowson. The book being given to him for the purpose of collecting the tithes, and the map with a view to the sale of the advowson, which was afterwards effected, and the lessor of the plaintiff appointed to the rectory by the purchaser,—Held, that the map was not a privileged communication; and *semble* that the book was not.

The heir and executors of the deceased rector having authorized the production of these documents,—Held, by *Erle, J.* that they were competent parties to waive the privilege if any existed. *Doe d. Marriott v. Marquess of Hertford*, 19 Law J. Rep. (n.s.) Q.B. 526.

Where the clerk of plaintiff's attorney went to defendant's attorney for the object of effecting a compromise, and what he said was said with the wish of effecting it,—Held, that all that passed was privileged as being a negotiation to bring about a compromise. *Jardine v. Sheridan*, 2 Car. & K. 24.

A prisoner was indicted for forging a will. The forged instrument had been given by the prisoner to his attorney, ostensibly for professional purposes, but in the opinion of the Judge, with some very different object. An objection that it was a privileged communication, and therefore could not be read,—Held, invalid. *Regina v. Jones*, 1 Den. C.C. 166; *nom. Regina v. Hayward*, 2 Car. & K. 234.

A took a forged will to B, a solicitor, and asked him to advance money on a mortgage of the property mentioned in the will. B made no charge for the interview, and did not advance the money:—Held, not a privileged communication. *Regina v. Farley*, 1 Den. C.C. 197; 2 Car. & K. 313.

Quære,—whether a person, not under any fiduciary relation to, or having any community of interest with, any other person, who has made a communication to a solicitor or counsel professionally on his own behalf alone, relating to property which is not the subject of any suit or dispute at the time, can be compelled to disclose such communication.

An estate was settled on A for life, with remainder to his children as he should appoint. A appointed to B, the eldest of several children, in 1834; and in 1836 A and B, who was only just of age, in consideration of money stated to be paid to A and B, mortgaged the estate. B made a devise of the property to A, and afterwards died. A entered into an agreement to sell the property to trustees of the will of P, subject to the approbation of the Court in a suit instituted to administer the estate of P. By an order, made at the instance of A, A was permitted to attend the Master on the inquiries as to the title; and all parties were to produce before the Master all books, &c., and to be examined on interrogatories. Interrogatories were allowed by the Master for the examination of A; in which, first, his communications with B respecting the appointment and mortgage were inquired after; and secondly, his communications with his solicitor respecting them. A excepted to the certificate of allowance:—Held, that A was compellable to answer the first class of inquiries; but was not compellable, in that stage, to answer the second class—without prejudice, however, to raising the question in a subsequent stage. *Pearce v. Pearce*, 16 Law J. Rep. (n.s.) Chanc. 153; 1 De Gex & S. 12.

Confidential communications made by a party to his attorney or counsel, do not cease to be privileged by the fact that the attorney or counsel afterwards becomes interested as devisee of the property to the title of which such communications related. *Chant v. Brown*, 7 Hare, 79.

Privilege of cases and opinions anterior to any litigation. *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59.

A party entered into an agreement for the sale of some houses for a sum of money; instead of which it was afterwards agreed that the purchaser should pay an annuity to the vendor during her life. A bill being afterwards filed for the purpose of having the amount of the annuity reduced, interrogatories were exhibited to the solicitor of the vendor, inquiring into the particulars of conversations which took place between him and the vendor, and him and a brother of the vendor, respecting the price at which the houses should be sold, and the amount of the annuity which should be required. The solicitor demurred to these interrogatories:—Held, that the business was strictly within the profession of a solicitor, and that the communications were necessary and confidential, and were entitled to be privileged, notwithstanding they related to matters which were not then in litigation, and were made not to the vendor, but to an agent. *Carpmael*

v. Powis, 15 Law J. Rep. (n.s.) Chanc. 275; 1 Phill. 687; 9 Beav. 16.

G, a solicitor, who was a trustee under a deed of settlement, in which M and H were respectively interested, was ordered, on bill filed by M against H and G, to produce letters admitted by G's answer to be in his possession, and which were written by him whilst acting as H's solicitor, during the negotiations touching the settlement, and subsequently to the execution thereof; notwithstanding the allegation of G, that most of the letters were written by him, and signed with the name of himself and partner in business, as the solicitor to H, and that the same were not written by him as trustee under the settlement. *Tugwell v. Hooper*, 16 Law J. Rep. (n.s.) Chanc. 171; 10 Beav. 348.

An attorney is bound to discover when and to whom he parted with documents of title of his client, and in whose possession the same were. *Banner v. Jackson*, 1 De Gex & S. 472.

A witness in demurring to certain interrogatories as to the production of letters, stated that they did not refer to any particular estates to be settled, and were received in his character of confidential solicitor, and contained particulars of confidential matters between himself and his clients:—Held, that the witness had not sufficiently shewn what was the subject of the communications, or that they were actually of a confidential character. *Walsh v. Trevanion*, 16 Law J. Rep. (n.s.) Chanc. 330; 15 Sim. 577.

(I) PRIMA FACIE AND PRESUMPTIVE EVIDENCE.

[See LEASE.]

The question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

Where, therefore, two persons had shewn a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, and the parties, by their acts at the time, shewed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found, nor any entry of the granting of it, or of the marriage itself, could be discovered; and though the bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage. *Piers v. Piers*, 2 H.L. Cas. 331.

Where entries purported to be made by Commissioners of the Land Tax in 1827, and evidence was given that the persons making them had acted as such Commissioners in 1828,—Held, that this was properly left as evidence to go to the jury that they were also Commissioners in 1827. *Doe d. Hopley v. Young*, 15 Law J. Rep. (n.s.) Q.B. 9; 8 Q.B. Rep. 63.

In ejectment for leasehold property, the plaintiff,

after proving the creation of the term in 1730, shewed it to be vested in E, in 1760. He then proved a deed-poll, executed by W in 1784, by which (after reciting the deed of 1760, the death of E, and that E had duly published her will in 1778, and that under the will the premises had vested in M) W released to M. No probate of E's will, nor any letters of administration, were produced, nor was any excuse given for their non-production. The plaintiff then deduced title from M, and shewed the enjoyment of the property since 1784 to have been consistent with the documentary title:—Held, that neither probate of E's will nor letters of administration could be presumed, and that the plaintiff had failed to shew himself possessed of the term. *Doe d. Woodhouse v. Powell*, 15 Law J. Rep. (n.s.) Q.B. 189; 8 Q.B. Rep. 576.

Where, under a plea of not possessed in an action for obstructing the plaintiff's wharf, the plaintiff gave general evidence of user for a long period,—Held, that the jury were properly directed to find for the plaintiff on such evidence, though the defendant put in the lease under which the plaintiff claimed, and which granted to the lessees the use of the *locus in quo*, "for a sawpit, and for laying timber upon." *Page v. Hatchett*, 15 Law J. Rep. (n.s.) Q.B. 281; 8 Q.B. Rep. 593.

The defendant having refused to produce the original of an agreement on which the plaintiff relied, one of the plaintiff's witnesses produced a counterpart, and, on cross-examination, stated that the original was not stamped when it was given to the defendant:—Held, that this evidence of want of the stamp was admissible, and that the counterpart was properly rejected. *Crouther v. Solomons*, 18 Law J. Rep. (n.s.) C.P. 92; 6 Com. B. Rep. 758.

It is not necessary to prove strictly the identity of the defendant with a person of the same name, concerning whom a witness gives evidence. The similarity of the names is sufficient to put the defendant to the proof that he is not the person spoken of. *Hamber v. Roberts*, 18 Law J. Rep. (n.s.) C.P. 250; 7 Com. B. Rep. 861.

On the trial of an action of trover for a bill of exchange, it was proved that the defendants, who were bankers, had discounted the bill for a customer for whom they were in the habit of discounting bills, and that the bill had been brought to them by the customer's clerk, who was directed to inquire whether they would discount it, and to state to the defendants the particulars of an arrangement between the holder of the bill and the customer. Neither party called the clerk as a witness:—Held, that the jury ought not to have been directed to presume that the clerk delivered the message; but that in the absence of evidence to the contrary, the presumption was, that the defendants had *bond fide* discounted the bill without notice of the circumstances which the clerk had been directed to tell them. *Middleton v. Barned*, 18 Law J. Rep. (n.s.) Exch. 433; 4 Exch. Rep. 241.

W H died intestate in 1798, seised of a house and land, leaving a widow and an only son (by her) J H, fifteen years old. The widow continued to reside on the property, and about a year after the death of W H married the defendant, and resided with him on the premises, J H also remaining with

them till 1805, when he went away, but occasionally returned for about a fortnight at a time till 1842. About that time the defendant applied to the lessor of the plaintiff to advance 100*l.* on mortgage of the property, and on that occasion the title-deeds being produced, the solicitor stated that it was necessary that J H, being the heir-at-law of W H, should execute the conveyance. The defendant accordingly brought J H, who executed the mortgage and signed the receipt for the 100*l.* which was received by the defendant:—Held, that a jury might well presume, on this state of facts, that the defendant was tenant at will to J H, and that the defendant, by his conduct, had waived all right to set up the Statute of Limitations, 3 & 4 Will. 4. c. 27, to defeat the right of entry of J. H. *Doe d. Groves v. Groves*, 16 Law J. Rep. (n.s.) Q.B. 297; 10 Q.B. Rep. 486.

The date a letter bears is *prima facie* its true date. *Potez v. Glossop*, 2 Exch. Rep. 191.

The date which appears on the face of a document is *prima facie* its true date. *Malpas v. Clements*, 19 Law J. Rep. (n.s.) Q.B. 435.

In ejectment under stat. 59 Geo. 3. c. 12. s. 17, for a parish house, on the demise of A and B, stated in the declaration to be the churchwardens and overseers of a parish, the fact that they acted as churchwardens and overseers at the time of the alleged demise is sufficient *prima facie* proof, for the purposes of the action, that they held the offices at that time. *Doe d. Bowley v. Barnes*, 8 Q.B. Rep. 1037.

The occupation of a tenement by a public company in September is not to be inferred from the payment of rates in respect thereof by the company in the April previous, coupled with the fact of the same business being continuously carried on there. *Gauntlett v. Whitworth*, 2 Car. & K. 720.

In pedigree cases, an old will by which the testator purports to leave all his property to collateral relations or friends is very strong evidence of his having died without children. *Hungate v. Gascoigne*, 15 Law J. Rep. (n.s.) Chanc. 382; 2 Ph. 25.

Presumption of death. See *Cuthbert v. Purrier*, 2 Phill. 199.

(K) ADMISSIONS.

[Of Official Character.—See TURNPIKE, and see PLEADING.]

Where a statement was made by the plaintiff's attorney to the defendant's attorney, in conversation during the assizes, with respect to the nature of the claim in the action, such statement not being expressly made for the purpose of being used as evidence,—Held, that it was not admissible. *Petch v. Lyon*, 15 Law J. Rep. (n.s.) Q.B. 393.

A plaintiff in ejectment claiming under a mortgagee gave in evidence the mortgage deed executed by the mortgagor and mortgagee, which recited that the mortgagor was seised in fee. The defendant was no party to this deed, but had subsequently indorsed upon it this memorandum—"The within premises were charged by me, W. Stone (the defendant), the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.*."—Held, that the memorandum was evidence for the jury that the defendant came in under the mortgagor, and that, if so, he was estopped from

setting up an adverse title prior to the date of the mortgage deed. *Doe d. Gaisford v. Stone*, 15 Law J. Rep. (n.s.) C.P. 234; 3 Com. B. Rep. 176.

Where an admission is relied upon against a party, the jury, in estimating the effect due to it, are justified in considering the circumstances under which it was made, and whether the defendant made it under an erroneous notion as to his legal liability.

A provisional committeeman of a railway was sued for work done by the plaintiff, on behalf of the company, in 1845, for a portion only of which he had given any authority to pledge his credit. In 1846 the committee circulated a letter which operated as an admission of the whole of the plaintiff's claim against the company:—Held, that the Judge was right in directing the jury to consider the circumstances under which the admission was made, and the mistaken view which was at that time entertained of the liability of members of provisional committees, and to qualify the effect of the admission accordingly. *Newton v. Belcher*, and *Newton v. Liddiard*, 18 Law J. Rep. (n.s.) Q.B. 53; 12 Q.B. Rep. 921, 925.

The admission of a document described in the usual notice to admit, is not the admission of a fact stated in the description: it may be some evidence of the fact which may be rebutted by evidence to the contrary. *Pilgrim v. the Southampton and Dorchester Rail. Co.*, 18 Law J. Rep. (n.s.) C.P. 330; 8 Com. B. Rep. 25.

On an interpleader issue between the plaintiff, the claimant of certain goods, and the execution creditor, the plaintiff claiming the goods under an assignment made to him by the debtor as a security for previous advances, an admission of the debt made by the debtor before the assignment in the absence of the defendant is not receivable in evidence for the plaintiff. *Coole v. Braham*, 18 Law J. Rep. (n.s.) Exch. 105; 3 Exch. Rep. 183.

To a certificate that A B had transferred to the defendant certain shares in a mine, was added a statement signed by the defendant, that he agreed to accept and take the same:—Held, in an action of debt for goods supplied to the mine, that the certificate was evidence against the defendant as an admission by him that he was a shareholder in the mine, and that it did not require a transfer stamp. *Toll v. Lee*, 18 Law J. Rep. (n.s.) Exch. 364; 4 Exch. Rep. 230.

In an action for wages, a statement by the plaintiff that the claim which formed the subject-matter of the action had been referred, and that the arbitrator had made an award against him, is receivable on behalf of the defendant under the issue of non assumpsit. *Murray v. Gregory*, 19 Law J. Rep. (n.s.) Exch. 355; 5 Exch. Rep. 468.

(L) DEPOSITIONS AND FORMER EVIDENCE.

Where a commission issued on a petition of right in Chancery, and inquisition returned thereon, a bill was filed for perpetuating testimony, reciting the petition:—Held, that upon a traverse of the inquisition by the Crown, and the record sent for trial into the Queen's Bench, the depositions of witnesses taken under the bill, but beyond the jurisdiction, were admissible, the parties being substantially the same, and the commission to examine

witnesses having issued in the same proceeding. *Baron de Bode's case*, 8 Q.B. Rep. 245.

Where a witness, examined upon interrogatories, refers in the course of his deposition to a document which he describes as a "legalized copy" of a former deposition made by him, and which he states that he confirms, but which is not authenticated in any way, such document is not admissible in evidence. *Alcock v. the Royal Exchange Insurance Co.*, 18 Law J. Rep. (n.s.) Q.B. 121; 13 Q.B. Rep. 292.

Upon the trial of a prisoner for unlawfully obtaining a promissory note by false pretences, the deposition of the prosecutrix, proved to have been regularly taken before the committing magistrate, stated by way of caption or title that it had been taken in the presence and hearing of Harriet Langridge (the prisoner), late of, &c., wife of John Langridge of the same place, labourer, who is now charged before me this day for obtaining money and other valuable security for money from the said Mary Rowe (the prosecutrix), then and there being the money of, &c.:—Held, that such title or caption charged an offence against the prisoner with sufficient distinctness, and that the deposition had been properly received in evidence at the trial, after due proof of the absence of the prosecutrix through illness.

The title or caption of the written deposition of a witness, taken before a committing magistrate, need state no more than that it is the deposition of the witness, and that the examination had reference to the particular charge upon which the prisoner is being tried. *Regina v. Langridge*, or *Langbridge*, 18 Law J. Rep. (n.s.) M.C. 198; 1 Den. C.C. 448; 2 Car. & K. 975.

The prisoners being charged with felony before a magistrate, minutes of the examination and cross-examination of the witnesses were taken in writing under the inspection of the magistrate. These minutes were taken to the magistrate's office to a clerk named T, who proceeded to draw up the depositions. The witnesses attended at the office, and T, in order to make the depositions complete, put questions to the witnesses, and inserted their answers in the depositions. Neither the magistrate nor the prisoners were present at the office. The depositions having been so written out, the witnesses again appeared before the magistrate, and in the presence of the prisoners were re-sworn, and the depositions were read over to them, and a full opportunity was given for cross-examination before the depositions were signed by the witnesses:—Held, that the counsel for the prisoner was entitled, without putting in the depositions, to ask a witness whether he had not made a certain statement to T, in answer to a question put by the latter in the course of writing the depositions, although, according to the evidence, the answer would have appeared in the depositions. *Regina v. Christopher*, 19 Law J. Rep. (n.s.) M.C. 103; 1 Den. C.C. 536; 2 Car. & K. 994.

(M) CONFESSIONS.

At the trial of a servant for attempting to poison her mistress, a medical man, having denied that he had held out any inducement to the prisoner to confess, gave evidence of a confession, without which the prisoner could not have been convicted.

Evidence was then given that before she made her confession he had said to her in the presence of her mistress, "it will be better for you to tell the truth." The medical man was re-called, but did not admit this, and the Judge left the evidence, including the confession, to the jury; but reported that if the evidence had been given in the first instance, he should have excluded the confession:—Held, that the confession ought to have been struck out, and that the conviction was wrong.

Per Erle, J.—Whether an exhortation to tell the truth is a mere exhortation or an inducement to confess, is a question for the Judge at the trial. *Regina v. Garner*, 18 Law J. Rep. (n.s.) M.C. 1; 1 Den. C.C. 329; 2 Car. & K. 920.

After taking the examination of the witnesses on a charge of felony against the prisoner, the magistrate cautioned the prisoner in the language prescribed by section 18. of the statute 11 & 12 Vict. c. 42, but did not, as the proviso to that section requires, tell the prisoner that he had nothing to hope from any promise of favour, or to fear from any threat. The prisoner then made a statement, which was taken down, but was not signed by the prisoner or the magistrate. The prisoner, after a remand, being brought again before the magistrate, some questions were put to the witnesses by the prisoner's attorney, who then objected to the statement being treated as the prisoner's statement, as an addition had been made to the evidence; and the prisoner being then asked if he wished to make any statement declined doing so:—Held, that the prisoner's statement was admissible in evidence against him at his trial. *Regina v. Bond*, 19 Law J. Rep. (n.s.) M.C. 138; 1 Den. C.C. 517.

When a party charged with an indictable offence before a magistrate, asked by the magistrate, pursuant to the statute, 11 & 12 Vict. c. 42. s. 18, whether he wishes to say anything in answer to the charge, and is told by the magistrate that he is not obliged to say anything, unless he desires to do so, but that whatever he says will be taken down in writing, and may be given in evidence against him upon his trial, and the prisoner thereupon makes a statement which is taken down, and the deposition containing it is duly returned, and bears upon its face that such caution has been given, and purports to be signed by the magistrate, and there is no evidence that any threat or promise has been held out to induce a confession from the prisoner, the deposition may, without further proof, be read in evidence against him on his trial, although the magistrate did not comply with the direction in the first proviso to the above-mentioned section, and give the prisoner to understand before he made his statement that he had nothing to hope from any promise of favour, and nothing to fear from any threat which might have been held out, but that what he should then say might be given in evidence against him, notwithstanding such promise or threat.

Semble—that the last proviso to the same section overrides the whole section, and renders admissible in evidence against a prisoner any statement made by him either before a magistrate or on any other occasion, which independently of the statute would by law be admissible as evidence against him. *Regina v. Sansome*, 19 Law J. Rep. (n.s.) M.C. 143; 1 Den. C.C. 545.

(N) PRACTICE, IN EQUITY.

A party had power to appoint by will executed without any particular formality. Upon a petition to obtain the fund out of court,—Held, that evidence of the probate was sufficient without producing the original will. *Ward v. Ward*, 11 Beav. 377.

A creditors' suit was instituted against the executors of a person, who, upon the marriage of A, had covenanted (as was alleged) to settle a sum of stock upon certain trusts, under which A had become absolutely entitled. No stock was settled according to the agreement. The deed was not produced; and in order to obtain the benefit of A's evidence respecting it, he assigned all his interest to the plaintiff without consideration. The attesting witness to the deed was not produced, nor was any satisfactory proof of his death given. The Court refused to grant any reference respecting the execution of the alleged deed; but retained the bill for a year, with liberty to proceed at law.

The evidence of A was rejected by the Court below, but admitted *de bene esse* by the Lord Chancellor.

Mode of referring, in a decree, to evidence which has been rejected, or admitted *de bene esse*. *Watson v. Parker*, 15 Law J. Rep. (n.s.) Chanc. 400; 2 Ph. 5.

If an heir files a bill stating that his ancestor's will was duly executed and attested, but dies before the cause is heard, leaving an infant heir, the will must be proved. *Hollings v. Kirkby*, 15 Sim. 183.

A person in possession of documents may be served with, and examined at the hearing upon a *subpoena duces tecum* under the 24th Order of May 1845, but—

Semble—the examination must be confined to questions relating to the mere purpose of production of the document.

If the possession of the document is admitted, but production of it is refused on the ground of a lien upon it, an order for its production will not be made. *Griffith v. Lunell*, and *Griffith v. Ricketts*, 19 Law J. Rep. (n.s.) Chanc. 399.

EXCHEQUER, COURT OF.

[See WITNESS.]

Quære—Whether an application by bill, on the equity side of the Court of Exchequer, can now be sustained. *Attorney General v. Boet*, 15 Law J. Rep. (n.s.) Exch. 155; 15 Mee. & W. 60; 3 Dowl. & L. P.C. 492.

The Court of Exchequer has, notwithstanding the 5 Vict. c. 5, retained all its actual and incidental jurisdiction, equitable as well as legal, which it has as a court of common law; also all its proper jurisdiction as a court of revenue, for the collection of the revenues of the Crown, whether the jurisdiction be exercised after the forms of common law or equity; but it has lost all jurisdiction as a court of equity between its officers and Crown debtors and other subjects of the realm, before incident to it as a court of revenue, and exercised by it as a mere court of equity; also all its usurped jurisdiction as a court of equity between subject and subject, which it exercised *de facto* as a mere court of equity in

the court of revenue, *Attorney General v. Halling*, 16 Law J. Rep. (N.S.) Exch. 303; 15 Mee. & W. 687.

EXCISE.

[See REVENUE.]

EXECUTION.

[See BARON AND FEME—PRACTICE AT LAW—SHERIFF.]

EXECUTOR AND ADMINISTRATOR.

[See ADMINISTRATION—EJECTMENT.]

- (A) EXECUTOR DE SON TORT.
- (B) RIGHTS, DUTIES, AND DISABILITIES.
 - (a) *Indemnity against Covenants.*
 - (b) *Setting off Debts due to Deceased.*
 - (c) *Carrying on Trade.*
 - (d) *Allowances to.*
- (C) LIABILITIES.
 - (a) *For Sums improperly dealt with.*
 - (b) *As Assignee of a Lease.*
 - (c) *As to Value of Testator's Property.*
 - (d) *To Costs.*
- (D) ASSETS.
 - (a) *What constitute.*
 - (b) *Admission of.*
 - (c) *Administration of.*
- (E) RETURN OF DUTY.
- (F) ACTIONS AND SUITS.
 - (a) *When maintainable.*
 - (b) *Pleading.*
 - (c) *Practice.*
 - (d) *Decrees and Costs.*

(A) EXECUTOR DE SON TORT.

Where a lessee died intestate during the term, and his widow entered and paid rent, and afterwards the defendant, her son-in-law, took the premises, with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term,—Held, first, that there being no assignment in writing, he was not chargeable as assignee in fact; and, secondly, that he could not be considered assignee in law, for, though the widow might have been chargeable as executrix *de son tort*, the defendant had not made himself executor *de son tort* by taking the premises after her. *Paull v. Simpson*, 15 Law J. Rep. (N.S.) Q.B. 382; 9 Q.B. Rep. 365.

The agent of an executor *de son tort*, collecting the assets, knowing them to belong to the testator's estate, and that his principal is not the legal personal representative, makes himself liable to account as executor *de son tort*, notwithstanding he has duly accounted for his receipts to his principal; on the ground that the doctrine, that the receipt of the agent is the receipt of the principal, does not apply

to the acts of a wrong-doer. *Sharland v. Mildon*, 15 Law J. Rep. (N.S.) Chanc. 434; 5 Hare, 469.

An executor *de son tort* is subject to all the liabilities, but entitled to none of the privileges of a rightful executor. *Carmichael v. Carmichael*, 2 Ph. 101.

(B) RIGHTS, DUTIES, AND DISABILITIES.

[See Conversion and Re-conversion.]

(a) *Indemnity against Covenants.*

A testator held long leaseholds, some as original lessee and others as assignee. They were sold in a suit.—Held, that the executors were entitled to be indemnified against the eventual breaches of the covenants, either by a retainer in court of part of the assets, or by a security of the legatees to refund.

Reference directed to ascertain the liabilities in respect of the covenants and what amount should be set apart, with liberty to the legatees to propose a proper security. *Dobson v. Carpenter*, 12 Beav. 370.

(b) *Setting off Debts due to Deceased.*

To assumpsit for money received to the use of plaintiff as administrator, and on an account stated with him as administrator, with promises to him as administrator, defendant cannot plead a set-off for money due from the intestate in his lifetime. *Schofield v. Corbett*, 11 Q.B. Rep. 779.

An executor is entitled to set off against a legacy a debt due from the legatee to the testator, though such debt may have been barred by the statute before the testator's death. *Courtney v. Williams*, 15 Law J. Rep. (N.S.) Chanc. 204.

One of the creditors of an insolvent died intestate, leaving the insolvent one of his next-of-kin:—Held, that the administrators of the creditor were not entitled to retain the debt out of the insolvent's distributive share of the creditor's estate. *Bell v. Bell*, 17 Sim. 127.

(c) *Carrying on Trade.*

To authorize executors to carry on or to permit to be carried on a trade, the property of a testator which they hold in trust, there ought to be the most distinct and positive authority and direction given by the will for that purpose. *Kirkman v. Booth*, 18 Law J. Rep. (N.S.) Chanc. 25; 11 Beav. 273.

(d) *Allowances to.*

A bill instituted by a testator was revived by his executors, and was afterwards dismissed, with costs, to be paid by the executors and retained out of the assets. The state of the assets required the executors to pay a considerable sum out of their own monies:—Held, that they were not entitled to interest thereon. *Lewis v. Lewis*, 13 Beav. 82.

F B died at the house of H, of a contagious disease, and, under the advice of medical men, H removed from his house with his family while it was cleansed, and the room where F B died fumigated. H, also, to prevent infection, destroyed all the furniture in the room where F B died; and his executor paid to H 160*l.* as a compensation for his loss, &c.; and upon exceptions to the Master's report disallowing the payment,—Held, it being both necessary to remove and a duty to destroy the

furniture, that an implied contract existed, and that the executor was entitled to be allowed the payment, but that the parties were entitled to further inquiry; and the exception was allowed, with costs.

A physician attended F B during several of the last years of his life without any payment being made to him, but upon some understanding that remuneration was to be made by a legacy, which was not done. The executor paid to the physician 100*l.* as a remuneration for the services performed, which the Master disallowed. Upon exceptions to the report,—Held, that there was nothing to raise an implied contract; that the executor had placed himself in the situation of the physician, and was not entitled to have the payment allowed; and the exception was overruled, with costs. *Shallcross v. Wright*, 19 Law J. Rep. (N.S.) Chanc. 443; 12 Beav. 558.

A sum of 27*l.* for wages due to the servants of a testator at his death, and another sum of 16*l.* for keeping a house for the repairs of which the testator's estate was liable, were allowed to an executor in passing his accounts (under the circumstances of the case) on his own affidavit and without vouchers. *Caton v. Rideout*, 19 Law J. Rep. (N.S.) Chanc. 408.

(C) LIABILITIES.

(a) For Sums improperly dealt with.

An executor held chargeable with interest on sums retained by him and mixed with his own monies at his bankers; the sums being retained out of the income of the testator's residuary estate, in order to satisfy a debt which there was probable ground to believe due to the testator's estate from a person entitled to a share of such income, but which turned out not to be due to the extent supposed. *Melland v. Gray*, 2 Coll. C.C. 295.

A, on behalf of the Crown, took out administration to the estate of B, who, it was alleged, had died without leaving any next-of-kin; and, as such administrator, sold out a sum of stock belonging to B, and paid the proceeds into the Treasury. Some years after a suit was instituted by the next-of-kin of B against A, and a decree obtained in his favour:—Held, that interest was payable on the proceeds of the sale of the stock since the time of the sale. *Turner v. Maule*, 18 Law J. Rep. (N.S.) Chanc. 454.

Executors by proving the will take upon themselves the obligation of seeing that the assets are got in and properly invested; and it is the duty of each to watch over, and, if necessary, to correct the conduct of the other; and therefore it is no ground of immunity to an executor that he has been passive in permitting a debt due from his co-executor to the testator's estate, or a balance in his hands, to remain outstanding or uninvested, whereby the same has been eventually lost.

Two of three executors who had allowed their co-executor to retain in his hands for a period of six years a sum of money due by him to the testator, and which was afterwards lost to the estate by the bankruptcy of such co-executor, were held liable to make good that sum to the estate.

A direction in a will that executors shall call in securities not approved by them will not authorize a continuance of that kind of investment which a court of equity would not sanction. *Stiles or Styles*

v. Guy, 19 Law J. Rep. (N.S.) Chanc. 185; 1 Mac. & G. 422; 1 Hall & Tw. 523.

(b) As Assignee of a Lease.

When a lease for years, by which the rent reserved is more than the value of the premises, vests in an executor, the executor is liable as assignee for the amount of rent which the premises could have been let for.

To a declaration in debt on a lease, for rent at 90*l.* a-year for two years and three quarters, due from defendant as assignee, the defendant pleaded "that he ought not to be charged with the said rent otherwise than as executor of W, who died possessed of the term; that he, the defendant, entered upon the said premises as such executor, and that he had not at any time since the death of the said W derived any profit or advantage as such executor or otherwise, by or from the said premises; that the said premises had not since the death of the said W yielded any profit whatever; that the said premises did not vest in the defendant by assignment or otherwise than as such executor, and that he has no assets to be administered." Replication, "that the defendant did after his entry upon the said premises derive great profit and advantage by and from the said premises, which have yielded to him profit (to wit) to the amount of the said rent sought to be recovered." It was proved that the premises could have been let for 60*l.* a-year, and the jury found a verdict for the plaintiff for 165*l.* (being rent at 60*l.* a-year for two years and three quarters):—Held, that *after verdict* the plea must be taken to contain the allegation, that the defendant could not have derived any profit whatever from the premises, and that the verdict was properly found for the plaintiff for 165*l.*

Held also, that the plea was to be construed as applicable distributively to each part of the sum demanded in the first count of the declaration; and thus, though the action was debt and the only plea to the first count was found for the plaintiff, yet he was only entitled to a verdict for so much of the sum claimed in the first count as could have been derived from the premises. *Hopwood v. Whaley*, 18 Law J. Rep. (N.S.) C.P. 43; 6 Com. B. Rep. 744.

(c) As to Value of Testator's Property.

Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties. *Rowley v. Adams*, 2 H.L. Cas. 725.

(d) To Costs.

Executors who are plaintiffs will not be exempted from paying the costs of issues on which they have failed, unless the defendant has been guilty of deception or misrepresentation. It is not enough that the conduct of the defendant has been such as to induce the executors to go on. *Birkhead v. North*, 16 Law J. Rep. (N.S.) Q.B. 284; 4 Dowl. & L.P.C. 732.

(D) ASSETS.

(a) What constitute.

A testator, by his will, after devising his real estate to his executors for the benefit of his wife and children, expressed himself as follows:—"My executors are charged with the payment of my just

debts, of which I shall leave an account with the letter named above to my dear wife:"—Held, that all the testator's real estates were equitable assets for the payment of his debts. *Dormay v. Borradaile*, 16 Law J. Rep. (N.S.) Chanc. 337; 10 Beav. 263.

(b) *Admission of.*

Suit by a bond creditor for the administration of the testator's estate, praying the usual accounts and payment. The executor, by his answer, admitted payment of certain legacies under a mistaken notion that the assets were sufficient:—Held, that such payment was not an admission of assets, entitling the plaintiff to an immediate decree personally against the executor, no such case being made by the bill, and the relief prayed being inconsistent therewith. *Savage v. Lane*, 17 Law J. Rep. (N.S.) Chanc. 89; 6 Hare, 32.

Payment of a legacy on an erroneous construction of a will not *mala fide* is not an admission of assets on the true construction. *Clark v. Bates*, 2 De Gex & S. 203.

(c) *Administration of.*

In an action by a purchaser of leaseholds against the vendor, who sold as executor, to recover his deposit on the ground of no title being made out, it appeared that prior to the sale a bill had been filed against the defendant, as executor, by a legatee for a general administration of the testator's estate, to which the defendant had appeared, but that no decree had been made:—Held, that the executor had power to make a valid sale of any part of the assets pending the suit.

Held, also, that the rule of equity by which the defendant is enabled to sell pending the suit is not a mere rule of practice, but one of which this Court takes judicial cognizance, and that evidence of the invalidity of the sale on that account was not admissible. *Neeves v. Burrage*, 19 Law J. Rep. (N.S.) Q.B. 68.

In an action by the plaintiff, as executor of an original lessee, against the executor of the assignee of the lease, upon a covenant by the assignee to indemnify the lessee against breaches of the covenants in the original lease, the defendant, under *plene administravit*, is protected by proof that he sold the lease in question, and had exhausted all the assets in his hands by payment of simple contract debts before the breaches of covenant declared on were committed. *Collins v. Crouch*, 18 Law J. Rep. (N.S.) Q.B. 209; 13 Q.B. Rep. 542.

(E) RETURN OF DUTY.

Where the effects of a testator were situate in two provinces, and the executors were obliged to take out two probates,—Held, that they were not entitled to a return of probate duty, upon shewing that they had paid debts out of the general effects of the testator, by which the effects were reduced to an amount upon which, if one probate only had been necessary, a less duty would have been payable than had been paid.

Semble—that the rule of the Commissioners of Stamps, in such cases, to apportion the debts rateably to the personal estate in each province is a fair and equitable one, and warranted by the statute 5 & 6 Vict. c. 89. s. 23. *Regina v. the Commissioners*

of Stamps and Taxes, 16 Law J. Rep. (N.S.) Q.B. 75; 9 Q.B. Rep. 637.

When a testator or intestate dies possessed of personal estate both in England and India, and indebted to English creditors in respect of debts contracted in England, the amount of assets in India cannot be taken into consideration in estimating the amount of duty to be returned to the executor or administrator, under the 5 & 6 Vict. c. 79. s. 23; India being for this purpose to be considered as a foreign country.

A died intestate in England possessed of personal estate in England to the amount of 5,858*l.* 16*s.* 1*d.*, in respect of which a duty of 150*l.* was paid on the letters of administration. His administratrix paid debts due to creditors resident in England and contracted in England to the amount of 4,890*l.* 0*s.* 10*d.*, leaving a balance of 968*l.* 15*s.* 3*d.*, on which the duty would only be 30*l.* A, at the time of his death, was also possessed of personal property in the East Indies to the amount of 12,118*l.* 16*s.* 4*d.*, which had been received by his administratrix by means of letters of administration granted to an agent in India, and there were no other debts due from the intestate:—Held, that the administratrix was entitled to a return of 120*l.* of the duty. *Regina v. the Commissioners of Stamps and Taxes*, 18 Law J. Rep. (N.S.) Q.B. 201.

(F) ACTIONS AND SUITS.

(a) *When maintainable.*

Leasehold property was bequeathed to the testator's wife for life, and afterwards to the defendant for the residue of the term. The wife entered with the assent of the executor (the plaintiff), and after her death the defendant entered and continued in possession for fifteen years, when the leaseholds were sold. No duty was ever paid on the legacy till after the sale, when 10 per cent. on the value of the leaseholds, and 10 per cent. on the amount of profits received by the defendant were paid by the plaintiff, the executor:—Held, that the plaintiff was entitled to recover from the defendant, as money paid, the whole duty paid. *Bate v. Pame*, 18 Law J. Rep. (N.S.) Q.B. 273.

Where a party is abroad at the time of the accrual of a right of action, and dies without returning to this country, his executors may sue although six years have elapsed from the time of its accrual.

Quare—whether, under such circumstances, the executors would be bound to sue within six years of the testator's death. *Townsend v. Deacon*, 18 Law J. Rep. (N.S.) Exch. 298; 3 Exch. Rep. 706.

(b) *Pleading.*

A set-off for money due from the plaintiff to a testator in his lifetime may be pleaded in answer to a declaration on a cause of action, which accrued to the plaintiff, from the defendants, as executors, after the death of the testator.

A declaration in assumpsit contained counts for goods sold, and on an account stated between the plaintiff and B, and a count on an account stated between the plaintiff and the defendants, as executors of B, assigning a general breach. Plea, to the whole declaration, a set-off for money due on an account stated between the plaintiff and B, payable

on request, and remaining unpaid to B, and to the defendants, as executors, at the commencement of the suit. Replication, as to parcel of the causes of set-off, the Statute of Limitations, and as to the residue, that the plaintiff was not indebted to B, nor is indebted to the defendants, as executors. Verification:—Held, on special demurrer to the replication, that the latter part of it was bad, and should have concluded to the country.

Quare—whether the replication was not also bad for duplicity.

Held, also, that the plea was a good answer to the action. *Blakesley v. Smallwood*, 15 Law J. Rep. (n.s.) Q.B. 185; 8 Q.B. Rep. 538.

In an action against A and B as executors, A cannot plead that B is not an executor.

In an action for use and occupation against defendants as executors, declaration that defendants, as executors, were indebted to the plaintiff for the use and occupation of certain premises held of the plaintiff by the defendants, as executors, under a demise thereof to the testator, and thereupon defendants, as executors, promised to pay:—Held, upon demurrer to a plea, that the declaration was good under the statute 11 Geo. 2. c. 19, and sufficiently charged the defendants *de bonis testatoris*. *Atkins v. Humphrey*, 15 Law J. Rep. (n.s.) C.P. 120; 3 Dowl. & L. P.C. 612; 2 Com. B. Rep. 654.

To a declaration charging the defendant as executor, a plea, that the defendant never was executor, nor ever administered any of the goods or chattels of the deceased, may conclude to the country. *Wood v. Kerry*, 15 Law J. Rep. (n.s.) C.P. 122; 3 Dowl. & L. P.C. 642; 2 Com. B. Rep. 515.

A judgment of assets *quando acciderint* affects all assets which at the time of such judgment are in the hands of the executor not administered, as well as those which may come into his hands subsequently.

Where, therefore, in an action against an executor, the defendant pleaded *plene administravit propter*, and the plaintiff replied that assets had come to the defendant's hands since plea pleaded,—Held, that such replication was unnecessary and bad. *Smith v. Tateham*, 17 Law J. Rep. (n.s.) Exch. 198; 2 Exch. Rep. 205; 5 Dowl. & L. P.C. 732.

In debt on bond against the defendant as executrix of S, who was executrix of the obligor, the defendant pleaded that S died intestate, *absque hoc*, that the defendant was the rightful executrix of S. On demurrer, held, that the plea was good in form, but that it afforded no answer to the action, as it admitted that the defendant as executrix *de son tort* had received all the assets not administered by S, but did not shew that the defendant had no assets in her hands unadministered of the original testator, either independent or in consequence of a *devastavit* by S, out of which she could satisfy the debt. *Meyrick v. Anderson*, 19 Law J. Rep. (n.s.) Q.B. 231.

The first two counts of the declaration charged the defendant as executor of J H in respect of principal and interest due from the testator to the plaintiff. The third count stated that the defendant as such executor as aforesaid was indebted to the plaintiff in 200*l.* for interest for the forbearance at interest by the plaintiff to the defendant as such executor as aforesaid at his request of monies owing from the defendant as such executor as aforesaid to

the plaintiff:—Held, that the declaration was bad on the ground of misjoinder, and that the words “at his request” in the third count could not be rejected as surplusage. *Bignell v. Harpur*, 19 Law J. Rep. (n.s.) Exch. 168; 4 Exch. Rep. 773.

(c) Practice.

In 1825 Henry Wyatt and his son Henry E, who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership deed, it was agreed that the plant, &c., which was stated to have been valued at 63,000*l.*, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus monies in the business were stated to amount to 48,915*l.*, on which he was to receive interest. He died in July 1826, having, by his will, given his surplus capital to his executors, in trust to invest the same in government or other security, and pay the income to his wife, and after her death to set apart two legacies of 12,000*l.* each for his two daughters and their children. He gave his interest in the business and the stipulated ordinary capital to his sons Henry E, George, and William, who was a minor, and he directed his executors to carry on the business, in conjunction with his two sons, until William attained twenty-one, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December 1827, the executors having in the mean time left the surviving partners in the undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827 for administration, which, through the interference of the executors, was abandoned. In 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E assigned his interest to George, in consideration of 20,000*l.*, and the executors released Henry E from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the Court, was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate; and in January 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital. By several decretal orders, made in both causes, accounts were directed to be taken as to the accuracy of the recitals in the partnership deed, the value of the plant, and the surplus money due to the testator at his death; and accounts were directed to be taken of the partnership dealings and transactions; and if the Master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstances. The Master, having reported that he could not take the accounts for non-production of books, he was, by another order, directed further to inquire by whom the partnership property was pos-

sessed at the death of the testator, and how disposed of, and whether the executors, with due diligence, and without their wilful default, might have possessed themselves, out of the partnership property, of sufficient to pay the two legacies of 12,000*l*. The Master again reported that he was unable to take the accounts, by reason of the non-production of the books; he found, however, on the evidence before him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might, with due diligence, and without their wilful default, have possessed themselves out of the partnership property of a sufficient sum to pay the two legacies. The Court, upon exceptions, negatived the finding of wilful default:—Held, by the House of Lords, that there was no just ground of appeal against the order directing further inquiries as to sufficiency of assets and wilful default of the executors.

If an order directing inquiries be deemed unnecessary, the party objecting should promptly apply to the Court to discharge it; as a Court of appeal would not listen to objections taken after the delay and expense of the inquiries were incurred; and if it did, it would reject the information so obtained.

Held, also, by their Lordships, affirming the order of the Court below upon the exceptions, that the Master's findings of the sufficiency of assets and wilful default, were displaced by his former findings, confirmed by the Court, of the impossibility of ascertaining the testator's surplus capital; that there was no reason for thinking that the surplus capital could, if at all, have been realized, without putting an end to the business, which the executors could not do without breach of their duty; that though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets out of which the legacies could have been recovered or secured, the executors ought not to be charged with wilful default. *Rowley v. Adams*, *Adams v. Rowley*, *Wyatt v. Adams*, 2 H.L. Cas. 725.

If a trustee be sued for an account in the Court of Chancery, and it should appear that he had properly expended sums of money for the protection and safety, or for the maintenance of his *cestui que trust*, at a time when the *cestui que trust* was incapable of taking care of himself, the Court will allow him credit for such sums.

A party had exhibited violent conduct as well during the lifetime of his mother as subsequently, and was considered to be of unsound mind, and, upon the proper medical certificates, was removed from prison (where he had been confined by order of a magistrate on account of a threat to murder a person,) to a lunatic asylum. He escaped from the asylum, and was afterwards, on an inquisition, found by a jury to be of sound mind. In a suit, afterwards instituted by the party, and praying the usual executorship accounts, against the executor of the will of the party's late mother, under which the party took beneficially, it was held that the executor was entitled to an inquiry before the Master, under what circumstances the executor interfered to take care of the party, and to place him in an asylum, and how long the party was maintained in such asylum, and what

sums were properly expended by the executor for the protection and support of the party whilst he remained in such asylum, and under what circumstances the commission of lunacy was sued out and prosecuted.

Held, also, that where facts have occurred after filing the answer to an original bill against an executor for an account, the defendant is justified in filing a cross-bill to put those facts in issue. *Nelson v. Duncombe* and *Duncombe v. Nelson*, 15 Law J. Rep. (N.S.) Chanc. 296; 9 Beav. 211.

An executor having a promissory note for 400*l*. as part of the assets, retained it in his possession without taking any proceedings to recover the amount or interest for seven years; and at the end of that time, when the sole residuary legatee came of age, the executor delivered the note to him. The residuary legatee, ten years afterwards, filed his bill against the executor, charging him with breaches of trust in the administration of the estate. The Court under such circumstances refused to charge the executor with the amount of the promissory note, or to direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce payment of the note.

In such a case the executor would only be chargeable if the amount of the note could have been recovered during the seven years between the death of the testator and the time when the plaintiff attained his majority; and in case it were found to have been recoverable during that time, still the executor would not be chargeable unless it could not be recovered during the ten years which elapsed after the note was delivered to the plaintiff. *East v. East*, 5 Hare, 348.

In a creditors' suit to administer the estate of an insolvent testator, his executor and son claimed to be allowed the amount of principal and interest due on a bond alleged by him, and admitted by the testator (as proved by a single witness) to have been given to the former for arrears of salary; and also the amount of principal due on two other bonds for valuable consideration from the testator to two creditors, which amount they had lent, after the testator's death and before the institution of the suit, to the executor personally, and from which they had released the testator's estate, but for which no part of the testator's assets had been paid or delivered to them by the executor:—Held, on exceptions to the Master's report, that on such evidence as the above an issue ought to be directed to try the consideration of the bond given by the testator to his son: and it being admitted that the executor had at the time of the transactions between himself and the bond creditors sufficient assets of the testator in his hands to satisfy the amount of those debts, that the executor was entitled to prefer them to others of equal degree, and to be allowed the payment of them in passing his accounts. Also, that it was immaterial to consider whether the assets had been converted into cash for the purposes of those transactions; and that they were not invalidated by the omission of an actual payment of cash or delivery of goods of equivalent value by the executor to those creditors.

The executor, who was the defendant in the suit, was ordered to be the plaintiff at law in the trial of the issue. A motion by him that he might be

examined and cross-examined as a witness at the trial was refused.

Such a motion as the above should be made, if at all, at the time when the issue is directed. *Hepworth v. Heslop*, 18 Law J. Rep. (N.S.) Chanc. 352; 6 Hare, 561, 622.

A testator who was carrying on the business of a brewer, made his will, and thereby gave all his real and personal estate to his son J K and three other persons, upon trust to raise an annuity and portions, and subject thereto, the testator directed that the trustees should permit the son during his life, to receive the annual produce and income of the testator's real and personal estate for his own use. The testator also appointed his four trustees and his wife his executors and executrix:—Held, on bill filed after a great lapse of time, and after the death of all the trustees and executors, against the personal representatives of the deceased executors, that the plaintiffs were entitled to an account and inquiry as to all the property which the testator possessed at his death, and what had become thereof, and what steps the executors took for the purpose of recovering or receiving any part of the property which without their wilful default they might have received.

Held, also, that, as to the furniture and converted debt, the Master ought to have liberty to state special circumstances, and that there ought to be a direction that if the Master could not satisfactorily take the inquiry, he should be at liberty to state the circumstances that created the difficulty. *Kirkman v. Booth*, 18 Law J. Rep. (N.S.) Chanc. 25; 11 Beav. 273.

(d) Decrees and Costs.

A party sued as executor *de son tort* jointly with a rightful executor stated by his answer that he had before bill filed accounted with his co-defendant, and paid over to him the balance:—Held, that such settlement did not bind the plaintiff, who was beneficially interested in the estate; and the Court refused to make the usual decree as to not disturbing the accounts. *Carmichael v. Carmichael*, 2 Ph. 101.

Proof of improper expenditure by executors will not support a decree against them on a bill for an account on the footing of wilful neglect or default, and the executors are entitled to the costs of depositions taken relative to that proof. *Smith v. Chambers*, 2 Ph. 221.

The Court will give to the administrators of a defaulting executor their costs of suit out of the assets of the executor that have been received by them. *Haldenby v. Spofforth*, 15 Law J. Rep. (N.S.) Chanc. 328; 9 Beav. 195.

EXTENT.

A writ of extent may be made returnable in vacation.

If a defendant in prison under a writ of extent be taken out of the precincts of the prison for a time, by order of the Commissioners of Excise, but without a writ, for the purpose of giving evidence, and be afterwards brought back and detained in the same custody, such custody is lawful. *Regina v.*

Renton, 17 Law J. Rep. (N.S.) Exch. 204; 2 Exch. Rep. 216; 3 Dowl. & L. P.C. 750.

Upon an inquiry under a writ of extent, it appeared that the defendant had assigned all his property two days before the teste of the writ, by a deed which was an act of bankruptcy, and upon which a fiat was issued before the teste of the writ. The sheriff returned that to the knowledge of the jurors the defendant had no goods, &c.:—Upon an application by the Attorney General, the Court ordered a writ *ad melius inquirendum* to issue, that the facts as to the assignment might appear upon the inquisition, it being suggested that the Crown would be entitled to the goods as against the assignees. *Regina v. Jobling*, 19 Law J. Rep. (N.S.) Exch. 14; 4 Exch. Rep. 483.

A bond given to the Crown under the 33 Hen. 8. c. 39. may be made payable to the king, his heirs or successors.

By a bond given to the Crown under that statute all the lands of the obligor are bound from its date; and as such bond is a voluntary act, the obligor cannot by mortgaging any portion of his lands, even under a power of appointment contained in a deed prior to the bond, render them free from liability under an extent subsequently issued on the bond.

Upon a proceeding of *amoveat manus* the Court may take notice of the bond upon which the extent has issued. *Regina v. Ellis*, 19 Law J. Rep. (N.S.) Exch. 77; 4 Exch. Rep. 652.

EXTORTION.

An information under the 33 Geo. 3. c. 52. s. 62, alleged that the defendant being a British subject, and exercising an office in the East Indies, and residing there, unlawfully did receive from a certain person called Sevajee Rajah a certain sum of money, to wit, &c., as a gift and present:—Held, affirming the judgment of the Court of Queen's Bench (16 Law J. Rep. (N.S.) M.C. 117; 13 Q.B. Rep. 42), first, that the offence was sufficiently described, as the statute prohibited a receipt of any gifts whatever. Secondly, that it was not necessary to allege for whose use the money was received (*Platt, B. dubitante*). Thirdly, that it was not necessary to aver that the money was received extortionately, or under colour of the defendant's office.

Held, also, that the provisions of the 7 & 8 Geo. 4. c. 64. s. 21. curing defects by verdict, apply to all informations and indictments triable in England whether the offences were committed abroad or not.

The information charged the receipt of a certain number of rupees. The jury found the value of each rupee at the time of the receipt. The Court passed judgment, imposing a fine upon each count, and a forfeiture of the value of the gift, adopting the value of a rupee as found by the jury, and sentence of imprisonment until the fine and forfeiture were paid:—Held, that under the 33 Geo. 3. c. 52. s. 63, where money was received, it was not necessary to give the defendant the option of returning the gift or the value; and that the information and judgment were therefore right.

Held, also, that the proper time to estimate the value was at the time of the receipt, and not of the conviction.

Held, also, that the Court had power to pass sentence of imprisonment until the forfeiture was paid. *Douglas v. Regina*, 17 Law J. Rep. (N.S.) M.C. 176; 13 Q.B. Rep. 74.

FACTOR.

Meaning of "intrusted" in statute 6 Geo. 4. c. 94. s. 2. *Hatfield v. Phillips*, 14 Mee. & W. 665; 5 Law J. Dig. 296.

Plaintiffs not intrusted with the bill of lading as agents by the true owners, but claiming to hold in their own right, have no title under the Factors Acts (see title. Stoppage in Transitu). *Van Costeel v. Booker*, 18 Law J. Rep. (N.S.) Exch. 9; 2 Exch. Rep. 691.

Principal and factor—accounts. *Clarke v. Tippling*, 9 Beav. 284.

The Factors Act (5 & 6 Vict. c. 39.) applies to mercantile transactions only, and not to advances made on the security of furniture, used in a furnished house, to the apparent owner of the furniture, who afterwards turns out to be merely an agent intrusted with the custody of the furniture by the true owner. *Wood v. Rowcliffe*, 6 Hare, 191.

A Calcutta firm, by a letter dated in January and received in London on the 11th of March 1841, directed their London correspondents to hold a sum of money (equal to a lac of rupees at the current rate of exchange), payable on the 19th of November following, out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and, after stating that they were in advance of the Calcutta house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house, also, in acknowledging to the Calcutta house the receipt of the order, said, that the state of their account did not then warrant them in meeting the requisition, but they would meet it if in a position to do so before November. The Calcutta house revoked the order by a letter of January 1842, received by the London house on the 12th of March 1842. The Court below having directed an account to be taken in favour of the Liverpool house as against the London house, the Lord Chancellor, on appeal, directed the cause to stand over, with liberty to the plaintiff to bring such action as he might be advised, to establish his right at law; and the plaintiff subsequently failing in an action at law, the bill was dismissed.

When mercantile correspondence respecting the appropriation of funds in the hands of a consignee belonging to the debtor, does not constitute a legal contract on the part of the consignee to apply the funds in payment of debt of the creditor, *quare*, whether the creditor may still support a claim to the funds on the ground of there being an equitable assignment. *Malcolm v. Scott*, 2 Hall & Tw. 440; 3 Mac. & G. 49.

Digest, 1845—1850.

FACTORY.

The provisions as to print works in 8 & 9 Vict. c. 29. amended by 9 Vict. c. 18; 24 Law J. Stat. 59.

Ropeworks exempted from the Factory Acts by 9 & 10 Vict. c. 40; 24 Law J. Stat. 119.

Hours of labour in mills and factories limited by 10 Vict. c. 29; 25 Law J. Stat. 95.

School attendance of children in print works regulated by 10 & 11 Vict. c. 70; 25 Law J. Stat. 219.

The laws relating to labour in factories amended by 13 & 14 Vict. c. 54; 28 Law J. Stat. 106.

It is no offence against the Factory Acts to employ a young person, or female, for ten hours in any one day, such ten hours ending at a period which is more than ten hours (in addition to the hour and a half allowed for meal-times) from the period another child or young person or female began to work.

Those acts limit the periods between which young persons and women are to work, and the number of hours, and also require the same hour and a half to be allotted to all for meal-times, but do not enact that all shall work during the same ten hours; so that, subject to the above limitations, working by relays is legal.

All children, young persons, and females must be taken to have commenced work when any one child, young person, or female commenced work. *Ryder v. Mills*, 19 Law J. Rep. (N.S.) M.C. 82; 3 Exch. Rep. 853.

FAIRS AND MARKETS.

The exception in 27 Hen. 6. c. 5. as to holding fairs and markets on the four Sundays in harvest repealed by 13 & 14 Vict. c. 23; 28 Law J. Stat. 32.

The provisions usually inserted in acts for constructing or regulating markets and fairs consolidated by 10 Vict. c. 14; 25 Law J. Stat. 29.

FALSE ANSWER.

[See MUNICIPAL CORPORATION.]

FALSE IMPRISONMENT.

[Under Speaker's Warrant. See Parliament.]

- (A) WHAT IS AN IMPRISONMENT.
- (B) ACTION FOR, AND DAMAGES.
- (C) JUSTIFICATION OF THE IMPRISONMENT.
 - (a) On Suspicion of Felony.
 - (b) Under the Metropolitan Police Act.
 - (c) Reasonable and probable Cause.

(A) WHAT IS AN IMPRISONMENT.

The forcibly preventing a party from proceeding in a particular direction, e. g. along a public footway, is not an imprisonment in law. *Per Patteson, J., Williams, J. and Coleridge, J.; dissentiente Lord Denman, C.J.* *Bird v. Jones*, 15 Law J. Rep. (N.S.) Q.B. 82; 7 Q.B. Rep. 742.

(B) ACTION FOR, AND DAMAGES.

B voluntarily attended before a magistrate to answer a charge of embezzlement, which C then preferred against him. Before taking the depositions formally, the magistrate said, "Do you intend giving him into custody for it?" C replied, "I do give him into custody." B was then told by one of the constables to go into the dock:—Held, that the act of C amounted to no more than calling on the magistrate to exercise his jurisdiction; and that the placing B in the dock must be referred to the authority of the magistrate, and that C was not liable in trespass for the consequent imprisonment. *Brown v. Chapman*, 17 Law J. Rep. (N.S.) C.P. 329; 6 Com. B. Rep. 365.

In trespass for false imprisonment, the defendant pleaded that under the 9 & 10 Vict. c. 95. the defendant issued a summons in the county court against the plaintiff, which was duly served upon the plaintiff; that the plaintiff did not appear to the summons, and that judgment was given against him by default for payment of the debt by instalments; that a minute of such judgment was served on the plaintiff, and that default being made in payment of the instalments, the defendant obtained a summons to the plaintiff to be examined touching his circumstances, &c.; that the last-mentioned summons was served on the plaintiff, who did not appear thereto, whereupon the Judge ordered him to be committed for fourteen days to the house of correction, and a warrant of commitment under the seal of the court was duly issued, under which the plaintiff was seized. Replication *de injuriâ*, and issue. It was proved that the defendant entered a plaint in the county court against one I, and had issued a summons against him, and had served it on the plaintiff, who said it was a mistake, and that he was not I. The defendant, however, persisted in leaving the summons with him. The plaintiff did not appear, and judgment for payment of the debt by instalments was given against I, which was served on the plaintiff, who still protested against it, and default being made in payment the defendant sued out against I a fraud-summons, under 9 & 10 Vict. c. 95. s. 98, which was served on the plaintiff, and on the day for appearance thereto the defendant, on proof of the service, obtained an order for the commitment of I, and a warrant was accordingly made out. The defendant went together with the officer, and, disregarding the plaintiff's protest, directed him to be apprehended, and he was accordingly taken to prison. The jury found that the plaintiff had not specifically or by his acts represented himself to be I:—Held, that the plea was not supported by the evidence, and that the plaintiff was entitled to the verdict. *Walley v. McConnell*, 19 Law J. Rep. (N.S.) Q.B. 162.

The defendant gave the plaintiff into custody on a charge of felony, and he was taken before a magistrate, who remanded him; and on his again being brought up he was discharged. In trespass for the false imprisonment, the Judge told the jury that the plaintiff was entitled to damages for the whole time he was in custody:—Held, to be wrong, as the damages ought to be limited to what occurred prior to the remand, which was the act of the magistrate,

and not of the defendant. *Lock v. Ashton*, 18 Law J. Rep. (N.S.) Q.B. 76; 12 Q.B. Rep. 871.

(C) JUSTIFICATION OF THE IMPRISONMENT.

(a) On Suspicion of Felony.

To trespass, first, for breaking and entering a dwelling-house; secondly, for false imprisonment; the defendant pleaded setting out grounds of suspicion of felony against the plaintiff, and then stated, "wherefore the defendant, suspecting the plaintiff to have been guilty of feloniously stealing the said goods, did peaceably enter the said dwelling-house of the plaintiff, the outer door being opened to him by the plaintiff's mother, in company with one B, a constable, and did then give the plaintiff into the custody of B, and then, in a reasonable time from entering the said dwelling-house, left the same, and then conveyed the plaintiff therefrom to the police station:—Held bad, on special demurrer, for not shewing, with sufficient certainty, for what purpose the defendant entered into the dwelling-house, nor whether he found the plaintiff there. *Smith v. Shirley*, 15 Law J. Rep. (N.S.) C.P. 230; 3 Com. B. Rep. 142.

In an action for false imprisonment, the defendant pleaded that his goods had been stolen, and having cause to suspect the plaintiff of the felony, he gave her into custody, the plea stating several grounds of suspicion. The plaintiff called a policeman to prove that the defendant directed him to take the plaintiff into custody; and in his cross-examination the policeman said, that, at the same time, and in the presence of the plaintiff, the defendant stated that the goods had been stolen, and also stated some of the grounds of suspicion mentioned in the plea:—Held, that this was evidence for the jury to consider, and from which they might find that the felony had been committed; and that the defendant had good cause to suspect the plaintiff, if this evidence satisfied them that the facts really were so.

Held also, that, although in this plea the defendant ought to set out his grounds of suspicion, yet that he would be entitled to a verdict without proof of the whole of them, if he proved that a felony was in fact committed, and proved so much of the grounds of suspicion as satisfied the jury that he had reasonable cause to suspect the plaintiff. *Williams v. Crosswell*, 2 Car. & K. 422.

(b) Under the Metropolitan Police Act.

The 54th and 63rd sections of 2 & 3 Vict. c. 47. (the Metropolitan Police Act) empowers a police constable to take into custody, without warrant, persons who "within view" of the constable, commit certain offences therein made punishable by summary conviction. The 66th section enacts, that any person "found committing" any offence punishable, either upon indictment, or as a misdemeanour, upon summary conviction, by virtue of the act, may be apprehended by the owner of the property, on or with respect to which the offence shall be committed, or by his servant, or any person authorized by him, and may be detained, &c. A plea, justifying an imprisonment of the plaintiff, on the ground of her having committed one of the offences mentioned in the 54th section, stated, that

it was committed "in view of the constable"; this allegation having been disproved at the trial,—Held, that the allegation was material, and that the justification, therefore, failed.

Held, also, that the plea was not a justification under the 66th section, because there was no allegation that the plaintiff was "found committing the offence," and that if the words "in view of the constable" were equivalent, they were not proved. *Per Maule, J. and Erle, J.*—The words "in view of the constable" are not equivalent to the words "found committing."

Semble—that the 66th section points to a different class of offences from those mentioned in sections 54. and 63. *Simmons v. Millingen*, 15 Law J. Rep. (N.S.) C.P. 102; 2 Com. B. Rep. 524.

(c) *Reasonable and probable Cause.*

Upon a plea of justification to an action for false imprisonment, the jury are to find what facts are proved, and the question of reasonable and probable cause on those facts is to be determined by the Judge.

A statement alleged in the plea of justification to have been made to O, but proved to have been made to H, may be admissible in evidence to shew that the defendant acted with proper motives. *West v. Bazendale*, 19 Law J. Rep. (N.S.) C.P. 149.

[See *ante*, (a), and title LEAVE AND LICENCE.]

FALSE PRETENCES.

[See INDICTMENT.]

(A) WHAT IS A FALSE PRETENCE UNDER THE STATUTE.

(B) INDICTMENT FOR.

(a) *Venue.*

(b) *Allegation of Intent.*

(c) *Allegation of Scienter.*

(d) *Allegation of the false Pretence.*

(A) WHAT IS A FALSE PRETENCE UNDER THE STATUTE.

A false pretence, knowingly made to obtain money, is indictable, though the money be obtained by means of a contract which the prosecutor was induced to make by the false pretence of the prisoner. *Regina v. Abbott*, 1 Den. C.C. 273; 2 Car. & K. 630.

If a party by means of a false pretence obtain a voluntary charitable gift of money, he may be indicted for obtaining money by false pretences under the statute 7 & 8 Geo. 4. c. 29. s. 53. *Regina v. Jones*, 19 Law J. Rep. (N.S.) M.C. 162; 1 Den. C.C. 551.

The prisoner, who was the secretary of a lodge of Odd Fellows, came to the prosecutor, who was a member of the same lodge, and told the latter that he owed a sum of money to the society, and he at the same time produced a paper purporting to be a summons signed by himself, giving notice to the prosecutor that he owed the money to the lodge. The prosecutor, believing the statement, then paid the prisoner the amount:—Held, that the prisoner was properly convicted under the statute for obtaining the money by false pretences, although the paper

was not set out in the indictment; and although by the rules of the society the secretary had no authority to receive money out of the lodge, and although the fact of what was due was as much within the knowledge of the prosecutor as of the prisoner. *Regina v. Woolley*, 19 Law J. Rep. (N.S.) M.C. 165; 1 Den. C.C. 559.

A party, by a false pretence, obtained from a railway company a ticket, which entitled him to travel without payment from one place to another place on the railway in one of the company's carriages, but which ticket was to be delivered up to the company at the end of the journey:—Held, that the obtaining by a false pretence such ticket was obtaining by a false pretence a chattel of the company with intent to cheat and defraud them of the same, within the meaning of the 7 & 8 Geo. 4. c. 29. s. 53. *Regina v. Boulton*, 19 Law J. Rep. (N.S.) M.C. 67; 1 Den. C.C. 508; 2 Car. & K. 917.

(B) INDICTMENT FOR.

(a) *Venue.*

The prisoner, in a begging letter containing a false tale of pretended distress, requested the prosecutor, who resided in Middlesex, to forward by post to an address in Kent a sum of money by way of charity. The prosecutor, believing the story, obtained a post-office money-order, inclosed it in an envelope, which he addressed as requested by the prisoner, and put the letter into a post-office in Middlesex:—Held, that the prisoner might be indicted in Middlesex for having obtained the post-office order by false pretences in that county, since by directing the prosecutor to send the money by post he constituted the postmaster in Middlesex his agent to receive the post-office order there for him. *Regina v. Jones*, 19 Law J. Rep. (N.S.) M.C. 162; 1 Den. C.C. 551.

(b) *Allegation of Intent.*

An indictment which alleged that A R H, intending to defraud J W, falsely pretended that he was a captain in the 5th Dragoons, by means of which false pretence he obtained from J W a valuable security, &c., whereas the said A R H was not, at the time of the making such false pretence, a captain in the 5th Dragoons,—Held, good on writ of error. *Hamilton v. Regina*, 16 Law J. Rep. (N.S.) M.C. 9; 9 Q.B. Rep. 271.

(c) *Allegation of Scienter.*

In an indictment for obtaining money by false pretences, under 7 & 8 Geo. 4. c. 29, it was alleged that the defendant "did unlawfully falsely pretend," &c.—Held, that the omission of the word "knowingly" was no ground for arresting the judgment. *Regina v. Bowen*, 19 Law J. Rep. (N.S.) M.C. 65. [See next case.]

(d) *Allegation of the false Pretence.*

An indictment for obtaining money and goods under false pretences stated that the prisoners unlawfully (not saying "knowingly") did falsely pretend that a certain printed paper produced to the prosecutor was a good and valid promissory note for the payment of 5*l.*, and that by means of such pretence they obtained the money and goods from

the prosecutor, and then alleged that such printed paper was not a good and valid promissory note:—Held, that the false pretence was sufficiently alleged, and that it was not necessary to set out the terms of the printed paper in the indictment, as nothing turned upon the nature or character of the document. *Regina v. Coulson*, 19 Law J. Rep. (N.S.) M.C. 182; 1 Den. C.C. 592.

FALSE REPRESENTATION.

[See CONTRACT, Rescission of.]

A party is not liable for a false representation made by him without knowledge of its being false and without fraud. *Ormrod v. Huth*, 14 Law J. Rep. (N.S.) Exch. 366; 14 Mee. & W. 661; 5 Law J. Dig. 7.

If A knowingly utter a falsehood to B, with intent to defraud B, and with a view to his own profit, and B, giving credit to the falsehood, is injured thereby, he may maintain an action against A for the false representation. Where, therefore, a declaration alleged that B had sent to A certain handkerchiefs, printed by B with a certain pattern, and that he was about to print others of the same pattern for profit, and that A, in order to defraud B, and to induce him to desist from printing the same, and to deprive him of the profits, and to acquire the same for his own use, falsely represented to B that the pattern was a registered pattern, and that the parties intended to proceed against B for pirating the design,—all which was untrue, to the knowledge of A; in consequence of which, B was induced to take a journey for the purpose of inquiring into the matter, and was meanwhile prevented from printing or selling other goods of the same pattern,—Held, on general demurrer, that the declaration disclosed a good cause of action, and that the special damage naturally flowed from the wrongful act of the defendant. *Barley v. Walford*, 15 Law J. Rep. (N.S.) Q.B. 369; 9 Q.B. Rep. 197.

Where the plaintiff made a purchase under the influence of the misrepresentations of the defendant, although a considerable time had elapsed between the misrepresentations and the sale,—Held, that the plaintiff was entitled to recover from the defendant, and that it made no difference that the sale was made by auction. *Bardell v. Spinks*, 2 Car. & K. 646.

Where the declaration alleged that the defendant had falsely represented himself as an agent of the master of a vessel, and so entered into a charter-party with the plaintiffs,—Held, that, under the plea of “not guilty,” the contract must be proved by the plaintiffs, and not the misrepresentation only; and, secondly, that the charter-party being unstamped could not be read in evidence, though the defendant was not an agent of any “master, or captain, or owner” of a vessel. *Brink v. Winguard*, 2 Car. & K. 656.

FEIGNED ISSUE.

[See ERROR, When it lies.]

A feigned issue alleging a pretended wager is not

rendered illegal by the statute against wagers, 8 & 9 Vict. c. 109; s. 19. of which gives a new form for the issue; but either form of issue may be used. *Luard v. Butcher*, 15 Law J. Rep. (N.S.) C.P. 187; 3 Dowl. & L. P.C. 815; 2 Com. B. Rep. 858.

Under a feigned issue, brought to try the right of property in certain goods which had been seized under an execution against A,—Held, that the question for the jury was, not whether the goods were the property of the plaintiff in the feigned issue, or of A, but merely whether they were or were not the property of the former. *Green v. Rogers*, 2 Car. & K. 148.

Where goods have been taken under a *fi. fa.*, and an issue is directed to try whether the goods were those of a third person, and on that issue the jury at the assizes find for such person who is plaintiff in the issue, the practice is for the associate to keep the Nisi Prius record till after the fourth day of the next term, unless the Judge orders it to be immediately delivered up to the plaintiff's attorney upon an application in the nature of an application for speedy execution. *Abbott v. Clarke*, 2 Car. & K. 209.

FELLOWSHIP.

Motion by an incumbrancer on a fellowship for a receiver and injunction refused, with costs. *Berkeley v. King's College, Cambridge*, 10 Beav. 602.

FELONY, MISPRISION OF.

Upon the trial of an indictment under the 7 & 8 Geo. 4. c. 29. s. 58. for corruptly receiving money to recover stolen goods, and not causing the thieves to be apprehended and brought to trial, it was proved that the prisoner brought certain suspected persons to the house of the prosecutrix, whom she recognized as having been implicated in breaking into her house and stealing some cheese, and then received from her 3*l.* for the purpose, as he promised, of obtaining from such persons a part of the stolen cheese. The prisoner never did obtain any part of the cheese; and the jury having found expressly that he knew the thieves, and assisted in endeavouring to purchase the stolen cheese from them, not meaning to bring them to justice, he was convicted:—Held, that such conviction was proper. *Regina v. Pascoe*, 18 Law J. Rep. (N.S.) M.C. 186; 1 Den. C.C. 456; 2 Car. & K. 927.

FERRY.

[See PLEADING.]

The second count alleged that the defendant, contriving to disturb the plaintiffs in the enjoyment of their ferry, carried divers passengers for hire over the river, near to the plaintiffs' ferry, whereby the plaintiffs were disturbed in the possession thereof:—Held, on motion in arrest of judgment, after verdict for the plaintiffs, that the count disclosed a good cause of action. *Blacketer v. Gillett*, 19 Law J. Rep. (N.S.) C.P. 307; 1 L. M. & P. 88.

Upon the construction of the act for establishing

a ferry across the Tyne:—Held, that the word "burthen," in the 85th section, meant capacity for carrying, not "register admeasurement," and that the latter part of the section did not limit the general right of ferry, but only added a cumulative penalty, and that the mere act of ferrying passengers was a disturbance of the franchise, and that on the purchase of the old ferry and the completion of the new one, the former became extinct. *North Shields Ferry Co. v. Barker*, 2 Exch. Rep. 136.

FIERI FACIAS.

[See PRACTICE.]

FINES AND RECOVERIES.

[See PROTECTOR.]

- (A) FINE, PROOF OF.
- (B) AMENDMENT OF EXEMPLIFICATION.
- (C) DISENTAILING DEED, PROOF OF.
- (D) CONVEYANCE BY MARRIED WOMEN UNDER 3 & 4 WILL. 4. c. 74. s. 91.
 - (a) Jurisdiction of Court of Chancery.
 - (b) Form of Conveyance.
 - (c) Wife's Provision.
 - (d) Husband's Concurrence.
 - (e) Certificate and Affidavit.
 - (1) Dispensation of Notarial Certificate.
 - (2) Description of Party.
 - (3) Amendment of Certificate.
 - (4) Form and Requisites of the Affidavit.

The evidence of proclamations on fines dispensed with by 11 & 12 Vict. c. 70; 26 Law J. Stat. 207.

(A) FINE, PROOF OF.

To prove that a fine was properly levied in a Court of Great Session in Wales, the defendant produced the chirograph of the fine, with only one proclamation indorsed, and the plea-roll of the court containing an entry only of a *licentia concordandi* between the same parties and respecting the same premises as those mentioned in the chirograph:—Held, that this was sufficient proof of the fine under the 5 Vict. c. 32. s. 2. *Doe d. Cadwalder v. Price*, 16 Law J. Rep. (N.S.) Exch. 159; 16 Mee. & W. 603.

(B) AMENDMENT OF EXEMPLIFICATION.

Where in the exemplification of a recovery the name of demandant had been inserted by mistake as that of tenant, and *vice versa*, and the deed leading the uses being produced in court shewed this, the Court declined to amend, holding that the defect was cured by the 3 & 4 Will. 4. c. 74. s. 8. *Wickens v. Shelley*, 19 Law J. Rep. (N.S.) C.P. 329.

(C) DISENTAILING DEED, PROOF OF.

A being entitled as quasi tenant in tail to a sum of stock, executed a disentailing deed, which was duly enrolled in Chancery, and presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate

of the clerk of enrolments indorsed, but no evidence was given of the execution of the deed:—Held, that the petitioner's title was not made out by the production of the deed, and that evidence of his execution of the deed ought to be given. *Bishop v. De Burgh*, 15 Law J. Rep. (N.S.) Chanc. 35.

(D) CONVEYANCE BY MARRIED WOMEN UNDER 3 & 4 WILL. 4. c. 74. s. 91.

(a) Jurisdiction of Court of Chancery.

Where the Court has ordered a conveyance of a mortgaged estate to be executed by all necessary parties, and one of those parties is a married woman, the Court has no jurisdiction to compel her to execute the conveyance or to acknowledge it. *Jordan v. Jones*, 16 Law J. Rep. (N.S.) Chanc. 93; 2 Ph. 170.

(b) Form of Conveyance.

The Court will not sanction a particular form of conveyance by a married woman, under the 3 & 4 Will. 4. c. 74. s. 91. *In re Woodall*, 3 Com. B. Rep. 639.

(c) Wife's Provision.

Where the certificate of the acknowledgment of a married woman, under the 3 & 4 Will. 4. c. 74, stated that "she freely and voluntarily consented" to a deed, and the affidavit of the commissioner stated that she consented to it, on condition of a provision being made for her by her husband's will, and which had been made, and which, she stated, she knew to be revocable, the Court, considering the certificate and affidavit to be contradictory, refused to order the officer to file them. *In re Dixon*, 16 Law J. Rep. (N.S.) C.P. 231; 4 Com. B. Rep. 631.

Where the amount of the consideration which forms the inducement for a married woman to give up her interest in an estate was too small (40*l.*) to form the subject of a settlement, and the arrangement was that the amount should be paid to the wife, the Court allowed her acknowledgment to be registered. *Ex parte Webber*, 5 Com. B. Rep. 179.

Where property is sold under the compulsory provisions of an act, no inquiry as to whether any provision has been made in lieu of the interest given up, need be made. *In re Foster*, 7 Com. B. Rep. 120.

(d) Husband's Concurrence.

A married woman, one of the trustees for sale of freehold property, made application, under the 91st section of the 3 & 4 Will. 4. c. 74, that the concurrence of her husband to the conveyance might be dispensed with. The husband was a seaman in the British navy, on a foreign station; she had not heard from him for two years, and the affidavits stated that she believed he would never return:—Held, that the facts were insufficient to warrant the application. *In re Smith*, 16 Law J. Rep. (N.S.) C.P. 168.

Upon a motion on the part of a married woman, under the 3 & 4 Will. 4. c. 74. s. 91, to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must shew in distinct terms, or by necessary inference, that the husband is lunatic at

the time of the application. *In re Turner*, 3 Com. B. Rep. 166.

The Court refused, in 1847, to dispense with the concurrence of a husband, under the 3 & 4 Will. 4. c. 74. s. 91, upon an affidavit merely stating that he entered a government steamer in January 1844, and that the last the wife had heard of him was, that in January 1845 he was on board another government steamer at New Zealand. *Ex parte Gilmore*, 3 Com. B. Rep. 967.

(e) *Certificate and Affidavit.*

(1) *Dispensation of Notarial Certificate.*

The Court allowed an acknowledgment to be received and filed under the 3 & 4 Will. 4. c. 74. s. 85, where the affidavit verifying the same was sworn before "The Provisional British Consul for the Society Islands," it appearing that there was no notary, or any other official person before whom it could have been sworn, within many hundred miles. *In re Darling*, 2 Com. B. Rep. 347.

An acknowledgment by a married woman was taken before Commissioners in India, pursuant to the provisions of the 3 & 4 Will. 4. c. 74, and an affidavit to that effect was sworn before a magistrate having competent authority. A person describing himself as "Major General" certified that the affidavit had been so sworn, and that the authority was competent, and stated that there was no notary at the place. On affidavits of the general's handwriting and rank, the Court held the certificate sufficient. *In re Daly or Daley*, 17 Law J. Rep. (N.S.) C.P. 1; 5 Dowl. & L. P.C. 333; 5 Com. B. Rep. 128.

(2) *Description of Party.*

The certificate of acknowledgment by a deed by a married woman, described her as Mary, the reputed wife of A, otherwise Mary —, spinster; she was similarly described in the deed. The Court directed their officer to receive and file the certificate and affidavit. *In re —*, 17 Law J. Rep. (N.S.) C.P. 110; nom. *Ex parte Francis*, 5 Com. B. Rep. 498.

(3) *Amendment of Certificate.*

Amendment of the certificate not allowed where the commission issued in January 1848, and the certificate stated the acknowledgment to have been taken in February 1847. *In re Millard*, 5 Com. B. Rep. 753.

(4) *Form and Requisites of Affidavit.*

The Court refused to allow an affidavit and notarial certificate of an acknowledgment to be filed, under the 3 & 4 Will. 4. c. 74. s. 85; the affidavit purporting to be sworn before one "G, a Commissioner for taking affidavits in the Court of Queen's Bench, Canada, West," and the notary certifying him to be a Commissioner of that court, and, as such, qualified to administer oaths. *In re Street*, 2 Com. B. Rep. 364.

In the jurat of an affidavit of the due taking of an acknowledgment at Calcutta, the name of one of the deponents was interlined:—Held, that the affidavit could not be received. *In re Fagan*, 5 Com. B. Rep. 436.

It is not necessary to state in a certificate, under 3 & 4 Will. 4. c. 74. s. 83, the specific place at

which the acknowledgment of a married woman has been taken; it is enough if the deed appear to have been executed within the terms of the commission.

A British consul abroad has no authority *per se* to administer oaths verifying the documents required by this act; but if a public notary of the foreign country certify that by the laws of that country the British consul is competent to administer oaths, the certificate and other documents sworn before him will be received by the Court. *Ex parte Hutchinson*, 17 Law J. Rep. (N.S.) C.P. 111; 5 Dowl. & L. P.C. 523; 5 Com. B. Rep. 499.

The certificate of acknowledgment of a married woman to *bar her dower*, taken under a special commission, was verified by an affidavit written on paper, contrary to the usual practice of the Court, by which such documents are required to be on parchment:—Held, that the affidavit and other documents might be received and filed. *Ex parte Carr*, 17 Law J. Rep. (N.S.) C.P. 107; 5 Dowl. & L. P.C. 488; 5 Com. B. Rep. 496.

The Court refused to direct the officer to receive a certificate and affidavit of an acknowledgment under the 3 & 4 Will. 4. c. 74, the affidavit having an interlineation in an important part, without anything to denote that the interlineation had been made before the affidavit was sworn. *In re Worthington*, 5 Com. B. Rep. 511.

No rule granted upon a mere statement of the husband, a seaman, being abroad, and not heard of for some years, and that the wife had been informed he was dead. *In re Taylor*, 7 Com. B. Rep. 1.

The Court refused to direct the proper officer under the 3 & 4 Will. 4. c. 74. to receive and file an acknowledgment where the affidavit of verification was sworn before the British minister at Florence, it not appearing that there was any difficulty in getting it sworn before some properly constituted authority at that place. *In re Baroness Dunsany*, 7 Com. B. Rep. 119.

In the case of an acknowledgment taken abroad, the Court will not dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it be distinctly shewn that great inconvenience would result from a strict adherence to the ordinary rule. *In re Crawford*, 4 Com. B. Rep. 626.

FIRE.

Malicious injuries by fire or by explosive substances made punishable as felonies or misdemeanours. 9 & 10 Vict. c. 25; 24 Law J. Stat. 71.

Liability for Consequences of negligent Fire.

The declaration alleged that the plaintiff was possessed of close A, and the defendant of close B; and that the defendant wrongfully lighted a fire in close B at a time when by reason of the state of the wind and weather it was dangerous to do so, and that through the negligence of the defendant the fire extended itself from close B to close A and destroyed the hedges, gates, &c.:—Held, on motion in arrest of judgment, that the action would well lie; and that the defendant was not relieved from liability by stat. 6 Ann. c. 31. and 14 Geo. 3. c. 78,

which must be taken to apply to fires which are the result of chance or are incapable of being traced to any cause, but not to fires which, though they may be accidental, as contradistinguished from wilful, are occasioned by negligence or want of reasonable care. *Filliter v. Phippard*, 17 Law J. Rep. (N.S.) Q.B. 89; 11 Q.B. Rep. 347.

Reward to Engine-man.

By 14 Geo. 3. c. 78. s. 76. it is enacted, that the keeper of the second large engine which shall be brought in good order to help to extinguish any fire, shall be paid a sum not exceeding 20s. by the churchwardens of the parish in which the fire occurs; and by section 77. no such reward is to be paid without the approbation and consent of a Justice of the Peace:—Held, that if the churchwardens refuse to name any sum to be given by way of reward, the engine-keeper may do so himself, and may ask the consent of the magistrate to the sum so named by him.

Where a local act had taken away from the churchwardens of a parish the power of making poor-rates, it was held that they might still lay a special rate under the 14 Geo. 3. c. 78. s. 81. *Ex parte Loader*, 18 Law J. Rep. (N.S.) Q.B. 94.

FISH AND FISHERY.

In trespass for taking the plaintiff's fish, it appeared that they had been nearly surrounded by seines of the plaintiff, and of which, but for the wrongful intrusion of the defendant's boats through the aperture, the possession would have been complete,—Held, that not having been so completed the action could not be maintained. *Young v. Hichens*, 6 Q.B. Rep. 606.

A navigable river is a public highway for vessels, at all times and states of the tide, and the right to pass and repass is not destroyed or abridged by the circumstance that at particular states of the tide a vessel cannot pass along without grounding, and thereby injuring oyster-beds therein.

The rights of the Crown are subject to this public right of passage, and the Crown, therefore, cannot, irrespectively of any ownership in the adjoining lands, make a grant inconsistent with it.

To a declaration charging the defendant with navigating his vessel unskillfully, and at improper states of the tide of a navigable river, and thereby injuring oysters of the plaintiffs lying in the bed of a river, a plea that the river is a public navigable river, at all times and states of the tide, is good, after verdict, the declaration not charging a wilful injury.

A plea that the oysters were an impediment to the navigation, and a common nuisance, but not stating that the defendant might not have avoided them by using reasonable care, is a bad plea; but the plaintiffs cannot have judgment on it *non obstante veredicto*, there being other material issues found for the defendant. *The Mayor, &c. of Colchester v. Brooke*, 15 Law J. Rep. (N.S.) Q.B. 59; 7 Q.B. Rep. 339.

A right of free fishery was granted to the burgesses of the borough of C, by a charter of Ric. 1. which recited a previous enjoyment of the franchise by the

borough. In the year 1740, by reason of judgments of ouster against all the existing members of the corporation, it became incapable of continuing itself; and there were no mayor or aldermen till 1763, when a new charter of incorporation was granted to the borough, by which all the former rights, liberties, and "fisheries" were ratified, confirmed, and restored to the new corporation:—Held, that the corporation were, under the new charter, entitled to the fishery.

The corporation exercised their right by granting to persons called dredgers, not being members of the corporation, licences to dredge and take oysters within the limits of the fishery:—Held, in an action on the case for injury to the fishery, the declaration stating the possession of the fishery, oyster-beds, and oyster-grounds, which was traversed by the third and seventh pleas, and the jury having found for the plaintiffs on these issues, that the above licences did not operate as demises of the fishery, so as to entitle the defendant to a verdict on these issues. *The Mayor, &c. of Colchester v. Brooke*, 15 Law J. Rep. (N.S.) Q.B. 173; 7 Q.B. Rep. 339.

A declaration stated that the defendant had been summoned to answer the plaintiff in an action of trespass, and charged that the defendant *vi et armis* broke and entered a fishery, to wit, the sole and exclusive fishery of the plaintiff, in a certain part of a river then flowing and being over the soil of one P F, and then fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of the plaintiff there found and being in the said fishery chased and disturbed. Conclusion *contra pacem*:—Held, first, affirming the judgment of the Court of Queen's Bench (16 Law J. Rep. (N.S.) Q.B. 68; 8 Q.B. Rep. 1000) that trespass lies for breaking and entering a several fishery, though no fish are taken.

Secondly, that the plaintiff was not bound to state any further title, although the declaration stated the several fishery to be *in alieno solo*, as there was no averment upon the record to shew that the defendant claimed title or authority under the owner of the soil.

Thirdly, reversing the judgment of the Court below, that after verdict the words "sole and exclusive fishery" were equivalent to "several fishery," as under such description the plaintiff must have proved the incorporeal right usually described as a several fishery.

Semble—that the declaration must be considered as a declaration in trespass, and not in case. *Holford v. Bailey*, 18 Law J. Rep. (N.S.) Q.B. 109; 13 Q.B. Rep. 426.

FIXTURES.

[See LANDLORD AND TENANT—TROVER.]

A chattel placed by the owner upon the freehold of another, but severable from it, *e. g.* a door which may be lifted from its hinges, or a sliding fence used to prevent the escape of water from a mill stream, does not necessarily become part of the freehold. It is matter of evidence whether by agreement it does not remain the property of the original owner. *Wood v. Hewitt*, 15 Law J. Rep. (N.S.) Q.B. 247; 8 Q.B. Rep. 913.

FOREIGN ATTACHMENT.

Where a foreign attachment had been sued by the plaintiff out of the Lord Mayor's Court, to seize money in the hands of bankers to a railway company only provisionally registered, but no further steps had been there taken against the garnishee, the Court refused to stay proceedings in an action subsequently brought in this court against three of the provisional committee of the railway company, in which the same debt was sought to be recovered as for work and labour done for the company. *Denton v. Maitland*, 15 Law J. Rep. (N.S.) Q.B. 332.

The customary process of foreign attachment in the city of London is not equivalent to an arrest on *mesme* process, though the attachment can only be dissolved by the defendant putting in bail or rendering himself to prison, and the 1 & 2 Vict. c. 110. does not affect the custom.

Where a suit in the Lord Mayor's Court, and a foreign attachment, issued according to the custom of the city of London, is removed into a superior court by *certiorari*, the plaintiff is entitled to a *procedendo*, unless the defendant puts in special bail in the court above. *Day v. Paupierre*, 18 Law J. Rep. (N.S.) Q.B. 270.

FOREIGN LAW.

[See PLEADING.]

A person residing in England who is a member of a company carrying on business in a colony must be taken to know the law of the colony.

Where a colonial act enabled the chairman of a company to sue and be sued for the company, he is to be taken as agent for the members; and, therefore, a member resident in England and sued on a judgment recovered in the colony in an action against the chairman, cannot avail himself of the fact that he had no notice of the process in that action, as a plea to an action brought in this country on the judgment.

Where an act providing for proceedings by and against a company contained provisions for charging the property of members for the time being on a judgment obtained against the chairman, but in other respects reserved the rights and liabilities of parties as they were before,—Held, that the remedy was cumulative, and that a member might be sued on the judgment recovered.

A foreign judgment, though conclusive where it was given, is only *prima facie* evidence of a debt here. Therefore, where the defendant, a member of a colonial company, in an action brought against him in this country on a contract entered into by the company, pleaded a judgment recovered in the colony against the chairman of the company as conclusive, the plea was held bad. *The Bank of Australasia v. Harding*, 19 Law J. Rep. (N.S.) C.P. 345.

A witness expert in the law of a foreign country was called to prove what that law was:—Held, that he should state on his responsibility what the law is, and not read any fragments of a code. *Cocks v. Purday*, 2 Car. & K. 269.

By the Canadian Act, 25 Geo. 3. c. 2, passed by the Legislature of Lower Canada, for regulating

proceedings in the courts of justice in Canada, it is enacted, that in proof of all facts concerning commercial matters, recourse should be had by the courts of civil jurisprudence in the Provinces, to the rules of evidence laid down by the laws of England:—Held, by the Judicial Committee, affirming the judgment of the Court of Appeals for Lower Canada, that this Colonial Act revoked so much of the old French law, which formerly prevailed in Canada, and was laid down in the *Ordonnance de Moulens*, passed in the year 1566, and subsequently altered by the *Ordonnance* of 1667, whereby parol evidence was excluded from the proof of all *contrats*, or matters, exceeding the sum of 100 *livres*, except in the case of accident, or where there was a commencement in writing; and that the English law, as to the admission of parol evidence in commercial matters, was substituted.

A contract entered into by persons in Canada with the Government Commissioner, to supply stone for making a canal, is a commercial matter, and is to be proved by the English law. *M'Kay v. Ruthersford*, 6 Moore, P.C. 413.

FOREIGN PRINCE.

During the rebellion in Sicily, agents were sent to England by the usurping government, who contracted with the Peninsular and Oriental Steam Packet Company for the purchase of two vessels and paid the purchase-money. One was transferred to the agents, and was taken away from this country. The other vessel was registered in the names of two English subjects, who were alleged to be trustees for the agents of the usurping government, and it had not yet been removed from England. The plaintiff, the King of the Two Sicilies, upon being restored to his government, filed a bill praying that he might be declared entitled to the second vessel, and for an injunction to restrain the company from parting with it. An injunction *ex parte* having been obtained against the company, it was dissolved, with costs, upon the ground that they had parted with all interest prior to the bill being filed. Upon demurrer, by the defendants, in whose name the vessel was registered, it was held, that the plaintiff had a right to follow to this country property which had been abstracted from the public treasury by his rebellious subjects, and that it was not necessary to make the members of the usurping government parties. *The King of Two Sicilies v. the Peninsular and Oriental Steam Packet Co.*, 19 Law J. Rep. (N.S.) Chanc. 202.

FOREST LAWS.

[See MANDAMUS.]

An information, at the suit of the Attorney General, stated, that the Queen was and still is seised in her demesne as of fee in right of her Crown of and in Waltham Forest, and that she and all her ancestors, kings, &c. have continually held and enjoyed the said forest, and the game of wild beasts and fowls of chase and warren coming and arising of and from the said forest, and all rights, &c., without any disturbance, &c.; that the defendant unlawfully

erected a high fence, and dug a deep ditch in and upon the soil of the said forest, to wit, upon and around 100 acres of land, being parcel of and within the said forest, and therewith inclosed the said 100 acres of the said forest, and encroached and usurped thereon, and separated the same from the residue of the said forest, and kept and continued the same, &c., and by reason of the premises the Queen could not have and enjoy the said forest, and the said game, and the said rights, profits, &c., in as full and ample a manner, &c., to the great injury and disturbance of the Queen in the said forest, to the great damage and destruction of the vert and venison of and in the said forest, and to the disinherison of the Queen, &c. Plea, that the same place in which, &c. was not now, nor was any part thereof, parcel of and within the said supposed forest *modo et formâ*:—Held, on demurrer, that this was not an information of intrusion into the lands of the Crown; that it was an information in the nature of an action of trespass on the case for the injury to the incorporeal right of forest by interfering with the game, and that the defendant was not bound to plead title to the land inclosed by him. *The Attorney General v. Hallett*, 16 Law J. Rep. (N.S.) Exch. 262; 1 Exch. Rep. 211; 5 Dowl. & L. P.C. 87.

FORGERY AND UTTERING.

- (A) WHAT CONSTITUTES THE OFFENCE.
- (B) JURISDICTION TO TRY.
- (C) BILLS, NOTES, AND CHEQUES.
- (D) ORDERS, WARRANTS, AND UNDERTAKINGS.
- (E) RECEIPTS.
- (F) INDICTMENT—VARIANCE. [See (C).]
- (G) EVIDENCE.

(A) WHAT CONSTITUTES THE OFFENCE.

In an indictment for forging a will, an intent to defraud the heir-at-law was charged in one count, and in another an intent to defraud certain persons to the jurors unknown. The only prisoner found guilty was the son of the testator whose will was alleged to be forged. No evidence was given that the testator had been previously married or left any other children, but one of the witnesses stated that he had heard a report that the deceased had left another son by a former wife:—Held, that there was no evidence of an intention to defraud any one, to justify a conviction. *Regina v. Tynley*, 18 Law J. Rep. (N.S.) M.C. 36; 1 Den. C.C. 319.

Indictment in seventh count charged that F. E. Toshack unlawfully, knowingly, &c. did forge a certain writing to the likeness of, and as and for a true and genuine writing of and under the hand of one W. Neilson, as master of a vessel called the *Ruokers*, certifying that he the said F. E. Toshack had served with the said W. Neilson as able seaman on board the said vessel from the 4th of November 1842, till the 1st of January 1845, and during such time conducted himself in a sober and orderly manner, with intent thereby, &c. to deceive, injure, &c. A, B, C and D, to the great injury, &c. of the said A, B, C and D, to the evil, &c. example of all other persons in the like case offending, and against the peace, &c. Eighth count. Same as above, with in-

tent to deceive, &c. the Corporation of the Trinity House. Both counts held good at common law. *Regina v. Toshack*, 1 Den. C.C. 492.

If A give to B a forged certificate of a pretended marriage between himself and B, in order that B may give it to a third party, A is not guilty of an "uttering" within the 11 Geo. 4. & 1 Will. 4. c. 66. s. 20. *Regina v. Heywood*, 2 Car. & K. 352.

In a case of forgery it is not required, in order to constitute, in point of law, an intent to defraud, that the party committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of his act would necessarily or possibly be to defraud any person, but there must at all events be a possibility of some person being defrauded by the forgery.

A was indicted for forging and uttering a deed of transfer of ten shares in the London and Croydon Railway Company, with three intents, viz., to defraud that company,—D L,—and W B. It appeared, that, in July 1845, E R transferred, by two deeds of transfer, 100 shares in this company to D L, and that these deeds purported to be executed by D L as transferree; but the signatures, D L, were, in fact, written by A, without the authority or knowledge of D L. On the 2nd of August 1845, by seven deeds of transfer, which purported to be executed by D L as transferor, these shares were transferred to five different persons, and by one of them ten of the shares purported to be transferred to W B. The name of D L was signed to all these deeds by A, without the authority or knowledge of D L. On those seven transfers there was a profit, which D L refused to receive from A, and it did not appear that any further call on these shares could be made:—Held, that on these facts A was entitled to be acquitted, as neither the company, nor D L nor W B could be defrauded. *Regina v. Marcus*, 2 Car. & K. 356.

The forgery of a railway pass, to allow the bearer to pass free on a railway, is a forgery at common law; but the uttering of it per se is not a misdemeanour.

The uttering of a forged instrument, the forgery of which is only a forgery at common law, is no offence, unless some fraud was actually perpetrated by it; and where, in such a case, the indictment contained some counts for the forging the instrument and others for uttering it, and the defendant was acquitted on the counts for the forgery, and convicted on the counts for the uttering, the judgment was arrested. *Regina v. Boulton*, 2 Car. & K. 604.

A, a sharebroker, had bought twenty shares in the Eastern Counties Railway Company, of L, a broker, which stood in the name of R A P; but L did not send A the deed of transfer, as A was in embarrassed circumstances, and owed L money. A procured a boy to execute a deed of transfer of the shares in the name of R A P. All the calls on the shares had been paid up:—Held, a forgery, and that A could be convicted on counts laying an intent to defraud R A P and the Eastern Counties Railway Company. *Regina v. Hoatson*, 2 Car. & K. 777.

The practice was, for the majority of the officers of a parish to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for

11. 3s. 6d. had a note at the bottom—"Unless this cheque is signed by a majority of the parish officers, it will not be cashed." This cheque was signed by one of the officers while it was for 11. 3s. 6d. It was altered to 31. 3s. 6d., and when cashed by the treasurer had the signatures of a majority of the officers to it:—Held, that if the cheque was fraudulently altered when it had only one signature to it, this was no forgery, as it was then an incomplete instrument. *Regina v. Turpin*, 2 Car. & K. 820.

(B) JURISDICTION TO TRY.

On the trial of an indictment for forgery, the jury found that the prisoner was guilty of forgery, but that there was no evidence of the forgery having been committed within the jurisdiction of the Court. The prisoner was not shewn to have been in custody till the time when the trial began:—Held, that as the prisoner was in custody before the Court at the time of the trial, the indictment and conviction were good under the 11 Geo. 4. & 1 Will. 4. c. 66. s. 24. *Regina v. Smythies*, 19 Law J. Rep. (N.S.) M.C. 31; 1 Den. C.C. 498; 2 Car. & K. 878.

(C) BILLS, NOTES, AND CHEQUES.

After an acceptance in blank, the drawer of a bill of exchange, whilst the same was in the course of completion, wrote in the corner of the bill the drawee's name, with a false address, with the intent of making the acceptance appear to be that of a different existing person:—Held, that this was a forgery by the drawer. *Regina v. Blenkinsop*, 17 Law J. Rep. (N.S.) M.C. 62; 1 Den. C.C. 276; 2 Car. & K. 531.

A bill of exchange was made payable to A, B, C, D, or order, *executrixes*. The indictment charged that the prisoner forged on the back of the said bill a certain forged indorsement, which said forged indorsement was as follows:—(naming one of the executrixes):—Held, a forged indorsement within the statute 1 Geo. 4. c. 66. s. 3. *Regina v. Winterbottom*, 1 Den. C.C. 41; 2 Car. & K. 37.

Prisoner falsely averring an authority to indorse a bill of exchange for T. Tomlinson, writes on the back of the bill "per procuration, Thomas Tomlinson, Emanuel White." The bill is thereupon discounted, and the prisoner goes off with the money:—Held, no forgery. *Regina v. White*, 1 Den. C.C. 208; 2 Car. & K. 404.

The prosecutor having signed a blank cheque, authorized the prisoner to fill it up with a certain sum, who, with the intention of defrauding the prosecutor, inserted therein a larger sum:—Held, to be forgery.

The prosecutor's name, and as it appeared upon the cheque, was *M'Nicoll*; it was written *M'Nicole* in the indictment:—Held, to be no variance. *Regina v. Wilson*, 17 Law J. Rep. (N.S.) M.C. 82; 1 Den. C.C. 284; 2 Car. & K. 527.

In debt by payee against makers of a banker's cheque, in which the defendants pleaded that they did not make the cheque, the defendants' signatures were admitted, but it was opened for the defendants, that the defendants, who were directors of a company, of which the plaintiff was secretary, kept blank cheques, with their signatures to them, in a book, and that this cheque was one of those filled up by the plaintiff without authority. The Judge

intimated that this would be a forgery, even though the whole sum the cheque was drawn for was due to the plaintiff. The plaintiff elected to be nonsuited, and the Judge ordered the cheque to be impounded in the hands of the Associate, but would not order the plaintiff to be taken into custody, as no evidence of any forgery had been given, and the matter rested on the statement of counsel only. *Flower v. Shaw*, 2 Car. & K. 703.

(D) ORDERS, WARRANTS, AND UNDERTAKINGS.

An order of wine-merchants, purporting to direct a cooper of the London Docks to permit "self and company to taste wines, ex Traveller," &c. which belonged to them, is an order for the delivery of goods. And where a prisoner was convicted of uttering such order with the wine-merchant and owner's signature to it forged:—Held, that the conviction was right, although the prisoner had failed to obtain the signature of the dock company's clerk to the order, without which the cooper addressed was not authorized to act upon it. *Regina v. Illidge*, 18 Law J. Rep. (N.S.) M.C. 179; 1 Den. C.C. 404; 2 Car. & K. 871.

An indictment for forging "a certain warrant and order for the payment of money" is not supported by proof of the forgery of an instrument which is a warrant for the payment of money, but which is not an order.

A kept a deposit account, but not a drawing account, with B, a banker, and A was not entitled to draw cheques on B. C presented a forged cheque of A on B, which B paid:—Held, that this was a forged warrant for the payment of money, but not a forged order, as A had, by the course of dealing between him and B, no right to draw cheques on B. *Regina v. Williams*, 2 Car. & K. 51.

Upon an indictment under stat. 11 Geo. 4. & 1 Will. 4. c. 66. s. 3, for uttering a forged undertaking for the payment of money:—Held, that the statute applies as well to a written promise for the payment of money by a third person, as to a like promise for payment by the supposed party to the instrument. *Regina v. Stone*, 1 Den. C.C. 181; 2 Car. & K. 364.

(E) RECEIPTS.

A railway scrip certificate in the following form is not an "accountable receipt" within the 11 Geo. 4. & 1 Will. 4. c. 66. s. 10, and the forgery of it does not amount to felony:—"1845. Scrip. Buckinghamshire Railway (and Oxford and Blechley Junction). Provisionally registered. Capital 2,250,000*l.*, in shares of 20*l.* each. No. 101,801 to 101,850. Deposit, 2*l.* 2*s.* per share. The holder of this voucher is entitled to fifty shares in the above undertaking, he having signed the subscribers' agreement and parliamentary contract, paid the deposit as above, and agreed to pay all calls in respect of the said shares. By order of the provisional committee of management, W H, secretary." *Clark v. Newsam*, 16 Law J. Rep. (N.S.) Exch. 296; 1 Exch. Rep. 131.

If A, by letter, desire B, an innocent agent, to write the name of "W S" to a receipt on a post-office order, and the innocent agent do it, believing that he is authorized so to do, A is a principal in this forgery, and it makes no difference that by the

letter A says to B that he is "at liberty" to sign the name of W S, and does not in express words direct him to do so. But if A before the date of the letter sent to B, received by post a letter of an earlier date purporting to have come from W S, and bearing post-marks of earlier date, from which it may be inferred that he was authorized to make use of the name of W S, the counsel of A, on his trial for the forgery, is entitled to state the contents of that letter, and to give it in evidence, with a view of shewing that A *bonâ fide* believed that he had the authority of W S for directing B to sign the name of W S to the receipt. *Regina v. Clifford*, 2 Car. & K. 202.

An instrument professing to be a scrip certificate of the London and South-Western Railway Company, is not a receipt and acquittance, nor a receipt, nor an undertaking, for the payment of money within the stat. 11 Geo. 4. & 1 Will. 4. c. 66. *Regina v. West*, 1 Den. C.C. 258; 2 Car. & K. 496.

It was the practice of the treasurer of the county of S, when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount to the attorney for the prosecution or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively:—Held, that such a signature is not a receipt, the forging of which is an offence against the stat. 1 Will. 4. c. 66. s. 10, and that it is merely an authority to the treasurer to pay the amount. *Regina v. Cooper*, 2 Car. & K. 586.

An unsigned forged paper, "Received from Mr. Bendon, due to Mr. Warmen, 17s. Settled," is a forged receipt within the stat. 1 Will. 4. c. 66. s. 10. *Regina v. Inder*, 2 Car. & K. 635.

(F) INDICTMENT—VARIANCE.

[See (C) Cheques.]

(G) EVIDENCE.

Quare—Whether a forged document intrusted by the prisoner to an attorney as an attorney can be produced on the trial for the forgery. *Regina v. Tylney*, 18 Law J. Rep. (N.S.) M.C. 36; 1 Den. C.C. 319.

FRAUD.

1. IN LAW.

2. RELIEF AGAINST.

1. IN LAW.

Any false statement knowingly made for the purpose of inducing a party to enter into a contract is fraud in law.

Fraud in one contracting party does not render the contract void, but only defeasible at the option of the other contracting party.

Money had and received by an agent under such a defeasible contract, ceases to be had and received to the use of the principal when the contract is defeated; and the agent may shew this as a defence

against the principal, though the fraud was entirely his, and the principal was innocent of it. *Murray v. Mann*, 17 Law J. Rep. (N.S.) Exch. 256; 2 Exch. Rep. 538.

A sale of property for good consideration is not, either at common law or under the stat. 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. *Wood v. Dixie*, 7 Q.B. Rep. 892.

2. RELIEF AGAINST.

[See PLEADING, IN EQUITY, Bill.]

A bill filed by a purchaser to set aside a purchase and conveyance of an estate, on the ground of fraudulent concealment of a right of way, dismissed with costs, there being no proof of concealment by the vendor, although the dealings were inconsistent with any right of way.

To set aside a purchase, perfected by conveyance and payment of the purchase-money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect, proof of concealment by the vendor's agent is not sufficient, there must be proof of direct personal knowledge and concealment by the principal.

A purchaser of an estate, having made no inquiry respecting the title from an agent for the sale, is not entitled to any relief for non-communication of any defect by him.

Constructive knowledge of an agent, or knowledge acquired by him otherwise than as an agent for the sale, of a fact, the non-communication of which is made the ground for relief against the purchase, does not at all affect the contract.

Constructive notice is resorted to, from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of direct personal fraud.

Where a purchaser seeks to be relieved against the purchase on the ground of personal fraud by the vendor, and the alleged fraud is not proved, he is not entitled to relief on any other ground. *Wilde v. Gibson*, 1 H.L. Cas. 605.

Upon a bill filed by a remainderman in tail, to set aside a sale of lands, made nearly fifty years before under a decree—in a suit by a judgment creditor; to carry the trusts of a will into execution, and for the administration of the testator's estate—on the ground of irregularities and error in the proceedings, and fraud in the sale:—Held, by the Lords, affirming the decree complained of, that, in the absence of proof of fraud on the part of the purchaser, or that the estate was sold under the value by reason of any corrupt bargain, the sale was not impeachable.

A purchase under a decree, not impeachable when made, cannot become so from any irregularities in the subsequent conduct of the cause, or errors in dealing with the purchase-money.

After a long lapse of time since the transactions complained of, there having been parties *in esse* competent to impeach them, fraud is not to be assumed on doubtful evidence; but if it be clearly proved, no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of a court of equity, and in that case it is immaterial by what machinery or contrivance the

fraudulent transactions may have been effected, whether by a decree in equity, or judgment at law, or otherwise.

But in proportion as such jurisdiction is powerful, so ought the caution of the Court to be anxiously exercised, lest, in its zeal to do equity, the reverse may be effected. *Bowen v. Evans*, 2 H.L. Cas. 257.

B L became entitled in fee as heir-at-law to certain real estates by virtue of limitations contained in an indenture of marriage settlement; G D F, who was one of the releasees to uses named in the settlement, entered into possession of the estates (as alleged) under colour of an appointment executed in his favour by a party to the settlement; G D F had the custody of the indenture of settlement, and afterwards and whilst B L was in this country on a visit from the Cape of Good Hope, through the instrumentality of P, who was his solicitor and son-in-law, and also stood in a fiduciary situation towards B L and acted as his solicitor, levied a fine with proclamations, and no adverse claim was made by B L to the estates until after the fine had taken full effect, when B L filed a bill against the parties claiming beneficially the estates under the will of G D F and certain mortgagees thereof, seeking that the fine might be decreed to accrue for his benefit, on the ground that P, in a conversation which he had with T L, the younger brother of B L, and who acted as B L's agent, fraudulently misrepresented to T L that B L had no claim to the estates. In support of the plaintiff's claim certain correspondence was produced, by which it appeared that previously to the levying the fine, P had stated to T L (since deceased) that he was gratified to find that B L was convinced he had no just claim to the estates, and it was also proved by X, the solicitor of the plaintiff, that in a conversation which he had with P after the plaintiff's claim had been effectually barred by the fine, P admitted to the witness that he had formerly stated to T L that B L had no title to the estates. The bill, however, contained no statement or charge of any such conversation having taken place. The bill was dismissed, with costs, against all the defendants, no case of fraud having been made out on the part of the plaintiff against the defendant's testator. *Langley v. Fisher*, 15 Law J. Rep. (n.s.) Chanc. 73; 9 Beav. 90.

The plaintiffs, in 1829, employed A & B, a firm of solicitors, to procure an investment for them. A wrote to the plaintiffs, naming S as a proposed mortgagor, for 4,500*l.*, whereupon the plaintiffs forwarded to A a cheque for 4,500*l.* to be so invested, which cheque was paid into a bank to the partnership account. The necessary mortgage deeds were prepared, but S afterwards declined to complete the transaction, but A untruly represented to the plaintiffs that the mortgage had been effected and continued to pay interest on the 4,500*l.* to the plaintiffs until 1841. In 1834 A & B dissolved partnership, but the plaintiffs continued to employ A as their solicitor. A became bankrupt in 1844, and the plaintiffs then first discovered that the mortgage to S had never been effected. On a bill by the plaintiffs against B to recover this sum,—Held, that the fraudulent representation of A must be taken to be the act of the firm; and the money being received by the partnership and lost to the plaintiffs in consequence of the fraud, which was

first discovered within six years before the filing of the bill, the plaintiffs were entitled in equity to recover the money from B, the innocent partner, notwithstanding the dissolution of the partnership in 1834, and the subsequent adoption of A by the plaintiffs as their solicitor, the plaintiffs being without remedy at law by reason of the Statute of Limitations. *Blair v. Bromley*, 16 Law J. Rep. (n.s.) Chanc. 105; 5 Hare 542; affirmed 16 Law J. Rep. (n.s.) Chanc. 495; 2 Ph. 354.

A man who is in distress may nevertheless contract, and if he procures others to consent to an agreement which he would not have requested or consented to if he had not been in distress, and afterwards obtains performance of that agreement and receives the money secured by it, and after that acquiesces for a length of time in the performance without notice of dissatisfaction, he is not entitled to set aside the transaction on the mere ground of poverty and distress in the absence of proof of deception or fraud practised on him. *Knight v. Marjoribanks*, 11 Beav. 322.

About six months after a lady came of age a creditor of her father obtained from her securities for his debt. The Court was of opinion that the creditor had not used any undue or fraudulent means, or availed himself of the fraud of any other party to procure payment, and held that the mere fact of a daughter voluntarily paying the debt of her father who was in difficulties was not of itself ground for imputing undue influence to the father, or even if such influence had been exerted, for imputing knowledge of it to the creditor.

An agreement to release executors, entered into about three months after an infant came of age, and carried into effect about three months subsequently by deed, set aside,—the agreement having been entered into in the absence of proper independent advice and assistance, and without a proper opportunity of examining the accounts, and the deed having been executed under the same influence and without a proper and necessary examination and verification of the accounts. *Thornber v. Sheard*, 12 Beav. 589.

A deed obtained from a tenant in tail by his brothers, without adequate consideration, and when he was in want of money, and either without legal advice or with legal advice meant to promote the wishes and interest of those with whom he was dealing, was set aside, on the ground that the plaintiff did not know that he was entitled to the whole estate, and because the deed was executed without disclosing to him all the material facts, which were known to his brothers, and because there was reason to suppose that the plaintiff was actually misled. *Sturge v. Sturge*, 19 Law J. Rep. (n.s.) Chanc. 17; 12 Beav. 229.

Pending proceedings before the Judicial Committee of the Privy Council, upon an appeal from the ecclesiastical courts in a suit by H B against her husband G T L B, for a divorce for cruelty and adultery, the defendant G T L B executed a deed conveying all his real and personal estates and effects to trustees, upon trust for the benefit of creditors, and for other purposes: various monitions were made against G T L B for the payment of costs, and for the payment of the alimony of his wife, but none of them were obeyed. During the progress of

the proceedings various acts of parliament were passed, and those in force at the commencement were either repealed or extensively varied at the termination of the proceedings before the Judicial Committee of the Privy Council; that Court issued a sequestration under the statutes then in force. Upon the sequestrators going down they were informed that the property was no longer vested in the defendant, but in F and T as trustees, and that they refused to give possession to the sequestrators. A return to that effect was made to the Judicial Committee of the Privy Council; another sequestration was issued, but no attempt was made to enforce it. Upon a bill by the plaintiff in this court, asking "that the deed might be declared fraudulent and void, and to have full benefit of all the proceedings before the Judicial Committee of the Privy Council, and if it was not void asking that the beneficial interest of G T L B might be made liable to the several sums of money due for costs and alimony,—Held, that under the last statute the surrogates had authority to issue a sequestration to compel obedience to all the orders of the Judicial Committee of the Privy Council; that under the writs of sequestration issued the Commissioners were authorized to take possession of the real and personal estates of G T L B; that powers given to the Judicial Committee of the Privy Council to direct issues, &c., make inquiries, &c., do not extend to cases like the present; and though the deed was executed before any right declared, yet as it was to defeat a right which the plaintiff was entitled to establish, it was considered as executed to defraud the plaintiff, and ought not to prevail, and that the deed was fraudulent and void, except as to creditors *bona fide*, whose debts were provided for; and that the plaintiff was entitled to payment of the sums of money directed by the proceedings in the Judicial Committee of the Privy Council, with costs, but that she was entitled to no relief against the creditors, against whom the bill was dismissed, with costs, to be paid by the plaintiff and recovered over against the defendant G T L B.

Held, also, that letters of the defendant written to his solicitors before the deed was executed were admissible in evidence; but, *quære*, whether letters written after the deed can be received as evidence of fraud in the execution. *Blenkinsopp v. Blenkinsopp*, 19 Law J. Rep. (N.S.) Chanc. 425; 12 Beav. 568.

Where the case made by a bill was that a trust deed (which it sought to set aside) was the produce of sheer imposture and plain cheating, and was obtained by a conspiracy between the defendant and his solicitor, whereby the plaintiff was entrapped into the execution of the deed under the fiction that it was an instrument of a different kind, and the evidence was only adduced to prove that the plaintiff was a very ignorant and illiterate person easily imposed upon, and that she executed the deed in question without distinct explanation, and without the advice of her own solicitor who resided near, and whom she expressed a desire to consult,—Held, that the case proved was not sufficiently put in issue by the bill to enable the Court to set aside the deed; but an issue was offered to try whether the execution had been fraudulently obtained, and that being declined by the plaintiff, the bill was dismissed.

An improvident settlement of a large part of a

woman's property was made by her shortly before her marriage. The husband and wife filed a bill to set it aside as a fraud on the marital right. *Semble*—that relief might be given notwithstanding the wife being a co-plaintiff, if an engagement to marry preceding the transaction, and a subsequent marriage without notice to the husband were proved, and an issue to try the fact was offered. *Griggs v. Staple*, 2 De Gex & S. 572.

A and B entered into a joint adventure for the purchase of goods to be shipped to China, to be there sold, and the proceeds to be invested in a homeward cargo. A was to render himself liable for the payment of the goods, and B was to supply A with a share of the money by a fixed time, so as to enable A to meet this liability. At the time fixed A applied to B for the money but B failed to supply it. In consequence, after some negotiation, A offered to allow B to withdraw from the adventure altogether, and this offer was accepted. Down to the time when A applied to B for the money, A had communicated to B all the information he possessed relative to the adventure and its chances of success which then appeared very doubtful: but while the negotiation was going on, A received two letters from his correspondents in China through whom the business was managed, which he did not communicate to B:—Held, in a suit impeaching the arrangement by which B gave up his share in the adventure, that considering the relative situation of the parties there was no obligation on A to communicate to B the letters in question; and that there being no proof of misrepresentation by A, the arrangement could not be set aside merely on the ground of the non-communication of the letters. *M'Lure v. Ripley*, 2 Mac. & G. 274.

FRAUDS, STATUTE OF.

[SURRENDER BY OPERATION OF LAW. See LANDLORD AND TENANT. And see GUARANTEE.]

- (A) CONTRACTS REQUIRED TO BE IN WRITING.
- (B) AGREEMENT TO ANSWER FOR THE DEBT OF ANOTHER.
- (C) NOTE OR MEMORANDUM IN WRITING.
- (D) ACCEPTANCE AND RECEIPT.
- (E) PART PAYMENT.

(A) CONTRACTS REQUIRED TO BE IN WRITING.

An agreement entered into by a contractor to share in the profits of the undertaking, although the contract was not capable of being completed within a year, is not such an agreement as by the Statute of Frauds, 29 Car. 2. c. 3. s. 4, is required to be in writing, but may be proved by parol evidence. *M'Kay v. Rutherford*, 6 Moore, P.C. 413.

An agreement to take a message and pay for alterations in it is an agreement relating to an interest in land, and is required to be in writing by the Statute of Frauds; and the part of the agreement as to the alterations cannot be severed from the other part. *Vaughan v. Hancock*, 16 Law J. Rep. (N.S.) C.P. 1; 3 Com. B. Rep. 766.

An agreement between plaintiff and defendant, that if plaintiff, the tenant of a farm, would surren-

der her tenancy to the landlord, and would prevail on her husband to accept the defendant as his tenant in the place of the plaintiff, he, the defendant, would pay the plaintiff 100*l.* as soon as he should become tenant of the land, is a contract relating to an interest in land within the meaning of the 4th section of the Statute of Frauds, and cannot be enforced unless in writing, even where the contract is executed. *Cocking v. Ward*, 15 Law J. Rep. (n.s.) C.P. 245; 1 Com. B. Rep. 858.

S proposed to B to support his (S's) illegitimate child at 1*l.* 1*s.* per month, and it was then suggested by B that this should continue for the first year, to which S objected, on the ground that the expense would be light during that year, whereupon it was ultimately agreed that B should maintain it at that rate so long as S should think proper. The child having been supported for several years, B brought his action for goods sold and delivered, and for necessities supplied for the maintenance of the child:—Held, that this contract was not a contract not to be performed within the space of one year under the 4th section of 29 Car. 2. c. 3; and also that, even if it were, the present action, being founded on the executed and not the executory contract, was maintainable. *Souch v. Straubridge*, 15 Law J. Rep. (n.s.) C.P. 170; 2 Com. B. Rep. 808.

A agreed by writing to receive B as clerk, &c., in consideration of B paying him a premium of 300*l.*, "and to pay him a salary at the following rates, viz. for the first year, 70*l.*; for the second, 90*l.*; for the third, 110*l.*; for the fourth, 130*l.*; for the fifth and following years, 150*l.*;" and in the case of the death of either to return 150*l.* At or just before the execution of this agreement, B said to A that it would be convenient for him to receive his salary quarterly, and during the first three years the salary was so paid:—Held, in an action for work and labour and wages for the first quarter's salary in the fourth year, that this was an agreement within the 4th section of the Statute of Frauds, and could not be varied by the conversations or acts of the parties; that under it the salary was payable at the end of every year, and that A could not recover *pro rata* before the expiration of the year. *Giraud v. Richmond*, 15 Law J. Rep. (n.s.) C.P. 180; 2 Com. B. Rep. 835.

By an indenture made between E C of the first part, G W of the second part, J R of the third part, and D H and J S N of the fourth part, E C assigned a patent to D H and J S N, to be paid for by instalments extending beyond a year from the execution of the deed. The deed was duly signed and executed by all the parties except D H. There was a seal in the usual way for him, but no signature. It was proved that he had, together with J S N, attempted to work the patent, and sent a notice to the plaintiff, pursuant to a certain proviso in the deed, in which the deed was recited as made between the several parties thereto, and their names were correctly stated. This notice was signed by D H. In an action of covenant against D H and J S N, they severally pleaded *non est factum*. At the trial D H produced the deed:—Held, first, that there was evidence to go to the jury that he had adopted and delivered the deed.

Secondly, that as all that was to be done by E C

was to be done within a year, the 4th section of the Statute of Frauds did not apply.

Semble—that the word "agreement" in the statute does not include deeds.

Semble, also, that if it did, the notice above mentioned would have been a sufficient memorandum within the statute. *Cherry v. Heming*, 19 Law J. Rep. (n.s.) Exch. 63; 4 Exch. Rep. 631.

(B) AGREEMENT TO ANSWER FOR THE DEBT OF ANOTHER.

A declaration stated that the plaintiff, a shipbroker, was retained by the shipowner to procure a charter for a ship, on the terms that the plaintiff should collect the freight and thereout retain his commission; that the plaintiff did procure a charter-party; that the defendants, in consideration of the plaintiff's abandoning his right of collecting the freight, promised to pay him his commission. The facts were, that the plaintiff agreed with the shipowner to procure a charter for the ship, and that he should be authorized to collect the freight on the proposed voyage as a security for his commission. The ship having sailed and returned, the defendants, as brokers of the then owners, put a stop on the freight. A written agreement, on which the action was brought, was afterwards made and signed by the plaintiff, the defendants and the charterers, that the stop should be taken off the freight; that the commission on the charter-party, payable to the plaintiff, should be paid to him by the defendants; and that no person signing that agreement should put any stop on the freight:—Held, first, that there was a variance between the agreement declared upon and the one proved, and that no amendment ought to be made; secondly, that the agreement was an agreement to answer for the debt of another within the Statute of Frauds. *Gull v. Lindsay*, 18 Law J. Rep. (n.s.) Exch. 354; 4 Exch. Rep. 45.

(C) NOTE OR MEMORANDUM IN WRITING.

A father having agreed to settle a certain sum for the benefit of his daughter and the children of her intended marriage with Lord G, a memorandum of the terms of the settlement was by his direction written by his solicitor, and approved of by him and Lord G, and he gave the solicitor instructions to prepare such settlement, but died before the same was ready for execution, having by his will given the daughter real estates and a moiety of the residue of his personal estate. Lord G married the daughter, and performed his part of the settlement in conformity to the written memorandum:—Held, that the memorandum was not a complete agreement, binding within the Statute of Frauds; and of an incomplete agreement there cannot be part performance. *Thynne v. Glengall and Glengall v. Thynne*, 2 H.L. Cas. 131.

In 1843 the plaintiff and A entered into a parol contract to become jointly concerned in a speculation for buying, improving, and selling land at B; A to find the necessary capital, and the plaintiff (a land-agent) to select, purchase, lay out, and re-sell the same, without charge; the advances made by A, with interest, to be the first charge upon the proceeds of the re-sales, and the surplus profits to go, two-thirds to A, and one-third to the plaintiff.

Land at B was selected and purchased by the plaintiff accordingly, and A afterwards made over a moiety of his interest in the speculation to C. The purchase-money was provided by A and C, and the conveyance taken in their joint names. On the plaintiff repeatedly pressing, by letters to A, for some acknowledgment in writing of his interest, A handed over to him a copy of an agreement, dated the 27th of October 1843, and made between A and C, to the effect that A and C were interested in two-thirds of the surplus profits, and that the remaining one-third was to be reserved for the plaintiff; but that the plaintiff should have no power to determine when any re-sale should take place. In 1844 A died, having devised the property by his will. To a bill by the plaintiff against C and the devisees of A for an account, a sale of the land, and application of the proceeds, according to the agreement, all the defendants by their answer insisted on the Statute of Frauds, C by his answer, admitting that, previously to his joining in the speculation, A had informed him that the plaintiff was to have one-third of the surplus profits:—Held, that this was a partnership; and that, the fact of the partnership being established by general evidence, the land would be dealt with in equity as the stock of the partnership, and that the statute was no bar to the plaintiff's claim. Secondly, that the memorandum of October 1843, coupled with the previous assertions in writing of the plaintiff's right, which was never denied by A, was a sufficient manifestation in writing, within the statute, of the pre-existing interest of the plaintiff in the lands. The Court directed two issues: first, whether it was agreed between the plaintiff and A that they should be jointly interested in purchasing, &c. land at B; and, secondly, (if the verdict on the first issue should be in the plaintiff's favour) whether it was a term in such agreement that the plaintiff should have no power of determining the period of the re-sales of the land. *Dale v. Hamilton*, 16 Law J. Rep. (N.S.) Chanc. 126; 5 Hare, 369; affirmed 16 Law J. Rep. (N.S.) Chanc. 397; 2 Ph. 266—when the Court declared the plaintiff entitled to one-third, and referred it to the Master to inquire whether it was expedient that the property should be sold immediately.

(D) ACCEPTANCE AND RECEIPT.

The defendant having ordered of the plaintiff two dozen of port and the same quantity of sherry, to be returned if not approved of, the plaintiff sent him four dozen of each. The defendant returned all but thirteen bottles, objecting to the quality:—Held, that more wine having been sent than was ordered, the defendant was entitled to return the whole, and was not bound to pay for more than he retained. *Hart v. Mills*, 15 Law J. Rep. (N.S.) Exch. 200; 15 Mee. & W. 85.

A bought a certain quantity of wheat, in value above 10*l.*, which wheat was to be reduced to a certain standard by dressing. After the making of the contract, A sent for a small portion of the wheat, which was then sent to him, but not dressed, whereby it fell short of the standard agreed upon, but he retained it, without objecting to it:—Held, that this was a part acceptance within the Statute of Frauds; and that retaining the portion so sent amounted to a waiver of the full performance of the

contract by the plaintiff as to that portion. *Gilliat v. Roberts*, 19 Law J. Rep. (N.S.) Exch. 410.

Where goods have been sent on a contract for sale, and the jury find they did not correspond with the sample contracted for, *semble*, that the mere unpacking of them by the vendee will not, under any circumstances, amount to an acceptance.—*Aliter*, if the goods are kept by the vendee an unreasonable time. *Curtis v. Pugh*, 16 Law J. Rep. (N.S.) Q.B. 199; 10 Q.B. Rep. 111.

The defendant verbally ordered goods of the plaintiff's agent in London, the price of which was 15*l.* The goods were accordingly sent from abroad to the agent, who warehoused them with a wharfinger, and received from him a warrant, by which the goods were made deliverable to the agent or his assignees, by indorsement, on payment of rent and charges from a certain day. This warrant the agent indorsed to and sent to the defendant. The defendant kept the warrant for ten months, and was repeatedly applied to for the charges and the price of the goods, which he did not pay, nor did he return the warrant, but said he had sent it to his solicitor, and meant to defend the action, as he had not ordered the goods, and the goods would remain at present in bond:—Held, that although there was sufficient evidence of the acceptance of the goods, if they had been delivered to the defendant, there was no evidence of the receipt of the goods sufficient to satisfy the Statute of Frauds. *Farina v. Home*, 16 Law J. Rep. (N.S.) Exch. 73; 16 Mee. & W. 119.

A, being himself yearly tenant of a house to B, underlet the house and furniture at a weekly rent to C. A being desirous of getting rid of his tenancy at the end of the current year, offered to sell the furniture to C for 50*l.*; which C thought too much, but verbally agreed to have it valued, and to pay so much as it should be found worth, on B's agreeing to accept him as his tenant instead of A. The furniture was valued at 80*l.*, which he refused to give, but he offered the 50*l.* Before the expiration of the year an agent of A took the key out of the door and gave it to C, telling him that he must settle with A himself about the furniture. B refused to accept C as his tenant, and he continued to occupy the house and use the furniture as before, but continually giving notice to A to take away the furniture, which he refused to do; and after the lapse of three months, C sent it to a broker's:—Held, that, upon these facts, there was no evidence to go to the jury of an acceptance by C of the furniture, under a contract of sale, to satisfy the Statute of Frauds. *Lillywhite v. Devereux*, 15 Mee. & W. 285.

A agreed to purchase of B a carriage, then standing in the shop of B, A at the same time desiring that certain alterations might be made in it. The alterations having been made, the carriage was, at A's request, placed in the back shop. On Saturday, the 14th of November, A called at the shop, and requested B to hire a horse and man for him, and to send the carriage to his house on the following day, in order that he might take a drive in it,—A having previously intimated his intention to take the carriage out a few times, in order that, as he was going to take it abroad, it might pass the Custom House as a second-hand carriage. The carriage was accordingly sent to and used by A on the Sun-

day, A paying for the hire of the horse and man. A afterwards refused to take or pay for the carriage:—Held, that there was a sufficient acceptance of the carriage by A before Sunday, the 15th of November, within the 17th section of the 22 Car. 2. c. 3, to entitle the plaintiff to recover upon a count for goods bargained and sold.

Quære—Whether the statute 29 Car. 2. c. 7. avoids a previous parol contract for the sale of goods, where the *delivery and acceptance* take place on a Sunday. *Beaumont v. Brengeri*, 5 Com. B. Rep. 301.

There may be a sufficient acceptance and receipt of goods to constitute a binding contract within the 17th section of the Statute of Frauds, although the right of the buyer to object that the goods do not comply with the terms of the contract of sale still remains.

A verbal contract was entered into for the purchase of fifty quarters of wheat, according to sample, each quarter to be of a certain weight. The next day the wheat was delivered by the plaintiff, the vendor, on board the lighter of a general carrier by canal, sent for that purpose by the defendant, the buyer, without being weighed; the same day the defendant sold the wheat by the same sample, and upon the same terms as to the weight, to H. The wheat immediately upon its arrival was found by H not to be of the weight stipulated for, and the same day H gave notice of his rejection of the contract to the defendant, who thereupon communicated with the plaintiff, and declined to receive the wheat:—Held, in an action for the price of the goods, that, although the defendant had done nothing to preclude him from objecting that the wheat was not according to the terms of the contract of sale, the jury were justified in finding, as they had done, a sufficient acceptance and receipt to render such contract good within the meaning of the Statute of Frauds. *Morton v. Tibbett*, 19 Law J. Rep. (N.S.) Q.B. 382; 15 Q.B. Rep. 428: s.p. *Bushelv. Wheeler*, 15 Q.B. Rep. 442, n.

Where the defendant selected some sheep from the plaintiff's flock, and verbally agreed to purchase them, and the plaintiff by the defendant's orders afterwards delivered the sheep at a field of the defendant's, whence the defendant had them removed by his own man to his farm, and on their arrival at the farm the defendant saw them and counted them over and said they were all right,—Held, that this was evidence for the jury that he had accepted the sheep so as to satisfy the Statute of Frauds, although the next day after seeing them the defendant wrote to the plaintiff repudiating the sheep as not being those he had purchased, and the plaintiff refusing to make an abatement in the price, sent them back to the plaintiff.

Quære—Whether there can be an acceptance before delivery, under the Statute of Frauds. *Saunders v. Topp*, 18 Law J. Rep. (N.S.) Exch. 374; 4 Exch. Rep. 390.

The defendant contracted with S for certain quantities of timber. The defendant's agent was to select the timber from felled trees, and to mark out the portions of the trunks which were to be delivered to the defendant; and it was then the duty of S to sever the timber, and convey the marked portions to the defendant's wharf, and deliver them there.

The defendant's agent having selected certain trees and marked out the required portions, S became bankrupt before the timber was severed, and the messenger of the Court of Bankruptcy took possession of it. The defendant afterwards seized the timber, severed it, and carried away the marked portions:—Held, that he was liable in trover, the property in the timber not having passed by the marking out of the parts required; and that there was no delivery or acceptance under the Statute of Frauds. *Acraman v. Morrice*, 19 Law J. Rep. (N.S.) C.P. 57; 8 Com. B. Rep. 449.

(E) PART PAYMENT.

The plaintiff being indebted to the defendant in 4*l.*, it was verbally agreed between them that the plaintiff should sell to the defendant, by sample, certain goods, above the value of 10*l.*, and that the 4*l.* should go in part payment. The goods were delivered, but refused acceptance:—Held, that the contract was void under the 17th section of the Statute of Frauds.

Semble—that if there had been an express agreement that the plaintiff should pay to the defendant the 4*l.*, and take it back again as earnest or part payment, the statute would have been satisfied, without proof that the money actually passed. *Walker v. Nussey*, 16 Law J. Rep. (N.S.) Exch. 120; 16 Mee. & W. 302.

FRIENDLY AND BENEFIT SOCIETIES.

[Vesting of Estate in Members. See *Poor*, Settlement.]

- (A) SHAREHOLDERS.
- (B) DEEDS, CONSTRUCTION OF.
- (C) RULES, CONSTRUCTION OF.
- (D) PROCEEDINGS BEFORE JUSTICES.
- (E) REFERENCE TO ARBITRATION.
- (F) OTHER REMEDIES AND POWERS OF THE TRUSTEES. [See (A) Deeds, and (D) Reference to Arbitration.]
- (G) STAMP. [See (A) Deeds.]
- (H) ELECTION OF OFFICERS.
- (I) JURISDICTION OF COUNTY COURT.

Acts relating to, amended by 9 & 10 Vict. c. 27; 21 Law J. Stat. 74.

The laws relating to friendly societies consolidated and amended by 13 & 14 Vict. c. 115; 28 Law J. Stat. 327.

(A) SHAREHOLDERS.

A joint-stock company cannot hold shares in a benefit building society established under the 6 & 7 Will. 4. c. 32. *Dobinson v. Hawks*, 16 Sim. 407.

(B) DEEDS, CONSTRUCTION OF.

Securities given to the trustees of benefit building societies, established under the 6 & 7 Will. 4. c. 32, are exempt from stamp duty under the provisions of the 10 Geo. 4. c. 56. s. 37, incorporated and re-enacted in the 6 & 7 Will. 4. c. 32. s. 4.

The 3 & 4 Vict. c. 73. s. 1, which limits the exemptions contained in the 10 Geo. 4. c. 56, in

respect of friendly societies, to cases where the sum assured does not exceed 200*l.*, does not affect the exemptions re-enacted as to building societies by the 6 & 7 Will. 4.

Where a document has several objects, of which some are merely ancillary to the main one, the amount of stamp duty is to be measured by the principal object.

Where a document has a double object, and has an unappropriated stamp on it large enough for it in either sense, it is admissible when offered to establish one of its objects.

When different parts of a deed are inconsistent with each other, effect ought to be given to that part which is calculated to carry out the real intention of the parties, and the other parts should be rejected.

An indenture recited the formation of a benefit building society, and that A and B, parties to the deed, were entitled to a certain sum out of the funds in respect of shares, and that for securing all payments to be made in respect of such shares they had agreed to execute the assurance thereby made. A and B then conveyed premises to C and D, the trustees of the society, upon trust to permit A and B to receive the rents until default in payment of their contributions, with powers to the trustees to appoint a receiver, or to sell on default. The deed contained a further clause, by which A and B agreed to become tenants to C and D, and the trustees for the time being of the premises "hereby demised *henceforth* during their will," at a certain rent:—Held, that the evident object of the deed being to secure the payment of the contributions, and the last clause being inconsistent with the rest, that clause did not operate as a demise.

Quære—Whether the rules of a building society were properly proved by the production of the printed book used by the society, containing a certificate by the proper officer under the 10 Geo. 4. c. 56, the 6 Will. 4. c. 32, and the 9 & 10 Vict. c. 27. *Walker v. Giles*, 18 Law J. Rep. (n.s.) C.P. 323.

The plaintiff was a member of a building society constituted under the 6 & 7 Will. 4. c. 32, and which by its rules was to continue till each share had realized 120*l.* The plaintiff became the purchaser of twelve and a half shares, that is, discounted his shares, receiving the present value; and in consideration of 750*l.* advanced to him in respect of such shares, he executed to the trustees of the society a mortgage of real property for securing his monthly subscriptions and other payments. This deed contained a power of sale, in case the plaintiff made default in his payments; and the trusts of the proceeds of the sale were, to retain thereout all payments due and which should afterwards become due from the plaintiff to the society up to its termination, which was to be calculated by the trustees; and it was declared, that all sums afterwards becoming due should be treated as due at the time of the sale. The 62nd rule, relating to the redemption of a mortgage to the society, though not in the same terms, was not inconsistent with these trusts. Upon bill by the mortgagor to redeem,—Held, that the Master, in taking the account of what was due upon the mortgage, was to calculate the probable duration of the society; and to treat the future accruing subscriptions and other payments until that period as

immediately due. *Mosley v. Baker*, 17 Law J. Rep. (n.s.) Chanc. 257; 6 Hare, 87; affirmed, 18 Law J. Rep. (n.s.) Chanc. 457; 1 Hall & Tw. 301.

(C) RULES, CONSTRUCTION OF.

The rules and practice of a society, held not to contravene the 6 & 7 Will. 4. c. 32, or to deprive the society of the protection against the usury laws given by section 2, and that whether the rules were a mere colour for usury would be a question for a jury. By one of the rules, no action was to be commenced by the trustees without the consent of the directors:—Held, that the defendant, though a member, could not allege that they were suing without such consent. *Doe d. Morrison v. Glover*, 15 Q.B. Rep. 103.

[See (B) Deeds, and (E) Reference to Arbitration.]

(D) PROCEEDINGS BEFORE JUSTICES.

By the Friendly Societies Act, 10 Geo. 4. c. 56. s. 27, it is enacted, that on a reference of disputes between members of the society to arbitrators, if either of the parties refuse to comply with the award of the arbitrators, a Justice of the Peace may, on proof thereof, and on complaint of the party aggrieved, summon the party complained against to appear before him, and on appearance, &c. two Justices may make such order as shall seem just; and if the sum awarded, with costs not exceeding 10*s.*, shall not be *immediately* paid, then such Justices may issue a distress warrant to levy such sum and costs. By section 28, if the reference shall be to Justices, such Justices may, on complaint of a refusal to comply with the rules by any member or officer, summon the party complained against to appear at a time named, and upon appearance or default two Justices may hear the complaint, and in case they shall adjudge any sum of money to be paid by the person complained against, and such person shall not pay such sum to the person and *at the time specified* by such Justices, they shall proceed to enforce their award in the manner hereinbefore directed to be used in case of neglect to comply with the decision of arbitrators:—Held, that where Justices have made an order for payment of money under section 28, a distress warrant cannot issue to enforce compliance with such order, without a previous summons on the party against whom the order is made. *Hammond v. Bendyshe*, 18 Law J. Rep. (n.s.) M.C. 219.

By general consent of the members of a friendly society, certain alterations were from time to time made in the original rules of the society, which had been regularly enrolled under the provisions of the 33 Geo. 3. c. 54. The alterations affected the rates of contribution and relief amongst the members, and had been acted upon; but they were made without the formalities required by the act, and had never been inrolled. A member of the society who had received relief in accordance with the alterations made in the rules, but was afterwards refused the same, summoned the stewards of the society before the defendants, and sought to compel payment of the allowance prescribed by the original enrolled rules, abandoning all claim under the subsequent alterations. The defendants, however, decided that the alteration in the rules took away their jurisdic-

tion, and refused to hear the complaint:—Held, that they were bound to hear and determine the matter of the complaint. *Regina v. Cotton*, 19 Law J. Rep. (N.S.) M.C. 233; 15 Q.B. Rep. 569.

(E) REFERENCE TO ARBITRATION.

The Metropolitan Building Association is a society established to enable parties to purchase freehold or leasehold property within twenty-five miles of London; and by rule 3. actions and suits are to be brought and defended in the names of the trustees, but no such proceedings are to be taken or defended until "the approbation of a majority of the members present at a special meeting of the association shall have been obtained." The president has power to call a "special meeting" of the committee; and on receiving a written request, signed by twelve of the members, to convene a "special general meeting," he is within three days after to convene such meeting:—Held, that an action brought with the approbation of the majority of the members present at a special general meeting was well brought within the meaning of the rule.

By the 28th rule, the committee are to determine "all disputes which may arise respecting the construction of these rules or any of the clauses, matters or things herein contained," the decision to be conclusive if satisfactory, but if not satisfactory, reference is to be made to arbitration, pursuant to the 10 Geo. 4. c. 56. s. 27:—Held, that this rule referred only to disputes respecting the construction of the rules, and did not prevent the trustees suing for the recovery of subscriptions and fines.

By the 11th rule, if the committee are satisfied that the premises offered by any member to whom shares have been awarded are a sufficient security, they are to direct the trustees to pay to such member the money he is entitled to receive, on his executing a deed in trust to sell, or other valid conveyance, mortgage, or assurance:—Held, that the society might lend money on mortgage to its own members as well as to strangers.

By the 8th rule, as often as the funds amounted to a share or sum of 120*l.*, the share is to be awarded to the highest bidder, the purchaser to have the privilege of taking as many additional shares at the same rate as he might choose. *Quære*—Whether, as the society enabled its members to hold an unlimited number of shares, each of which might be the maximum share, it was within the act 6 & 7 Will. 4. c. 32. s. 2. *Cutbill v. Kingdom*, 17 Law J. Rep. (N.S.) Exch. 177; 1 Exch. Rep. 494.

A rule of a building society which requires that all disputes which may arise between the society and any member thereof, shall be referred to arbitration, pursuant to the 10 Geo. 4. c. 56. s. 27, relates only to disputes between the society and a member as member. Therefore, where the trustees of a building society lent money on a mortgage of leasehold property to one of the members, who covenanted to observe and fulfil the rules of the society, and also to pay certain rent due to the superior landlord, and the trustees sued for breaches of both these covenants, a plea that the claims and demands of the plaintiffs were matters in dispute between the society and the defendant, within the meaning of the rules, was held bad.

A building society may lend money upon mort-

gage security to one of its own members, and such security will be within the 21st section of 10 Geo. 4. c. 56, and therefore vested in the trustees or treasurer for the time being.

A declaration upon such deed by the trustees for the time being, need not negative that there is a treasurer.

The rules of the society provided for the transfer in certain cases of securities taken by the trustees of the society to other trustees:—Held, that a declaration in covenant stating that the plaintiffs were trustees for the time being, and sued as such trustees, was good on general demurrer, although it shewed they were not the covenantees, and no assignment to them was stated.

A member of a building society may hold shares exceeding 150*l.* in value. *Morrison v. Glover*, 19 Law J. Rep. (N.S.) Exch. 20; 4 Exch. Rep. 430.

By another rule, disputes between the association and any of its members were to be referred to arbitration, according to statute 10 Geo. 4. c. 56. (Friendly Societies Act) s. 27. A member, borrowing the amount of his share from the association, gave the trustees a mortgage of premises held by him on lease, which contained a clause of forfeiture on non-payment of rent; and he covenanted, by the mortgage deed, to pay his dues to the association, and to pay his landlord the rent reserved by his lease:—Held, that on default by the mortgagor in payment of the society's dues, and also in payment of the rent, the trustees might proceed at law, and were not bound by the arbitration clause. *Doe d. Morrison v. Glover*, 15 Q.B. Rep. 103.

(F) OTHER REMEDIES AND POWERS OF THE TRUSTEES.

[See (B) Deeds, and (E) Reference to Arbitration.]

(G) STAMP.

[See (B) Deeds.]

(H) ELECTION OF OFFICERS.

The committee, consisting of eleven persons, of a friendly society were, by the rules of the society, from time to time to elect a treasurer:—Held, that a meeting of the committee, at which ten only of the members were present, the eleventh not having received any notice of the meeting, was not properly constituted, and the election of the plaintiff as treasurer in the place of the defendant was invalid, though made by a majority of the members of the committee, and though the absent member had some time previously expressed his intention not to take any part in the affairs of the society, and the defendant was present at the meeting, and had himself demanded a poll. *Roberts v. Price*, 16 Law J. Rep. (N.S.) C.P. 169; 4 Com. B. Rep. 231.

(I) JURISDICTION OF COUNTY COURT.

The rules of a building society, duly enrolled under 6 & 7 Will. 4. c. 32, provided that all disputes be referred to two Justices, pursuant to the 10 Geo. 4. c. 56. s. 27:—Held, on motion for a mandamus, that the jurisdiction of the county courts did not extend to any disputes between the members of such society. *Ex parte Payne*, 18 Law J. Rep. (N.S.) Q.B. 197; 5 Dowl. & L. P.C. 679.

GAME.

- (A) NIGHT POACHING.
- (B) LAWFUL APPREHENSION.

Owners and occupiers of land authorized to kill hares without a game certificate by 11 & 12 Vict. c. 29; 26 Law J. Stat. 54.

(A) NIGHT POACHING.

Indictment under statute 9 Geo. 4. c. 69. s. 9. (against night poaching) charged A B and six others, "that they being respectively armed with guns, and other offensive weapons, entered, &c." A and B were each proved to be armed with a gun, the other six with bludgeons. Objection: that the averment "other offensive weapons" (not specifying *what*) made the arming of the other six only constructive; which was not sufficient to bring them within the statute. Indictment held good. *Regina v. Goodfellow*, 1 Den. C.C. 81.

Under the 9 Geo. 4. c. 69, the Night Poaching Act, it is not essential that all the prisoners charged should actually enter the inclosed places, but if they are associated together for the common purpose of taking game contrary to the statute, and some of the party actually enter such place to effect that purpose, while the others remain near enough to aid and assist, they may all be convicted under an indictment, charging them with being in such place for such purpose. So held (upon a case reserved) by Lord Denman, C.J., Wilde, C.J., Pollock, C.B., Coltman, J., Rolfe, B., Wightman, J., and Erle, J.: *dissentientibus Parke, B., Patteson, J., Cresswell, J., Platt, B., and Williams, J.* *Regina v. Whittaker*, 17 Law J. Rep. (N.S.) M.C. 127; 1 Den. C.C. 310; 2 Car. & K. 636.

Offence of night poaching committed by A and B on the 4th of December 1845. Information and warrant for their apprehension, 19th of December 1845. A committed for trial 5th of September 1846. B on 21st of October 1846. Indictment preferred, 5th of April 1847:—Held, under statute 9 Geo. 4. c. 69. s. 4, that the prosecution was commenced within twelve calendar months after the commission of the offence. *Regina v. Brooks*, 1 Den. C.C. 217; 2 Car. & K. 402.

(B) LAWFUL APPREHENSION.

On an indictment for wounding with intent to prevent lawful apprehension, it was proved that the prisoners were found poaching in the night, armed, in a preserve which had belonged to the Earl of L, and then was in the possession of the Earl's trustees. The person trying to apprehend was a watcher employed by the head keeper, the latter having been appointed by the Earl twenty years before, and paid by his agent down to the time of the trial, but the head keeper had never had any direct communication with the trustees:—Held, sufficient proof of an authority to apprehend. *Regina v. Fielding*, 2 Car. & K. 621.

Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, and they waited in a turnpike-road, expecting the poachers to come there, which they did, and an affray ensued between the gamekeepers and

the poachers:—Held, that if the gamekeepers were then endeavouring to apprehend the poachers they were not justified in so doing. *Regina v. Meadham*, 2 Car. & K. 633.

GAMING AND WAGERING.

(A) LAWFUL AND UNLAWFUL GAMES.

- (a) Foot-race.
- (b) Lottery.

(B) WAGERS.

- (a) *What Wagers are legal.*
- (b) *Recovery of Money deposited with Stakeholder.*
- (c) *Construction of Statutes against wagering.*

(A) LAWFUL AND UNLAWFUL GAMES.

[*Thorpe v. Coleman*, 5 Law J. Dig. 311; 1 Com. B. Rep. 990.]

(a) Foot-race.

Since the passing of the 8 & 9 Vict. c. 109. a foot-race is a lawful exercise.

Two persons deposited 10*l.* each with a stakeholder, to abide the event of a foot-race to be run between them:—Held, that the money deposited was "a subscription" for a sum of money to be awarded to the winner of "a lawful game," within the 8 & 9 Vict. c. 109. s. 18. *Batty v. Marriott*, 17 Law J. Rep. (N.S.) C.P. 215; 5 Com. B. Rep. 818.

(b) Lottery.

A declaration in debt contained two counts: the first for 24*l.* money had and received; the last, for the like sum, on an account stated. Plea to the whole declaration, after averring that the account so stated was concerning the sum of money and the causes of action in the first count mentioned, that a horse-race being about to be run, an illegal lottery was set up, upon the terms that the adventurers therein should consist of seventy members, who should pay 15*s.* each; that Mr. R should be treasurer, and Mr. S the secretary; that the names of the horses should be put on separate cards, in one box, and the names of the adventurers, on separate cards, in another box, and that two disinterested persons should draw these cards by chance, one from each box alternately, and that the person whose name was drawn next after the name of the winning horse should be paid out of the subscriptions 24*l.*; that the plaintiff, the defendants, and others became adventurers, and paid the same sum each to Mr. S and the defendants, and that the plaintiff became the winner, &c.:—Held, first, that this was an illegal lottery; secondly, that the plea was a good answer to the whole declaration, as well to the recovery of the plaintiff's own stake, as of the 24*l.*; thirdly, that the plea was not double, nor did it amount to the general issue; and, lastly, upon special demurrer, that the plea was defective for not stating the christian names of the persons therein mentioned, no reason being assigned for the omission. *Gatty v. Field*, 15 Law J. Rep. (N.S.) Q.B. 408; 9 Q.B. Rep. 431.

(B) WAGERS.

(a) *What Wagers are legal.*

Before the 8 & 9 Vict. c. 109. s. 18, where the sum of 10s., betted by the plaintiff, upon a foot-race, was deposited with the defendant as the stakeholder, to abide the event of the race,—Held, that the wager was legal, as it did not amount to 10l., within the statute of 9 Anne, c. 14, nor was made upon credit contrary to the statute 16 Car. 2. c. 7, and therefore that the plaintiff could not, before the determination of the race, recover the amount of his deposit from the stakeholder. *Emery v. Richards*, 15 Law J. Rep. (N.S.) Exch. 49; 14 Mee. & W. 728.

(b) *Recovery of Money deposited with Stakeholder.*

The plaintiff and others having each deposited 2l. with the defendant, in a lottery, upon the Derby, the plaintiff brought an action for the whole amount, claiming to be the drawer of the winning horse. The particulars of demand stated that the action was brought to recover the amount of 13l. 16s., being money received by the defendant to the use of the plaintiff:—Held, that the plaintiff, under his particulars of demand, was not entitled to recover his stake of 2l.

Quære—Whether, where a party claims, as winner, the whole of the stakes deposited on an illegal wager he can recover back his own stake as money received to his use by the stakeholder. *Mearing v. Hellings*, 15 Law J. Rep. (N.S.) Exch. 168; 14 Mee. & W. 711.

After the passing of the 8 & 9 Vict. c. 109, a sum of money was deposited by two persons respectively with a stakeholder, to abide the event of a wager on a trotting match. Before the time fixed for its determination, one of the depositors repudiated the wager and demanded his money, which the stakeholder refused to return. In an action for money had and received, held, that the deposit was recoverable from the stakeholder, notwithstanding the 18th section of that act.

Semble—that if the 8 & 9 Vict. c. 109. s. 18. be a bar to such an action, it must be specially pleaded. *Varney v. Hickman*, 17 Law J. Rep. (N.S.) C.P. 102; 5 Dowl. & L. P.C. 364; 5 Com. B. Rep. 271.

(c) *Construction of Statutes against wagering.*

The 8 & 9 Vict. c. 109. does not apply to an action for a wager commenced before the passing of that act.

The general rule in construing recent statutes is, "*Nova constitutio futuris formam debet imponere, non præteritis*," but this rule will yield to a sufficiently expressed intention that the enactment shall have a retrospective operation. *Moon v. Durden*, 2 Exch. Rep. 22.

GAOL.

[Delivery. See PRISONER, Discharge of.]

Appointment of Surgeon to Borough Gaol.

The 2 & 3 Vict. c. 56. s. 1, which enacts that the 4 Geo. 4. c. 64. shall extend to all gaols except, &c., is to be construed with reference to the 7 Will. 4. & 1 Vict. c. 78, and its effect is to put all

borough gaols, with reference to the 4 Geo. 4. c. 64. on the same footing with the gaols of the boroughs enumerated in Schedule A. of that act, so as to affect them by the provisions of that act, and by all subsequent enactments relative thereto. The appointment, therefore, of a surgeon of a gaol of a corporation is vested in the Justices of a borough, and not in the recorder or town council; and they are to make the appointment at a quarter sessions, and at a subsequent sessions to direct a reasonable sum to be paid to him as salary, and also sums of money for medicines and other articles.

Semble—the appointment is not within the terms of the proviso in the 38th section of the 7 Will. 4. & 1 Vict. c. 78. s. 38, and, therefore, does not require the confirmation of the town council. *Hammond v. Peacock*, 16 Law J. Rep. (N.S.) M.C. 154; 1 Exch. Rep. 41.

Contribution by Borough to Purchase of County Gaol.

Under the provisions of the 5 & 6 Will. 4. c. 76. s. 117, a borough having a separate court of Quarter Sessions is not exempt from contributing a proportion of the money expended by the county in the purchase of a gaol, pursuant to the provisions of a particular statute:—Held, therefore, that the borough of Birmingham was bound to contribute towards the purchase of the gaol of Coventry, made out of the county rate of Warwickshire, under the provisions of the 5 & 6 Vict. c. 110. *The Mayor, &c. of Birmingham v. Regina*, 18 Law J. Rep. (N.S.) M.C. 176.

GAS WORKS.

Provisions usually contained in acts authorizing the construction of gas works consolidated by the 10 Vict. c. 15; 25 Law J. Stat. 36.

GIFT.

A mere verbal gift of a chattel to a person in whose possession it is, does not pass the property to the donee. *Sharr v. Pilch*, 19 Law J. Rep. (N.S.) Exch. 113; or *Shower v. Pilch*, 4 Exch. Rep. 478.

GIFTS IN INDIA.

[See EXTORTION.]

GOODS SOLD AND DELIVERED AND BARGAINED AND SOLD.

[See COAL ACTS—FRAUDS, STATUTE OF—LIEN—STOPPAGE IN TRANSITU—TROVER.]

(A) WHEN MAINTAINABLE GENERALLY.

- (a) *Contract for specific Chattel.*
- (b) *Unexpired Credit.*
- (c) *Specific Appropriation.*
- (d) *Evidence of the Contract.*

(B) WHEN THE PROPERTY PASSES.

(C) PLEADING AND EVIDENCE.

(A) WHEN MAINTAINABLE GENERALLY.

(a) *Contract for specific Chattel.*

"I, J Parsons, do hereby agree to provide a fourteen-horse engine and sixteen-horse boiler with fittings and everything complete for the sum of 260*l.*, and to deliver and erect the same at the mill of Sexton & Co., and to set the same to work; to be completed in a workmanlike manner on or before the 1st of October next, and if not completed by the 10th of October to forfeit 10*s.* a day for every day's delay." "In consideration of your supplying us with a certain fourteen-horse engine, which our foreman has inspected, and putting the same in thorough repair, and supplying a new sixteen-horse boiler, commonly called a Cornish boiler, with fire-place, valves, steam-cocks, and gauges complete, and delivering and erecting the whole, and setting the whole at work, according to the undertaking signed by you, and left with us, we engage to pay for the same 260*l.*" [Two instalments were then provided for, and the letter proceeded], "and will, on being satisfied with the work, as per your agreement, pay you the remainder within two months of its completion":—Held, to be a contract for the specific engine, and that the breach of the warranty, as to its power, assuming that there was one, was no answer to an action for the price, but might be given in evidence in reduction of it.

Held, also, that the stipulation as to payment referred to the work of the plaintiff in erecting the engine, and not to the engine itself; and that it ought to have been left to the jury whether the work was such as ought reasonably to have satisfied the defendants. *Parsons v. Sexton*, 16 Law J. Rep. (N.S.) C.P. 181; 4 Com. B. Rep. 899.

(b) *Unexpired Credit.*

Goods were sold, and work was done, the price of which amounted to 244*l.*, upon an agreement that 30*l.* should be paid in ready money, and the residue by bills of 80*l.* each, payable in succession every three months:—Held, that until the expiration of the period at which the last bill would become due, the vendor could not recover in an action for goods sold and delivered and work done, although the defendant had omitted to pay the 30*l.* or to give the bills, and that the proper remedy was by a special count for not paying that sum and giving the bills. *Paul v. Dod*, 15 Law J. Rep. (N.S.) C.P. 177; 2 Com. B. Rep. 800.

(c) *Specific Appropriation.*

In assumpsit for goods bargained, &c., the contract being, that if not required to be delivered on or before a day fixed, they were to be paid for on that day,—Held, that upon the averment of being ready and willing, &c., it was unnecessary for the plaintiff to shew a specific appropriation of goods for the purpose, and that the plaintiffs were entitled to recover the full price of the goods, and not merely damages sustained by breach of the contract. *Dunlop v. Grote*, 2 Car. & K. 153.

(d) *Evidence of the Contract.*

Two parcels of goods, differing in quality only, were intrusted by Y & Co. to the plaintiff (a carrier) to deliver to the defendant and A respectively.

The plaintiff, by mistake, delivered the goods of A (being the best quality) to the defendant. The defendant used the goods, and when the plaintiff applied to him for them the defendant *agreed to pay for the same he had ordered of Y & Co.*:—Held, sufficient evidence of a verbal agreement to support a count for goods sold and delivered. *Coles v. Bulman*, 17 Law J. Rep. (N.S.) C.P. 302; 6 Com. B. Rep. 184.

(B) WHEN THE PROPERTY PASSES.

The giving of a delivery order does not, without some positive act done under it, operate as a constructive delivery of the goods to which it relates, nor deprive the owner of the goods, who gave it, of his right of lien for their price, even as against the claims of a third person who has *bond fide* purchased them from the original vendee.

S, the owner of sugars, sold them to B, to whom he gave a delivery order addressed to his agent A, and took a bill of exchange in payment of the price. B sold the sugars to M, and transferred to him the delivery order. The sugars were in the warehouse of L, in whose books they were entered as received by him "from A, on account of S." The sugars were weighed and invoiced by A upon the order of S. Neither B nor M took any steps to act upon the delivery order, till a rumour arose of B's insolvency, when M presented the order to A, and received from him a fresh order, addressed to L, the warehouse-keeper. Before the sugars could be actually delivered under this order, A removed them under the direction of S:—Held, affirming the judgment of the Court below, that the possession of the goods had never been changed, and that S might still enforce upon them his lien as vendor. *M'Ewan v. Smith*, 2 H.L. Cas. 309.

Messrs. H L & Co. of Montreal, entered into a written contract with Messrs. L & Co., for the sale of a quantity of red pine timber, then lying above the Rapids, Ottawa River, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June, then next, and to be paid for by the purchaser's promissory notes of ninety days from that date, at the rate of 9½*d.* per foot, measured off: if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½*d.* per foot, on delivery: and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate was paid by Messrs. L & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L & Co. against Messrs. H L & Co., to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference between the contract price of 9½*d.* per foot and 10½*d.* per foot, the market price when the timber was to have been delivered,—Held, by the Judicial Committee, affirming the judgment of the Court of

Appeals in Lower Canada, first, that the action was maintainable; secondly, that by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers; thirdly, that the taking possession of part of the timber by Messrs. L & Co., after the day mentioned for the delivery thereof, in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission that the property in the timber passed to them before the storm broke up the raft.

The old French law in force in Lower Canada, grounded on the civil law, is in substance the same as the law of England upon this point. *Logan v. Mesurier*, 6 Moore, P.C. 116.

The plaintiff, a merchant at Sunderland, having given an order to B & Co., at Dantzic, for a cargo of wheat, wrote to request that B & Co. would hold it at the disposal of the defendants, merchants at Liverpool, who would lodge the necessary credits for the remaining balance, and communicated this to the defendants. A few days afterwards, and before the wheat was shipped from Dantzic, the plaintiff wrote to the defendants as follows:—"We request you will account to Mr. J S, of Newcastle, for the proceeds of the wheat we have consigned to you, lying at Dantzic, in Messrs. B's possession, which we wrote about to you a few days ago." The defendants assented to this order, and informed S (who was largely indebted to them) that they held the wheat to his account; and on its arrival they rendered accounts of the sale of it to S, and placed the balance of the proceeds to the credit of his account with them:—Held, that the plaintiff's order to account to S was an order transferring the proceeds to him, and not a mere order to pay to him, and was not revocable after the defendants had acted upon it. *Dickinson v. Marrow*, 14 Mee. & W. 713.

An "appropriation" of goods under a contract of sale may mean a mere election by the vendor, where he has the right himself to choose what articles he will supply in performance of his contract, in which case the property does not pass; or it may mean that both parties to the contract have agreed that particular goods shall be the articles to be supplied, and yet the appropriation may not operate so as to pass the property. But where both parties have agreed that particular goods shall be the article contracted for, and shall become the property of the vendee, and nothing further remains to be done in order to transfer the goods, that is an appropriation which operates in law so as to vest the property in the vendee.

Under a contract for the sale of goods, to be selected by the vendor, a selection and a delivery to a common carrier for the vendee is a delivery to the vendee, whose agent the carrier becomes; and if there is a binding contract, and the article agrees with it, such delivery is such an appropriation as leaves nothing more to be done in order to transfer the goods, and therefore the property passes. But in the case of a delivery on board a ship under a bill of lading, the captain is in possession of the goods, and carries for and on behalf of the vendor, and the delivery does not operate as in the case of a common

carrier, though the ship be expressly hired for the vendee: it is an appropriation only in the sense of an election, and does not vest the goods in the vendee.

Under a contract for the sale and delivery of barley, to be according to sample, for cash on receipt of bill of lading, the vendor at the request of the vendee procured a ship for him, and sent him the charter-party, and he insured the ship. The vessel was loaded and the captain gave a bill of lading to the vendor, who had written to the vendee—"I hope to be able to send you the invoice and bill of lading on Wednesday." A day or two after, the vendor called and left the invoice and undorsed bill of lading with the vendee; but afterwards, upon the vendee expressing himself dissatisfied with the samples from the cargo, though he did not refuse to accept it, and tendered the price, the vendor took away the bill of lading and indorsed it to other parties. The vendee having on the arrival of the ship obtained part of the cargo,—Held, that the property in the barley had not passed to the vendee, and that the indorsees of the bill of lading were entitled to recover the value in an action of trover against the vendee. *Wait v. Baker*, 17 Law J. Rep. (N.S.) Exch. 307; 2 Exch. Rep. 1.

A sold to B, by sample, twenty-four sacks of flour, part of a lot of 217 sacks belonging to A, which were lying at the warehouse of one M, and he also gave B a delivery-order on M, in pursuance of which M transferred twenty-four sacks of flour to B's name in his books; and afterwards delivered twelve sacks of the flour to B, which B paid for. No appropriation of any particular twenty-four sacks was ever made for B. The flour contained in the twelve sacks delivered was found, on examination, not to correspond with the sample, and B consequently refused to accept or pay for the remaining twelve:—Held, that A could not recover the price of these twelve sacks in an action for goods sold and delivered.

Whether, in such a case, goods bargained and sold would lie—*quære*. *Elliott v. Heginbotham*, 2 Car. & K. 545.

(C) PLEADING AND EVIDENCE.

In *indebitatus assumpsit* for goods sold and delivered, the defendant cannot, under non assumpsit, shew that the plaintiff had no legal title to the goods at the time of sale. *Walker v. Mellor*, 17 Law J. Rep. (N.S.) Q.B. 103; 11 Q.B. Rep. 478; 2 Car. & K. 346.

GRANT.

Trespass for breaking and entering the close of the plaintiff. Pleas, first, right of way under the Prescription Act; second, a user of the way for forty years. Replication to the first plea, that the corporation of L being seised in fee of the *locus in quo*, demised it to H for a term of lives and years; that the corporation delivered seisin of the same to H, who became seised of the said term, and that the said term so demised was existing in full force. Replication to the second plea stated, as in the former replication, the seisin and possession of H for the said term, and that H being so seised of the *locus in quo*, and during the continuance of the seisin,

by indenture between C of the first part, H of the second part, and M and W of the third part, granted to M and W a right of way over the said close. Rejoinder to first replication traversed the existence of the term during the period of twenty years in the plea mentioned. Rejoinder to second replication, that H did not grant to M & W the right of way *modo et formâ*. At the trial, it appeared that the corporation of L, being seised in fee of the *locus in quo*, by indenture of the 17th of February 1800, demised the same to H for a term of lives and years. By indenture of the 23rd of July 1803, H assigned to C his interest in the demised premises, to secure payment of 1,200*l.* lent by C to H. By indenture of the 9th of February 1804, reciting the two former indentures, and also that H had agreed to sell part of the land to M & W for a sum, out of which the sum due from H should be paid to C, C bargained, sold, assigned, and transferred, and H granted, bargained, sold, assigned, and transferred to M & W part of the demised premises, together with the right of way in question. In 1812 H died, having made his will, whereby, after bequeathing his estates to his wife for life, he devised the same, after her death, to J & M in manner following, "upon trust to pay and apply the rents, issues, and profits of the same to and for the life and benefit of my daughter Mary and her assigns during her life, and independent of her present or any future husband; and from and after the decease of my said daughter, I give, devise, and bequeath my real and leasehold estates as aforesaid unto and equally among all and every the children of my said daughter Mary, share and share alike, as tenants in common." In 1816 the wife of H died. By indenture of the 11th of December 1817, the corporation of L assigned to the trustees the reversion in fee simple of the *locus in quo*:—Held, that as the trustees took only an estate during the life of Mary, the lease for lives did not merge in the grant of the reversion; secondly, that the rejoinder to the second replication only put in issue the fact of a grant, and that the seisin of H was admitted. *Cooke v. Blake*, 17 Law J. Rep. (n.s.) Exch. 370; 1 Exch. Rep. 220.

Plea in trespass, that the defendant, being seised in fee of a manor, the closes in which, &c., and parcel thereof, demised the closes to C for ninety-nine years, and that afterwards C, by indenture, granted to the defendant the exclusive right to kill game and birds of warren in and upon the said closes during the term, and justified, &c.; and upon the latter indenture being set out on oyer, it appeared to be a demise of the closes by the defendant to C, "except and always reserved out of that demise unto the defendant, &c. all timber trees, &c., and also except, &c., all *royalties* whatsoever to the premises belonging or in anywise appertaining:"—Held, on demurrer, that such claim created an exception or reservation, and was not pleadable as a grant; but, at all events, it did not amount to a grant by C of a liberty to the defendant to enter upon the closes for the purpose of pursuing and killing birds of warren. *Pannell v. Mill*, 3 Com. B. Rep. 625.

A rent-charge, with a power of distress, cannot be created except by a grant binding some legal interest in the land, and ceases to exist when the same person who is owner of the rent becomes en-

titled to the whole legal estate in the land out of which it issues.

The interest of a mortgagor in possession is not a legal estate at all, and consequently cannot support a rent-charge with powers of distress.

A grant, purporting to be the grant of a rent-charge, with powers to distrain, made by a person having no legal estate in the land, may operate as an irrevocable licence by the grantor to seize such goods as may be on the land at the time the grantee seizes, and to treat them as a distress, and may therefore justify the seizure of the goods of the grantor himself, and give the grantee an interest in them after seizure; but it does not give any interest in the goods of the grantor before seizure, and does not justify the seizure of the goods of third persons at all.

Therefore, in an action of trespass *de bonis asportatis* by the assignees of a bankrupt, a plea setting forth an indenture of mortgage of copyholds in fee, by which the mortgagor granted that the mortgagee might distrain for the arrears of interest; and averring a surrender and admission of the mortgagee in pursuance of it, and justifying the seizure of the goods on the premises, whilst still in the possession of the bankrupt, but after bankruptcy as a distress, was held bad after verdict; and the plaintiffs had judgment *non obstante veredicto*. *Freeman v. Edwards*, 17 Law J. Rep. (n.s.) Exch. 268; 2 Exch. Rep. 732.

Acts of ownership exercised by the lord of a manor upon the sea shore adjoining, between high and low water mark, such as the exclusive taking of sand, stones, and seaweed, may be called in aid, to shew that the shore is parcel of the manor, although an ancient grant under which the manor was held, professing to grant wreck of the sea, &c. did not grant *littus maris*. *Calmady v. Rowe*, 6 Com. B. Rep. 861.

GREENWICH AND CHELSEA PENSIONERS.

Services of out-pensioners rendered effective by 9 Vict. c. 9; 24 Law J. Stat. 51.

Payment of out-pensioners regulated by the 9 Vict. c. 10; 24 Law J. Stat. 51.

GUARANTIE.

[See STAMP.]

- (A) CONSTRUCTION OF.
- (B) STATEMENT OF CONSIDERATION.
- (C) LIABILITY UPON.
- (D) EVIDENCE TO EXPLAIN.

(A) CONSTRUCTION OF.

A, by a trust settlement, gave to his son "a like sum of 5,000*l.* sterling, payable, &c., after my decease, from which provision shall be deducted any sum that I have already advanced, or may still advance for him, to enable him to carry on his business." A entered into a guarantee for 2,000*l.* for the firm of which his son was partner. A was

compelled to pay that sum, and the firm afterwards becoming bankrupt, he obtained from its assets a small dividend:—Held, that this was an advance to the son, which came within the description of money advanced to the son to enable him to carry on his business, and that the son could only claim the balance of the 5,000*l.*, after deducting the sum thus advanced.

The practice of allowing the costs in such a case to be paid out of the estate, was disregarded. *Berry v. Morse*, 1 H.L. Cas. 71.

Declaration in assumpsit, that in consideration that the plaintiffs, at the request of the defendant, would sell and deliver to, and supply one S on credit, with goods, of the price to an extent of not exceeding 100*l.*, she, the defendant, promised the plaintiffs if S did not pay the same, she, the defendant would do so, upon the defendant's receiving from the plaintiffs three months' notice requiring payment of the same. Plea, non assumpsit, and issue thereon. At the trial, the following guarantie was proved: "In consideration of your supplying Mr. S, of, &c., with goods to the extent of 100*l.*, I undertake to pay you for the same, if he does not, upon receiving from you three months' notice."—*Semble*—that there was no variance between the declaration and the guarantie proved; but assuming the true meaning of the guarantie to be that the defendant should not be liable until one hundred pounds worth of goods had been supplied, the declaration might be amended accordingly. *Dimmock v. Sturla*, 15 Law J. Rep. (n.s.) Exch. 65; 14 Mee. & W. 758.

Where one count in a declaration on a guarantie stated, that in consideration that the plaintiff at the request of the defendant would sell and deliver to, &c., the defendant promised to guarantee the due payment of any goods then or thereafter to be sold and delivered to one C, and the whole of any money lent or to be, &c., to the amount of —*l.*—Held, to disclose a sufficient consideration depending on the future sale or advances of some amount.

The guarantie being in the form of a letter addressed to Messrs. A, B, & C, "or the person or persons for the time being carrying on the business at," &c., and the consideration stated being confined to the supply of goods by A (the other partners being dead):—Held, that whether a variance or not, it might have been amended at the trial under 3 & 4 Will. 4. c. 42. s. 23.—Held, also, that upon the issue taken on a traverse that the defendant had not guaranteed, &c., the word was to be taken in the sense used in the instrument itself, viz., a payment of the debt for C, and not to be confined to the merely giving the paper, the instrument of guarantie. *Boyd v. Moyle*, 2 Com. B. Rep. 644.

The defendant signed an instrument, addressed to the plaintiff in the following terms:—"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A B, by the following instalments, that is to say, 10*s.* in the pound, on the 18th day of August next, &c., I promise to guarantee the payment of the instalments;" and delivered it to the plaintiff in exchange for an indenture executed by the plaintiff:—Held, that the true construction of the instrument was, that the defendant made his promise in consideration that the plaintiff would execute an indenture, and

release A B; and, consequently, that the execution of the instrument was not an admission by the defendant that the plaintiff had released A B, and furnished no evidence in support of an issue taken on an allegation in the declaration that the plaintiff had released A B. *King v. Cole*, 17 Law J. Rep. (n.s.) Exch. 283; 2 Exch. Rep. 628.

A declaration, after stating that the plaintiff had been a member and deacon of the Baptist Church at Clapham, and an agreement of the 25th of September 1840, by which the plaintiff and P M, as deacons, had agreed to be responsible for the payment by the said church of 700*l.* to the Rev. J E, in consideration of his having resigned the pastoral office over the said church, and the subsequent payment of 550*l.*, part of the said sum of 700*l.*, and that at the time of the promise thereinafter alleged, the defendant was the pastor and minister of the said church, alleged that theretofore, to wit, on &c. in consideration that the plaintiff, at the request of the defendant, would resign the said office of deacon and his connexion with the said Baptist church and congregation at Clapham, the defendant then promised the plaintiff to hold himself responsible to the plaintiff for the payment of the said sum of 150*l.* so due to J E by the said Baptist church, and also the interest for the same at, &c., for which the plaintiff and P M had become responsible to the said J E. It then averred that the plaintiff did then, to wit, on the day and year last aforesaid resign the said office of deacon and his connexion with the said Baptist church; that the said Baptist church had the means and power of paying, to wit, out of the funds of the same church, and but for their neglect and default might have paid; and that a reasonable time for payment had elapsed. Breach, that the church had not paid, and in default thereof the plaintiff had been forced to pay, and that the defendant had not since paid. Pleas, traversing, first, the making of the agreement; secondly, the promise; thirdly, the power and means of the church to pay; fourthly, that a reasonable time to pay the whole had not elapsed.

The agreement, signed by the defendant, as it appeared in evidence, was, "In consideration of your having resigned the office of deacon and your connexion with the Baptist church and congregation at Clapham, I hereby agree to hold myself responsible to you for the payment of the sum of 150*l.* due to the Rev. J E, by the Baptist church at Clapham, and also the interest for the same at, &c., being the residue of the sum of 700*l.* principal and interest remaining unpaid, for which you and Mr. P M, deacons of the said church, became responsible to the Rev. J E, by an instrument bearing date the 25th of September 1840." It appeared also that the debt of 700*l.* had been reduced in March 1845 to 150*l.*; that the defendant had, in July 1842, agreed to become pastor upon condition of his being responsible to the plaintiff for the debt to J E; agreeing that 50*l.* half-yearly should be paid in liquidation thereof out of a trust fund distributed at the discretion of the trustees, for the support of the poor of the congregation and the maintenance of the minister, and that the interest thereon should be paid half-yearly from the church funds. Out of the said trust fund the defendant had, from 1842 to 1847, received annual payments of different amounts

expressly for the minister's income only, and also two additional small annual sums from other trust funds, part by way of salary and part as a gift:—Held, first, that the agreement alleged in the declaration was, in effect, proved by that produced in evidence. Secondly, that the terms of the agreement were capable of expressing either a past or a concurrent consideration, and as upon the former construction the instrument was void, the latter construction, which made it valid, was to be adopted, and that the agreement appeared to be a binding guarantie, without too the aid of any extrinsic evidence. Thirdly, that there appeared to be sufficient funds for payment, and therefore, fourthly, that a reasonable time for such payment had arrived. *Steele v. Hoe*, 19 Law J. Rep. (N.S.) Q.B. 89.

The plaintiff, a merchant at Dublin, contracted with L, a ship-builder at Quebec (for whom the defendant was London agent), for a ship, particularly described in the contract, to be paid for by accepting a bill at six months; "and should the vessel, on her arrival at Dublin, exhibit any defect which shall be so declared by two competent persons, L agrees to put it to rights at his own expense on her second voyage." The bill was sent for the plaintiff to accept, which he declined to do, having heard from Quebec that the vessel was defective; and he wrote to the defendant, "I only want your guarantie that L shall perform his contract to the full extent. If you agree to appoint one merchant, I will another. Let them agree to an umpire, and give me a letter of guarantie that L will abide by the award and perform his part without delay." The defendant answered, "If you will accept L's bill for the price, and return it to us forthwith, we hereby agree to become personally responsible to you for the due fulfilment of L's contract; and as C & F have the confidence of both parties we suggest that they should be appointed to decide what should be done in case you have cause to complain." The plaintiff replied, "Relying on the guarantie you give me, I send inclosed the bill accepted for the full amount of the new ship." The bill was paid at maturity. The vessel arrived in Dublin, and was defective. A surveyor was appointed by the plaintiff and another by Messrs. C & F to survey the vessel, who reported it would take 376*l.* to make her equal to the contract; and C & F thereupon made their award, whereby they ordered the defendant to pay that sum, which he refused to do. On a special case stating the above facts for the opinion of the Court,—Held, that the plaintiff never acquiesced in the defendant's proposal to refer the matter to C & F; that C & F never professed to act under any authority derived from the plaintiff; and, consequently, that the plaintiff was not entitled to recover in respect of the award. *Fagan v. Harrison*, 19 Law J. Rep. (N.S.) C.P. 105; 8 Com. B. Rep. 388.

Under a guarantie given to a banking-house consisting of several partners for the repayment of such bills drawn upon them by one of their customers as the bank might honour, and any advances they might make to the same customer,—Held, that the guarantie ceased on the death of one of the partners in the bank before the expiration of the time to which the guarantie was expressed to extend.

That bills accepted before the death of the part-

ner and payable afterwards, were within the guarantie.

That the amount guaranteed could not be increased by any act of the continuing firm and the customer after the death of the partner, although it might be diminished by such act.

That the amount guaranteed in respect of bills honoured at the bank was not to be reduced by the amount of a balance owing from the bank to the customer when the guarantie ceased, such balance having been afterwards paid in the course of business between the continuing firm and the customer. *Holland v. Teed*, 7 Hare, 50.

(B) STATEMENT OF CONSIDERATION.

A guarantie was given in the following form:—"1843, June 28th.—Mr. Price, I will see you paid for 5*l.* or 10*l.* worth of leather, on the 6th of December, for Thomas Lewis, shoemaker. Robert Richardson:—Held, that no consideration appeared on the face of the guarantie. *Price v. Richardson*, 15 Law J. Rep. (N.S.) Exch. 345; 15 Mee. & W. 539.

A declaration on a guarantie stated, that J L made his promissory note payable to the plaintiff; that it was in the plaintiff's hands dishonoured; that thereupon, to wit, on the 2nd of November 1844, in consideration that the plaintiff would forbear and give time to J L for the payment of the note for a reasonable time, the defendant guaranteed the payment. The defendant, at the time of making the note, wrote the following words on the back, "I guarantee the payment of the within note by J. Leigh, the maker, on the 2nd of November next. J. Pink." On the day of the dishonour of the note, the defendant wrote and signed the following guarantie, addressed to the plaintiff:—"Sir, I request you will hold over the promissory note in your favour of Mr. J. Leigh, dated the 31st of July 1844, for 200*l.*, at three months, and in consideration of your so doing, I undertake to continue, in all respects, my guarantie of the same. John Pink:—Held, that the guarantie was defective, and that the plaintiff was properly nonsuited.

Semle—that the declaration, stating the consideration to be forbearance to sue for a reasonable time, was bad. *Temple or Semple v. Pink*, 16 Law J. Rep. (N.S.) 237; 1 Exch. Rep. 74.

B gave to A the following memorandum in writing:—"In consideration of your agreeing to supply S with goods upon credit (the amount to be in your discretion), I hereby guarantee you the due payment of such sum as he may now, or at any time and from time to time hereafter, owe you. My liability under this guarantie is to be limited to principal sum in running account of 100*l.*" Declaration thereon, that confiding in B's said promise A did afterwards supply S with goods amounting to 85*l.*; that S, though requested, had not paid for the same, of all which B had notice. Breach, non-payment by B on request of 85*l.*—Held, on general demurrer, that the declaration was good, and that the guarantie disclosed a sufficient consideration for B's promise. *White v. Woodward*, 17 Law J. Rep. (N.S.) C.P. 209.

A guarantie, purporting to be given in consideration "of Messrs. E, &c. giving credit to Mr. D J" is good, as those words may apply to future as well as to past credit.

Evidence is admissible in an action on such a guarantie to shew that it was intended to apply to future credit.

The declaration stated, that D J was indebted to the plaintiffs in 46*l*. for goods sold, which sum was already due, and that the plaintiffs had delivered goods to D J of the value of 50*l*., at a month's credit, which had not expired at the time of the promise; that D J applied to the plaintiffs for time for payment of both sums, and the plaintiffs consented to give three months' time, upon having the guarantie of the defendant, set out in the declaration. The guarantie was then set out, the consideration being stated on the face of it, as above, viz. "giving credit" to D J:—On special demurrer, held that the declaration was good; and that it sufficiently appeared on the face of it that the consideration for the guarantie was future credit. *Edwards v. Jevons*, 19 Law J. Rep. (N.s.) C.P. 50.

The defendants gave a guarantie in the following terms—"We, the undersigned, hereby indemnify the National Banking Company to the extent of 1,000*l*. advanced or to be advanced to R P by the said company:—"—Held, that this instrument did not disclose a sufficient consideration for the promise of the defendants.

The declaration alleged that at the time of the agreement thereafter mentioned, R P kept a banking account with the National Banking Company, and was on &c., indebted to the company in 800*l*., and it was then proposed between R P and the company that the company shall advance further monies not then agreed upon, and thereupon, to wit, on &c., a certain agreement in writing was made between the said company and the defendants—"We, the undersigned, &c. (the above guarantie was then set out,) "and thereupon in consideration of the premises"—alleging mutual promises, that R P was indebted to the company, and default on the part of the defendants to indemnify the company. Plea, the general issue:—Held, that the proposal between R P and the company formed part of the consideration, and was put in issue by non assumption. *Bell v. Welch*, 19 Law J. Rep. (N.s.) C.P. 184.

Where the guarantie was in consideration of the plaintiffs agreeing to take 10*s*. in the pound for their debt, giving five years for the payment, with interest payable half-yearly, the sum to be paid by instalments, and in the manner mentioned in the plaintiff's agreement with the debtor; and the agreement entered into was for the payment of the debt by instalments, &c., and contained a proviso making the agreement void, and for the recovery of the whole debt if default was made in payment of any instalment or on the issuing of a fiat in bankruptcy, —Held, that the agreement did not comply with the terms of the guarantie, and that the defendant was not liable. *Clarke v. Green*, 3 Exch. Rep. 619.

In assumpsit on a guarantie given to plaintiff for a debt owing by another person, in order to enable the latter to obtain an interim order of protection under the 7 & 8 Vict. c. 96. s. 6, with the knowledge of the plaintiff, who gave a written acknowledgment, not under seal, that he had no claim on the debtor:—Held, that the defendant was entitled to a verdict, and that the plaintiff was not entitled to judgment *non obstante veredicto*. *Coles v. Strick*, 15 Q.B. Rep. 2.

[See (A) CONSTRUCTION OF.]

(C) LIABILITY UPON.

A declaration on a guarantie stated, that the defendant guaranteed to the plaintiffs the due acceptance and payment of two bills of exchange, drawn by C K, for 160*l*. 5*s*. and 160*l*. 5*s*. 3*d*., being the amount of an invoice of the plaintiffs of stationery shipped by them, and as the defendant had not then heard from C K if the said invoice had been found correct, the defendant was to have the reserve customary under such circumstances. The declaration then averred, that the invoice was found correct; that the defendant had all the reserve and time customary in such circumstances, and that the bills were dishonoured. The guarantie corresponded with the statement of it in the declaration, except that it alleged that the defendant claimed "this reserve as customary under such circumstances:—"—Held, that the defendant's liability on default of the principal depended upon the invoice being found correct in point of fact, and not upon the defendant's hearing from C K that it was correct; that the words "the" in the declaration and "this" in the guarantie signified the same "reserve," and therefore, that there was no variance.

A party guaranteeing the due acceptance and payment of a bill of exchange, guarantees the payment of the interest as well as the principal. *Ackermann v. Ehrensperger*, 16 Law J. Rep. (N.s.) Exch. 3; 16 Mee. & W. 99.

A, B, & C were railway contractors in partnership, and had entered into a contract to do certain work for a railway company. D had entered into a sub-contract to do part of the work, for which part bricks were required; and it was necessary that D should have coals to burn the bricks. In order to induce the plaintiffs to supply D with coals, A, without the previous knowledge or subsequent assent of his co-partners, entered into a guarantie in the name of the firm to secure the payment of the price of the coals to be supplied to D by the plaintiffs:—Held, that B and C were not liable on the guarantie.

The managing clerk of the firm, without the knowledge of B and C, wrote letters to the plaintiff, containing evidence of an account stated respecting the amount due under the guarantie:—Held, that as the giving the guarantie was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B and C. *Brettell v. Williams*, 19 Law J. Rep. (N.s.) Exch. 121; 4 Exch. Rep. 623.

(D) EVIDENCE TO EXPLAIN.

A declaration on a guarantie stated, that in consideration that the plaintiff would, on the 22nd day of June 1840, lend to one V D the sum of 750*l*. on the security of a warrant of attorney, payable on the 22nd of August then next, the defendant promised the said plaintiff to pay him the said sum of money on default. The guarantie was in these terms:—"In consideration of your having this day advanced to our client, Mr. V D, of &c., 750*l*., secured by his warrant of attorney, payable on the 22nd of August next, we hereby jointly and severally undertake to pay the same on default, &c. Dated this 22nd day of June 1840. Yours, &c.,

S & M." On objection, that the declaration varied from the guarantie,—Held, first, that no amendment was necessary; secondly, that evidence was admissible to shew that the guarantie had, in fact, been executed on the 22nd of June, simultaneously with the payment of the money by the plaintiff to the party guaranteed. *Goldshede v. Swan*, 16 Law J. Rep. (N.S.) Exch. 284; 1 Exch. Rep. 154.

To assumpsit on a guarantie, the defendant pleaded, that the guarantie was given by him on certain terms, which limited the liability of him the defendant thereunder, and the plaintiff traversed this plea:—Held, that, in this state of the record, the plaintiff was not at liberty to object to the admissibility of evidence to prove what those terms were, on the ground that they were not shewn to have been reduced into writing. *Galley v. Taylor*, 2 Car. & K. 551.

[See (B) Statement of Consideration.]

GUARDIAN.

[See INFANT.]

GUERNSEY.

The advice of the bailiff and jurats of the Royal Court in the Island of Guernsey, is not necessary, for the purpose of authorizing the governor, or lieutenant-governor, to exercise the power of deportation of aliens domiciled in the island.

The bailiff and jurats are individually entitled to take part and speak in all conferences with the governor, or lieutenant-governor, of the island; but the governor, or lieutenant-governor, has the sole authority to appoint the time and place for such conference.

A writ of pardon, under Her Majesty's sign manual addressed to the lieutenant-governor, and the keeper of the gaol, to discharge out of custody a person undergoing imprisonment, does not require to be verified and registered by the Royal Court, before it is executed.

The refusal of the gaoler to discharge a prisoner, on the production of a writ of pardon under the sign manual, will not warrant the lieutenant-governor in enforcing obedience to the writ, by the threat of military or other force. *In re the Bailiff and Jurats of Guernsey*, 5 Moore, P.C. 49.

HABEAS CORPUS.

[See INFERIOR COURT—WRIT OF REPLEVIN.]

- (A) JURISDICTION TO GRANT.
- (B) WHO MAY APPLY FOR.
- (C) WRIT AND RETURN.
- (D) AFFIDAVITS. [See (C) Return.]

(A) JURISDICTION TO GRANT.

[*In re Wilson*, 5 Law J. Dig. 318; 7 Q.B. Rep. 984.]

Where the commitment on a return to a writ of rebellion omitted the date of the return,—Held, to

be a ground only for applying to the court of equity, and not of a *habeas corpus*; so an allegation of collusion between the plaintiff in the suit and the Commissioner under the writ; and the Court will not interfere as to the detention, when the grounds are, the improper or irregular conduct in the details of the suit before the Judge committing the party; nor if one legitimate cause of detention appears, will it inquire whether there be also others: the commitment for contempt by a court of equity need only recite an adjudication of contempt, and not go on to adjudicate it. *In re Cobbett*, 7 Q.B. Rep. 187.

The Court, although having a jurisdiction to order a party to be brought up by *habeas corpus* to be present at the hearing of the argument relating to his discharge, will not grant the application, unless it be satisfied that without his personal attendance justice may not be done. *Clark v. Smith*, 3 Com. B. Rep. 984.

The defendant was tried on an indictment for perjury, convicted and sentenced, at Nisi Prius. On motion for a writ of *habeas corpus* to discharge him out of custody, on the ground that the judgment recited in the warrant of commitment was not warranted by law,—Held, that the Court will not grant a writ of *habeas corpus*, the effect of which will be to review the judgment of one of the superior courts. In such case the remedy is by writ of error. *In re Dunn* 17 Law J. Rep. (N.S.) C.P. 97; 5 Dowl. & L. P.C. 345; 5 Com. B. Rep. 215.

The Court refused to grant a *habeas corpus* to a prisoner in custody under process out of the Court of Chancery, applied for on the ground that the keeper of the Queen's Prison had improperly removed him to a part of the prison provided for prisoners of a particular class. *Ex parte Cobbett*, 5 Com. B. Rep. 418.

Semble—that since the 5 Geo. 3. c. 26. a writ of *habeas corpus* will run at common law to the Isle of Man, as part of the dominions of the Crown of England.

The publisher of a newspaper, in which had appeared an article contemptuously reflecting on the proceedings of the Chancery Court of the Isle of Man, was brought before that Court, and committed for contempt. A, who was then present, avowed himself to be the author of the article, and was also forthwith committed verbally by the Court. After some time a written warrant was drawn up, signed by the Lieutenant Governor of the island, which, after stating that at a Chancery Court held, &c., A voluntarily appeared and avowed himself the author of an article headed, &c., and that the writing and publishing the said article was a contempt of the Court, ordered that A should be for such contempt committed a prisoner to the gaol of R, there to remain "until further order." It appeared that the Lieutenant Governor presided in the Chancery Court, which was a court of record, having jurisdiction over the whole island, and having power to punish for contempt of its authority; and that the ordinary course of proceeding in such cases is by a rule or judgment declaring the party to be in contempt, and awarding such punishment as the Court may deem proper; that no warrant is granted, but a certified copy of the rule or judgment is a sufficient authority to the officer to imprison;

that by the law of the island parties in contempt of any of the Courts are committed to the gaol of R, and no period is in general fixed for their release, which they may obtain by application to the Court, and in case of contemptuous behaviour, by paying the fine imposed, or making such apology or complying with such terms as the Court may deem satisfactory.

On a motion for a *habeas corpus* to discharge A from custody,—Held, that it sufficiently appeared that the warrant was a judicial act of the Chancery Court; that a Court of competent authority having decided this to be a contempt, the Court of Queen's Bench could not review its decision; and that the commitment, being according to the ordinary form adopted by the Chancery Court of the Isle of Man, was valid, though it was not for a time certain.

Quære—Whether committals by way of punishment by the superior Courts must be for a time certain.

Every tribunal has the power of committing those who treat it with contempt; and the question whether a contempt has or has not been committed is for the sole decision of that Court itself.

A libel, reflecting contemptuously on the proceedings of a Court, published while the Court is not sitting, may be punished by immediate commitment, as well as such a contempt committed in its face and *sedente Curia*. *In re Crawford*, 18 Law J. Rep. (N.S.) Q.B. 225.

[And see *Oldfield v. Cobbett*, 2 Ph. 289.]

(B) WHO MAY APPLY FOR.

A woman may move for a *habeas corpus* on behalf of her husband. *Ex parte Cobbett*, 15 Q.B. Rep. 181.

(C) WRIT AND RETURN.

[*In re Wilson*, 5 Law J. Dig. 318; 7 Q.B. Rep. 984.]

Where a party shall have been brought up to this Court, by virtue of any writ of *habeas* duly issued, and by reason of pressure of business, or from any other cause, the hearing shall have been postponed to a future day, a new writ of *habeas* may be issued for such future day, if the Court shall so direct, without payment of any fee. *Order of 31st of January 1846*, 15 Law J. Rep. (N.S.) Chanc. 118.

The return to a *habeas corpus* to bring up the bodies of two prisoners detained in Millbank Prison set out an act of the Royal Court of Jersey, whereby the prisoners were convicted of burglary by that Court (which was alleged to be a competent Court to try and punish that crime), and sentenced to be transported to such place as Her Majesty in council should order. It also set out an Order in Council directing the place of transportation of these convicts, and a warrant of the Secretary of State for their removal to Millbank Prison, in order to carry the said sentence into effect, and an authority to the keeper of that prison to receive them:—Held, that this Court was bound to presume that the sentence, being passed by a Court of competent jurisdiction and unreversed, was warranted by law and valid.

Held, also, that the 5 Geo. 4 c. 84. s. 17. is directory only, and that the fact of a convict not being detained in a prison appointed under that statute will not entitle him to his discharge.

Affidavits cannot be used in addition to a return to a *habeas corpus*, which sets out the sentence of a Court of competent jurisdiction.

On the argument upon a return to a *habeas corpus* alleging a sentence by the Royal Court of Jersey, which is a Court of competent jurisdiction, the law of Jersey cannot be discussed. *Regina v. Brennan*, 16 Law J. Rep. (N.S.) Q.B. 289; 10 Q.B. Rep. 492.

A return to a *habeas corpus* stated that the prisoner was detained by an order of the Vice Chancellor (which was set out), committing him for a contempt incurred by breach of an injunction issued in a cause in Chancery:—affidavits for the purpose of shewing that the Lord Chancellor, by whom the order for the injunction was made, was an interested party, were held to be inadmissible, as the return stated a commitment by a court of competent jurisdiction. *In re Dimes*, 19 Law J. Rep. (N.S.) Q.B. 158.

(D) AFFIDAVITS.

[See (C) Writ and Return.]

HACKNEY CARRIAGE.

Liability of Proprietor.

In assumpsit against a cab-driver for the loss of the plaintiff's luggage, the declaration alleged a promise by the defendant to convey the plaintiff and his luggage "safely and securely":—Held, that these words do not necessarily mean "safely and securely at all events," but are sufficiently supported by proof of the want of due care; and that the meaning to be given to the words, varies according to the different species of bailments. *Ross v. Hill*, 15 Law J. Rep. (N.S.) C.P. 182; 3 Dowl. & L. P.C. 788; 2 Com. B. Rep. 877.

Defacing Driver's Licence.

Under the 6 & 7 Vict. c. 86. s. 8. the registrar is authorized to grant licences to drivers of hackney carriages; which licences, by section 21, the proprietors of the carriages are required to procure to be delivered to them, and to retain whilst the drivers remain in their service, and by section 24, when the drivers leave their service to return on demand. A declaration in case stated that the plaintiff, a driver of a hackney carriage, having procured such licence, delivered it to the defendant under this statute as his employer, and that whilst he retained it in his custody he "wrongfully and unjustly wrote in ink in and upon the said licence certain words, purporting to give, and being then intended by the defendant to give, a character of the plaintiff as an unfit and improper person to act as a driver of hackney carriages, that is to say," setting forth the words, whereby it was defaced and became useless:—Held, on motion in arrest of judgment, that the possession being in the defendant, the form of action was properly case, and that it was unnecessary to state the act to have been done maliciously, and that the declaration was good. *Hurrell v. Ellis*, 15 Law J. Rep. (N.S.) C.P. 18; 2 Com. B. Rep. 295.

HARBOURS.

Provisions usually contained in Acts authorizing the making and improving of harbours, docks, and piers consolidated by 10 Vict. c. 27; 25 Law J. Stat. 80.

HEALTH.

General and local boards of health established and provisions for promoting the public health made by 11 & 12 Vict. c. 63; 26 Law J. Stat. 171.

Further provisions made by 12 & 13 Vict. c. 94; 27 Law J. Stat. 189.

HEIR.

In 1784, after the recognition of the independence of the United States by the treaty of 1783, A, a British-born subject, emigrated to Virginia, and in the same year took the oath of allegiance to the United States, and continued to reside there, exercising all the rights of an American citizen until his death in 1833. By the terms of the oath he abjured allegiance to any other state, &c. In 1787 A married the daughter of an American citizen, and had issue a son B, who never came to this country, and died abroad, leaving a son C; who, according to the pedigree, was the heir of the testatrix in the cause. The testatrix died in 1839, and in a suit instituted to administer her estate, C, by his answer filed in 1840, claimed to be her heir. In 1846 C for the purpose of complying with the requisitions of the 13 Geo. 3. c. 21. left New York, and in the same year arrived in England and received the sacrament, and took the oaths as prescribed by that act, and thenceforth continued to reside in this country. Upon exceptions to the Master's report finding C to be the heir, it was held, first, that the treaty of 1783 did not apply to A, who had emigrated subsequently to that treaty. Secondly, that the subsequent treaty of 1794 was local; and A did not reside within the locality. Thirdly, that A by his own acts had not, at the time of the birth of his child, absolved himself from his allegiance, nor divested himself of the character of a natural-born subject. Fourthly, that the exception in the 4 Geo. 2. c. 21, as to the father's being liable to the penalties of treason, was referable to a well-known class of offences, and ought not to be extended; and that therefore C, under the 7 Ann. c. 5, 4 Geo. 2. c. 21, and 13 Geo. 3. c. 21, was entitled to all the rights and privileges of a natural-born subject, and capacitated thereby to take lands by descent. Lastly, that it was sufficient that C should have made his claim within the five years allowed by the last-named act; and that it was not necessary that he should have complied with all the requisitions of the same act within the five years, but a reasonable time must be allowed him for that purpose. *Fitch v. Weber*, 17 Law J. Rep. (N.S.) Chanc. 73; 6 Hare, 51.

HEIR-LOOM.

[See DEVISE, Construction of in general — PERIOD OF VESTING — LEGACY, What Interest Vests.]

HIGH TREASON.

An allegation upon a record that three Judges executed a commission in relation to the trials of prisoners, to try whom that commission was issued, is an affirmative allegation of their authority to perform that duty, and is not rendered uncertain by a subsequent statement that the commission was directed to them and others.

An indictment, charging a prisoner in Ireland with compassing, &c., to excite insurrection there, and to levy war, and to put the Queen to death, and charging as overt acts assembling with others, armed with weapons to excite insurrection and to levy war, is not an indictment founded on the 57 Geo. 3. c. 6. Such prisoner, therefore, is not entitled, under section 4. of that act, to the benefit of the statutes 7 & 8 Will. 3. c. 3. and 7 Ann. c. 21, and consequently is not entitled to a copy of the indictment, and to a list of witnesses, to be delivered ten days before the trial. The 4th section of the 57 Geo. 3. c. 6. extends only to treasons made or declared by that statute.

Quære—Whether the objection for the want of such copy and list is to be raised by plea of arraignment.

The 36 Geo. 3. c. 7, having been passed before the Union, did not bind Ireland. The 57 Geo. 3. c. 6. s. 1. made perpetual the provisions of the 36 Geo. 3, but did not extend the provisions of that statute to Ireland. The only effect of the 11 & 12 Vict. c. 12. was to extend to Ireland certain of the provisions of the 36 Geo. 3, made perpetual by the 57 Geo. 3, but not to extend thither the provisions of 4th section of the last-mentioned act, which was limited to treasons made or declared by that act. The offence of levying war against the king, declared by the 25 Edw. 3. stat. 5. c. 2. is high treason in Ireland by the effect of the Irish statute 10 Hen. 7. c. 22, commonly called Poyning's Act, by which, acts which were treason in England under the statute of Edw. 3. were made treason in Ireland. An *allocutus*, whether "the Justices and Commissioners ought not on the premises and verdict aforesaid to proceed to judgment" against the prisoner, is sufficient. The form "judgment of death," or "judgment to die," is surplusage. *O'Brien v. Regina*, 1 H.L. Cas. 465.

HIGHWAY.

[See RATE—TURNPIKE—WAY.]

(A) DEDICATION.

- (a) *Presumption of, by User.*
- (b) *Effect of, without Notice under 5 & 6 Will. 4. c. 50. s. 23.*

(B) SURVEYORS.

- (a) *Appointment of.*
- (b) *Notice of Action to.*

- (C) REPARATION. [See (D) (a).]
 (D) INDICTMENT FOR NON-REPAIR.
 (a) *Liability to.*
 (b) *Order to indict.*
 (c) *Costs to Prosecutor.*
 (E) DIVERTING AND STOPPING-UP.
 (a) *Order of Sessions.*
 (b) *Award of Inclosure Commissioners.*
 (c) *Appeal against Certificate.*

Returns of expenditure on highways to be transmitted to the Secretary of State, 12 & 13 Vict. c. 35; 27 Law J. Stat. 59.

(A) DEDICATION.

(a) *Presumption of, by User.*

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed, whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public. *Regina v. the Tything of East Mark*, 17 Law J. Rep. (N.S.) Q.B. 177; 11 Q.B. Rep. 877.

(b) *Effect of, without Notice under the 5 & 6 Will. 4. c. 50. s. 23.*

If a road has been dedicated to the public and used, but the necessary steps have not been taken by notice, &c. under the 5 & 6 Will. 4. c. 50. s. 23, to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for obstructing it to the plaintiff's damage. *Roberts v. Hunt*, 15 Q.B. Rep. 17.

(B) SURVEYORS.

(a) *Appointment of.*

On the 22nd of March a notice was posted for a vestry meeting, to appoint parish officers on the 25th; and the meeting being held, two surveyors of highways were appointed. On the 11th of April, at a special sessions for highways, it appeared to the Justices that the appointment was invalid, as there had not been three clear days' notice of the vestry meeting, which is requisite under the 58 Geo. 3. c. 69, and the Justices then appointed two other surveyors under the 5 & 6 Will. 4. c. 50. s. 11. The new surveyors, on the 1st of October, made a rate which some of the inhabitants refused to pay. On the 20th of November they made another rate, and W, one of the inhabitants, having refused to pay, was summoned before the Justices. The Justices refused to grant a distress warrant, whereupon the surveyors obtained a rule *nisi* for a mandamus:—Held, that the appointment at the vestry meeting was invalid on account of the insufficiency of the notice, but that the appointment by the Justices was also bad, because it was made at the same special sessions at which it appeared to them that the inhabitants had neglected duly to choose surveyors; whereas, under the 5 & 6 Will. 4. c. 50. s. 11, it should have been made at the next succeeding special sessions for the highways.

Semble—that the second rate, under such circumstances, is not bad, although there was a former one existing, the second not being substituted for

the first. *Regina v. Best*, 16 Law J. Rep. (N.S.) M.C. 102; 5 Dowl. & L. P.C. 40.

(b) *Notice of Action to.*

The members of a board for repair of the highways in the parish of B, having resolved that the surveyor should be directed to open the *locus in quo* to the public, on the suggestion that there was an ancient right of footway over it, the surveyor did, in pursuance of such resolution, remove a gate obstructing such supposed right of footway. An action of trespass being brought against the members of the board and the surveyor,—Held, that they were entitled to twenty-one days' notice of action, under the 5 & 6 Will. 4. c. 50. s. 109, it being admitted that the act was done *bond fide*. *Smith v. Hopper*, 16 Law J. Rep. (N.S.) Q.B. 93; 9 Q.B. Rep. 1005.

[And see *Action, Notice of.*]

(C) REPARATION.

[*Regina v. the Inhabitants of Hickling*, 5 Law J. Dig. 319; 7 Q.B. Rep. 880.]

[And see *post*, (D) Indictment for Non-repair, (a) *Liability to.*]

(D) INDICTMENT FOR NON-REPAIR.

(a) *Liability to.*

By a local act of parliament it was enacted that a certain navigation company should make a good road to the township of T, at least seven yards wide, and should keep the same in repair, and should be liable to be indicted for not repairing the same; and it was also provided that they should be entitled to a tonnage of 1*l.*, which they were to apply to the making of the road. By a subsequent act of parliament the defendants (a canal company) were empowered to purchase from the first-mentioned company the navigation and all the rights to tolls, &c., and were in like manner to be liable to be indicted for non-repair of the road. The road was kept in repair by the first-mentioned company to the extent of twelve yards wide till the year 1817, when the purchase by the defendants took place under the above act of parliament, and from that period by the defendants:—Held, that the defendants were, under the provisions of the statute, liable to be indicted for non-repair of the road to its full width of twelve yards.

Held also, that a count charging them with a liability to repair *ratione tenuræ* of the land, &c. connected with the navigation, and purchased by them under the powers of the second act of parliament, could not be sustained. *Regina v. the Sheffield Canal Co.*, 19 Law J. Rep. (N.S.) M.C. 44.

By a local act (12 Geo. 1. c. xxxviii.) the proprietors of a navigation were directed to repair an ancient highway situate in the township of B, and were subjected to indictment in case of default. By the same act nothing therein contained was to excuse the inhabitants of the several townships, &c. in which the said way lieth, from contributing to the repairs thereof with their carts, &c., or otherwise, as they are now obliged to do by law:—Held, that the township of B was not exempted from the common law liability to repair the highway.

In an indictment against a township for the non-

repair of a road, an indictment against an adjoining township for non-repair of a portion of highway in continuation of the road in question, either submitted to or prosecuted to conviction, is admissible, as evidence to prove the road in question to be a highway. *Regina v. the Inhabitants of Brightside Bierlow, Regina v. the Inhabitants of Attercliffe cum Darnall, Regina v. the Inhabitants of Tinsley*, 19 Law J. Rep. (N.S.) M.C. 50.

A large parish consisted of two townships, G and H, each of which had immemorially repaired the highways situated within it separately, and also of a tract called "the Marsh," over which formerly there were no roads, and which was surrounded on three sides by G, and on the fourth part by a sea bank dividing it from a salt marsh anciently overflowed by the sea. Before the passing of an inclosure act, the landowners in G and H had rights of common over "the Marsh." Under the Inclosure Act, Commissioners set out a public and also a private road in the marsh, and awarded allotments on one side of the said roads in respect of the commonable messuages, &c. in G, and on the other side in respect of those in H. "The Marsh" was situate at the opposite extremity of the parish to H, and no part of it being nearer than ten miles. No repairs were ever done by G or H on the public road, nor on the private road till 1814, when the surveyors of G and H agreed to divide both the roads transversely, and that one portion should be maintained by G and the other portion by H. On an appeal against an order of Justices, under the 5 & 6 Will. 4. c. 50. s. 58, dividing the roads transversely according to the agreement, the Sessions confirmed the order.

On a case finding the above facts, the Court of Queen's Bench quashed the order of Sessions as being made without jurisdiction.

The proviso in section 58. of the 5 & 6 Will. 4. c. 50. applies only to cases where a boundary line runs along a highway, and where the liability to repair is not at common law, but *ratione tenuræ* or *clausuræ*. *Regina v. Perkins*, 19 Law J. Rep. (N.S.) M.C. 105.

By a local act passed in 1823, which was to be in force for twenty-one years, and the preamble of which stated that the making and maintaining a certain turnpike road would be of advantage to the public at large, certain trustees were appointed, who were enabled to make the turnpike road, and required to erect sufficient fences where it passed through private lands. The act did not expressly declare that the road should be a highway, but it enabled all persons to use it on payment of toll. Part of the turnpike road was formed upon an existing road, which had been made under a local inclosure act, but which had never been declared to be completed, as provided by the 41 Geo. 3. c. 149. s. 9. The turnpike road was completed and opened to the public in 1833, and had for fourteen or fifteen years since that time been used by the public, and a coach had at one time travelled over it. Part of the road passed through the parish of L, and was out of repair. No repairs had ever been done upon it by the parish. While the Turnpike Act continued in force an indictment was preferred and found against the parish of L for non-

repair:—Held, that the road was a common Queen's highway, which the parish was liable to repair, the user and the preamble of the statute shewing it to be beneficial to the public.

That the indictment sufficiently described it as a common Queen's highway, without reference to its temporary nature under the Turnpike Act or the payment of toll.

That the want of compliance with the provisions of the 41 Geo. 3. c. 149. s. 9, though it rendered the road under the inclosure act a highway, but not repairable by the parish, did not prevent it from having all the incidents of a common highway when adopted and used by the turnpike trustees.

That a breach of duty by the trustees, in not making the road of a proper width, or erecting sufficient fences, was no answer to the indictment.

Evidence was offered by the defendants at the trial to shew that although the road had been opened to the public and used by them, it had never been fully completed according to the requirements of the Turnpike Act.

Held, that such evidence was properly rejected as irrelevant. *Regina v. the Inhabitants of Lordsmere*, 19 Law J. Rep. (N.S.) M.C. 215; 15 Q.B. Rep. 689.

(b) Order to indict.

Justices in special sessions made an order under the 5 & 6 Will. 4. c. 50. ss. 94, 95, directing an indictment for non-repair of a highway to be preferred against the inhabitants of the parish of H. The order did not state that the highway was within the division for which the special sessions were held. At the trial the defendants had a verdict; the jury finding that the highway was not within the parish of H. The Judge ordered the costs of the prosecution to be paid by the defendants. The Court set aside the certificate for costs, on the ground of the defect in the order of Justices.

Quære—Whether the certificate for costs must shew on the face of it that the order of Justices was properly made.

Quære, also, whether the Judge had jurisdiction to make such an order, the jury having found that the highway was not in the parish of H. *Regina v. the Inhabitants of Hickling*, 15 Law J. Rep. (N.S.) M.C. 23; 7 Q.B. Rep. 880.

(c) Costs to Prosecutor.

The provision in the 5 & 6 Will. 4. c. 50. s. 95, as to the Judge's certificate for the costs of the prosecution of an indictment for the non-repair of a highway, only extends to cases where the liability to repair is disputed; and, therefore, where on an indictment for the non-repair of a public carriage-way, the defendants were acquitted, on the ground that the way was not a public highway for carriages, and the Judge certified for the costs of the prosecution,—Held, that he had no jurisdiction to make this certificate, and this Court set it aside. *Regina v. the Inhabitants of Heanor*, 14 Law J. Rep. (N.S.) M.C. 38; 6 Q.B. Rep. 745.

An order for the costs of the prosecution under the 5 & 6 Will. 4. c. 50. s. 95, can only be made when the road is proved affirmatively to be a highway; and the Court will not go into that question on

affidavit. *Regina v. the Inhabitants of Down Holland*, 15 Law J. Rep. (N.S.) M.C. 25.

If an indictment be preferred against the inhabitants of a parish under the Highway Act, 5 & 6 Will. 4. c. 50. s. 95, and the defendants plead guilty, the Judge will not direct the prosecutor's costs to be paid under that section, as the indictment was not tried before him. *Regina v. Fowchurch*, 2 Car. & K. 393.

A Judge's order for costs of the prosecution of an indictment for non-repair of a highway, under the General Highway Act, 5 & 6 Will. 4. c. 50. s. 95, should state on the face of it out of what funds the costs are to be paid; and where it did not do so the Court set aside the order.

Semble—that it should also state the amount.

Semble—that where an indictment is preferred at the Quarter Sessions by order of special sessions, and is removed into this court by the defendants by writ of *certiorari*, and is then tried at Nisi Prius, the Judge sitting there is a "Judge of assize, before whom the said indictment is tried," within the meaning of the 95th section of the 5 & 6 Will. 4. c. 50, so as to be enabled to make an order for payment of the costs of the prosecution.

Where the order was made to pay the costs to "G H A" (the prosecutor) "or his attorney,"

Semble—that the order was not bad because "G H A" was dead at the time of the order made.

Semble—that it need not appear by express averment, if it may be gathered by reasonable imputation, that the highway in respect of which the indictment is preferred is within the division for which the Justices in special sessions were sitting, who ordered the indictment to be preferred.

Semble—that it is not necessary that the Judge should state on the face of the order, the facts out of which his jurisdiction arises. *Regina v. the Inhabitants of Watford*, 4 Dowl. & L. P.C. 593.

(E) DIVERTING AND STOPPING-UP.

(a) Order of Sessions.

By the General Highway Act (5 & 6 Will. 4. c. 50.) s. 82. two Justices are empowered to order any highway to be widened, but such power is not to extend to pull down any house, &c. By section 84. and subsequent sections, if it appears to two Justices that any highway may be diverted, and the owner of the land through which the proposed new highway is to be made shall consent thereto, the said Justices, upon proof of certain notices, and on delivery to them of a plan describing the old and new highways, may certify that the proposed new highway is nearer or more commodious to the public; and this certificate, with the proof and plan so laid before them, is to be lodged with the clerk of the peace for the county, and read in open court at the next Quarter Sessions, and enrolled among the records of the court; and if no appeal against the certificate is made, or being made, is dismissed, the Quarter Sessions may order the highway to be diverted, and the soil for such new highway to be purchased, "subject to such exceptions and conditions in all respects as is mentioned with regard to highways to be widened."

Semble—that the limitation as to not pulling down

any house, &c. does not apply to the case of diverting a highway, which must be done with the consent of the owner of the land through which the new road passes; but,

Held, (assuming it to apply to such a case) that, where, at the instance of A, and with his consent, the Quarter Sessions duly made an order that an existing highway should be diverted, and a new highway substituted through the lands of A, which the surveyors were thereby authorized to purchase for that purpose, with a proviso that in so doing the surveyors were not to pull down any house, &c., and the surveyors made the new road, not according to the plan deposited with the clerk of the peace, but as nearly on the site there delineated as was practicable, without pulling down a house, that the statutory power for diverting the old highway had not been properly carried out.

Held, also, that the proviso rendered the order of Sessions bad on its face, for throwing that upon the discretion of the surveyors, who are ministerially to execute, what is in truth a restraint upon the power of the magistrates who are to order; and that if it were rejected, the new highway would not be made in pursuance of the order. *Regina v. the Newmarket Rail. Co.*, 19 Law J. Rep. (N.S.) M.C. 241; 15 Q.B. Rep. 692.

(b) Award of Inclosure Commissioners.

An ancient public bridle-way existed for the greater part undefined over common uninclosed lands, the remaining part being through old inclosures. By an award of Inclosure Commissioners under an act, 54 Geo. 3. c. clx. the road, altered in some parts, and defined throughout within narrower limits, was set out as "one public bridle-road and private carriage-road for the use" of certain private individuals named, to be kept in repair by them. No order of Justices for stopping up or diverting the old road, or certificate of the sufficiency of the new road, had been obtained:—Held, that the award did not operate under the General Inclosure Act, 41 Geo. 3. c. 109, as a diversion or stopping up of the old public bridle-road, and setting out of a new one, but that the public had the same right of passage as before, and therefore that the parish in which the road lay remained liable to do such repairs as were requisite to maintain it as a public bridle-road. *Regina v. the Inhabitants of Cricklade*, 19 Law J. Rep. (N.S.) M.C. 169.

(c) Appeal against Certificate.

The 85th section of the 5 & 6 Will. 4. c. 50. requires the certificate of Justices for stopping up a highway, to be read at "Quarter Sessions to be holden for the limit" within which the highway so stopped up shall lie, next after the expiration of four weeks from the day of the certificate having been lodged with the clerk of the peace, and section 88. gives an appeal to the "said Quarter Sessions" upon giving ten days' notice thereof:—Held, that this means the General Quarter Sessions for the county, and not any adjournment thereof; and where the sessions are held on certain fixed days at different places for different divisions of a county, but on each by adjournment from the preceding, the four weeks under the 85th section, and the ten

days' notice of appeal required under the 88th section, must be reckoned with reference to the commencement of the sessions for the first division, though the highway is not situate within such division. *Regina v. the Justices of Suffolk*, 17 Law J. Rep. (N.S.) M.C. 143; 5 Dowl. & L. P.C. 558.

HOLDERNESS DRAINING ACT.

[See RATE, Retrospective Rate.]

HOUSE OF COMMONS.

The acts relating to the offices of the House of Commons further amended by 12 & 13 Vict. c. 72; 27 Law J. Stat. 139.

HULL DOCK ACT.

[See LANDS CLAUSES ACT, Assessment of Compensation.]

HUSBAND AND WIFE.

[See BARON AND FEME.]

INCLOSURE.

- (A) RIGHT OF LESSOR TO INCLOSURE BY LESSEE.
- (B) CONSTRUCTION OF INCLOSURE ACTS.
 - (a) *Wayleave to carry Minerals.*
 - (b) *Reservation Clause as to Mines and Minerals.*
- (C) PROCEEDINGS UNDER INCLOSURE ACTS.

(A) RIGHT OF LESSOR TO INCLOSURE BY LESSEE.

In 1756, E L demised to R J a farm and lands, for the lives of R J, his wife, and T J their son. The farm adjoined a common, over which the occupiers of the farm had rights of common. Subsequently to the lease, R J inclosed small portions of the common, and by writing indorsed on the lease, and signed and sealed by himself and his landlord, dated 1778, agreed that the inclosure should be deemed a part of the farm, and should be occupied by R J, his executors, &c., at the yearly rent of 6*d.*, and be delivered up by him to his landlord ditched and fenced at the end of the term. In 1785, R J built a house upon the common, which was occupied by T M, and made other inclosures. In 1792, by deeds of lease and release, he bargained and sold to his son a house built upon the common, occupied by T M. No possession followed the deeds, nor were the deeds delivered to the grantee. By another similar indorsement on the lease in 1793, it was agreed, that a house on the common occupied by T M, and all inclosures then already made, should be surrendered to the landlord at the end of the demise; and that R J should repair the house and pay 6*d.* annually as an acknowledgment for the same. The farm, the house, and inclosures were

possessed and occupied by R J until his death, when they then passed into the hands of other members of his family, and were finally in the possession of T J, the last *cestui que vie*, until his death in 1837. The lessor of the plaintiff was the heir of E L, the original lessor, and the defendant was the heir of T J, the *cestui que vie*. No evidence was given of any payment of the rents, made payable by the two indorsements:—Held, first, that it is a presumption of law, that a tenant making inclosures makes them for the benefit of his landlord; secondly, that the indorsements were equivalent to an admission that R J inclosed for the benefit of his landlord, and resembled an attornment; thirdly, that the second indorsement did not amount to an invalid surrender, but to an agreement to surrender; and lastly, that the deeds of lease and release conveyed no interest to the son of R J, and that the lessor of the plaintiff was entitled to recover. *Doe d. Lloyd v. Jones*, 16 Law J. Rep. (N.S.) Exch. 58; 15 Mee. & W. 580.

(B) CONSTRUCTION OF INCLOSURE ACTS.

(a) *Wayleave to carry Minerals.*

An act of parliament for inclosing the moors and commons within the manor of Lanchester, in the county of Durham, contained a saving of all the seigniorial rights of the Bishop of Durham as lord of the manor, and also provided, that the bishop and his successors, and their lessees and assigns, should at all times thereafter work and enjoy all mines and quarries lying under the said moors and commons, together with all convenient and necessary ways and wayleaves over the same, and full and free liberty of making and using any new roads or waggonways over the same, and for that purpose to remove obstructions, &c., and of winning and working the said mines and quarries belonging to the see and bishoprick of Durham, wheresoever the same should be, and of leading and carrying away all the coals, minerals, &c. to be gotten thereout, or out of any other lands and grounds whatsoever, &c.:—Held, that this clause entitled the bishop to carry over the lands inclosed under the act, not only coals and minerals got within or under those lands, but also those got out of any other mines belonging to the see of Durham; but not to carry coals, &c. got out of other mines worked by the bishop, but not belonging to the see.

Held, also, that an allegation, that a certain colliery was within and parcel of the manor, was not a sufficient allegation that it was a colliery belonging to the see. *Midgley v. Richardson*, 15 Law J. Rep. (N.S.) Exch. 257; 14 Mee. & W. 595.

(b) *Reservation Clause as to Mines and Minerals.*

Certain waste lands in the manor of Shipley, to the soil of which, and everything constituting the soil, the lord of the manor was entitled, were by an inclosure act, 55 Geo. 3. c. xviii, which recited the lord's title, taken away from the lord and allotted to commoners, except as saved by the 32nd clause. That clause reserved to the lord all *mines and minerals* of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample and beneficial a manner, to all intents and purposes, as he could or might have held and enjoyed the same in case the said act had

not been made; and enacted, that he should and might at all times thereafter have, hold, win, work and enjoy exclusively all mines and minerals of what nature or kind soever, within and under the said commons and waste grounds, with full liberty of digging, sinking, searching for, winning and working the said mines and minerals, and carrying away the lead ore, lead, coals, ironstone and fossils to be gotten thereout; provided that the lord, in the searching for and working the said mines and minerals, should keep the first layer or stratum of earth separate and apart by itself, without mixing the same with the lower strata. The 33rd section provided for reimbursement to the owners of allotments, for injury done by searching for or working mines and minerals:—Held, that the reservation clause must be construed with reference to the title of the lord to the whole of the soil, and inasmuch as the object of the act was to give to the commoners the surface for cultivation, and leave in the lord what it did not take away for that purpose, the word “minerals” must be understood, not in its general sense, signifying substances containing metals, but in its proper sense, including all fossil bodies or matters dug out of mines, that is, quarries or places where anything is dug; and this, notwithstanding the provision in the latter part of the clause, authorizing the carrying away the “lead ore, lead, coal, ironstone, and fossils,” as fossils may apply to stones dug or quarried. Therefore, that the clause reserved to the lord the right to the stratum of stone in the inclosed lands.

The 18th section directed the commissioner to set out parts of the waste for places for getting “stones and other minerals” for the erection and repair of buildings, walls, fences, &c. *Semble*—that the word “minerals” was used by mistake for materials. *Earl of Rosse v. Wainman*, 15 Law J. Rep. (N.S.) Exch. 67; 14 Mee. & W. 859; affirmed in error, 2 Exch. Rep. 800.

(C) PROCEEDINGS UNDER INCLOSURE ACTS.

An award made by an assistant Inclosure Commissioner, that a certain common was within the manor of L, was removed into the Court of Queen's Bench by *certiorari*, on the application of the lord of the manor of E, who claimed the common to be parcel of his manor. On his expressing himself dissatisfied with the award, and requiring to have the matter tried by a feigned issue, and stating as the ground of his dissatisfaction that the award was wrong, and setting forth the evidence in support of his claim, the Court directed the trial of a feigned issue under the statute 8 & 9 Vict. c. 118. s. 44. to determine the disputed question of boundary. *Regina v. Kelsey*, 19 Law J. Rep. (N.S.) Q.B. 523.

An act empowering commissioners therein named to inclose certain lands in the township of A, and reciting that it would be of great advantage to the proprietors of such open lands that the same should be allotted and divided, enacted, that it should be lawful for the commissioners to set out and make such ditches, watercourses, &c., of such extent and form, and in such situations as they shall deem necessary in the lands to be inclosed, and to enlarge and improve any of the existing watercourses, &c.:—Held, that the commissioners were not thereby justified in draining the water from the lands to be

inclosed into an ancient watercourse running through the township of B into the township of A, so as to obstruct the drainage of the plaintiff's lands in the township of B, by means of the said ancient watercourse, to his damage and injury. *Dawson v. Paver*, 16 Law J. Rep. (N.S.) Chanc. 274; 5 Hare, 415.

INDEBITATUS ASSUMPSIT.

Executed Consideration.

Where the father of an illegitimate child, in order to prevent the mother from applying to the magistrates for an order in bastardy, promised to pay her 2s. 6d. per week for the child, and the time for going before the magistrate had expired before action brought without any application having been made,—Held, that *indebitatus assumpsit* lay at the suit of the mother against the father for the child's maintenance, the consideration, which was originally executory, having been executed. *Linegar v. Hodd*, 17 Law J. Rep. (N.S.) C.P. 106; 5 Com. B. Rep. 437.

Where in *indebitatus assumpsit* the plaintiff by his declaration claims one sum in respect of work and labour, money paid, and money had and received, the whole forms only one count.

Where, therefore, the latter part of the declaration was bad for not alleging that the money was paid, &c. at the request of the defendant,—Held (after a general verdict for the plaintiff), that the defect in the declaration was no ground for arresting the judgment. *M'Gregor v. Graves*, 18 Law J. Rep. (N.S.) Exch. 109; 3 Exch. Rep. 34.

INDEMNITY.

A declaration in *assumpsit* contained a set of counts for work done, and money paid by, and on an account stated with D, alleging promises made to D, and a similar set of counts by and with the plaintiffs as executors of D, laying the promises to the plaintiffs as such executors. The second plea stated that D, being the projector of a railway company, agreed, in consideration of the defendant consenting to act as member of the provisional committee, to indemnify him from any professional or other charges on account of the said railway; that the defendant accordingly consented to become and became a member of the provisional committee; that the said work and labour, monies, and accounts in the declaration were respectively done, paid, and stated by D and by the plaintiffs as his executors, in and about the surveying the line of the said railway, and after the said agreement to indemnify; that the defendant became liable to the said professional and other charges, and made the promises in the declaration mentioned, only in his character of member of the provisional committee; that after the accruing of the causes of action the railway was abandoned, and the said work done and money paid became wholly useless and of no value to the defendant; and that any money paid by or damage recovered from the defendant, in respect of the said work or payments, will be wholly lost to the defendant, and that the defendant will be thereby damni-

fied, contrary to the said agreement. Last plea, that the said D in his lifetime caused and procured the defendant to enter into the promises in the declaration by fraud and covin. On special demurrer,—Held, that the first plea was a good bar to avoid circuitry of action.

Held, also, that the last plea was well pleaded to the whole declaration, as the defendant had a right to treat the work done and money paid by, and account stated with the plaintiffs, as being done, paid, and stated in continuance and in respect of the previous contract with D; and that fraud used in procuring that contract extended to the implied promise arising from the plaintiffs' performance of it. *Connop v. Levy*, 17 Law J. Rep. (N.S.) Q.B. 125; 11 Q.B. Rep. 769.

A, tenant to B, received notice from C, a mortgagee of B's term, that the interest was in arrear, and requiring payment to her, B, of the rent then due. A, notwithstanding this notice, paid the rent to B (under an indemnity which turned out to be unauthorized), and was afterwards compelled, by distress to pay the amount over again to C:—Held, that the payment to B was a voluntary payment, with full knowledge of the circumstances, and therefore not recoverable back in an action for money had and received.

At the trial, in support of a special count founded upon the indemnity, the plaintiff proved that one H was B's general attorney; and he then proposed to prove that H, as such attorney, had given the indemnity:—Held, that this evidence was not admissible, in the absence of proof of H's authority to make such a contract for his client. *Higgs v. Scott*, 7 Com. B. Rep. 63.

INDICTMENT.

[See ATTORNEY AND SOLICITOR—ERROR, When it lies—PRACTICE—PLEADING—and the several titles of Criminal Offences.]

- (A) INDICTABLE OFFENCES.
- (B) WHO MAY BE INDICTED.
- (C) VENUE.
- (D) CAPTION.
- (E) NECESSARY AND IMMATERIAL AVERMENTS.
- (F) DESCRIPTIVE ALLEGATIONS.
- (G) JUDGMENT AND SENTENCE.
- (H) REMOVAL BY CERTIORARI.
- (I) QUASHING.

Defects in the administration of criminal justice removed by 11 & 12 Vict. c. 46; 26 Law J. Stat. 141.

The administration of the criminal law further amended by 11 & 12 Vict. c. 78; 26 Law J. Stat. App. i.

(A) INDICTABLE OFFENCES.

The second count of the indictment charged that the defendant, contriving, &c. to injure B S, being a person of unsound intellect, and incapable of taking care of himself, did, "whilst" the said B S was under the care, custody, and controul of the defendant, and whilst the defendant received divers sums of money for his support and maintenance,

unlawfully confine him in an unwholesome room, and neglect to clothe him, and suffer him to be covered with filth, &c. The third count charged that B S was the illegitimate son of the defendant, and was of unsound intellect, and that the defendant had ample and sufficient means for the comfortable support and maintenance of herself and the said B S, whereupon it became and was the duty of the defendant to take due and proper care of the said B S, yet she neglected to do so, and confined him (as before):—Held, on motion for arrest of judgment, that the second count was bad for not containing a direct averment that B S was ever under the care or controul of the defendant.

Held, also, that the third count was bad for want of any allegation shewing it to be the duty of the defendant to take care of him, or that any injury resulted to B S by the acts of the defendant, or was the necessary consequence of them. *Regina v. Pelham*, 15 Law J. Rep. (N.S.) M.C. 105; 8 Q.B. Rep. 959.

If an indictment be bad this Court will quash it, although no question is reserved thereon.

To sustain an indictment for a nuisance at common law by indecent exposure, it is essential to prove that it was done in the sight of more than one person.

Quare—Whether an indictment charging the exposure to have taken place in the presence of divers persons is good. *Regina v. Webb*, 18 Law J. Rep. (N.S.) M.C. 39; 1 Den. C.C. 338; 2 Car. & K. 933.

By statute 49 Geo. 3. c. 126. s. 3. it is provided that if any person shall sell, or bargain for the sale of, or take any money for any office, commission, place, or appointment belonging to or in the appointment or controul of the East India Company, such person and every person aiding and abetting shall be guilty of a misdemeanour. W was presented to the court of directors as a cadet, on the nomination of A B a director, and C D received a sum of money for such nomination. It appeared that W, by virtue of such nomination, was entitled to proceed to India as a cadet, but did not receive or hold any commission or appointment till his arrival there. On an indictment against C D, for receiving the money, and A B, for aiding and abetting,—Held, that a cadetship was an office, commission, place, and appointment, and that the offence was complete within the statute. *Regina v. Charretie*, 18 Law J. Rep. (N.S.) M.C. 100; 13 Q.B. Rep. 447.

The merely exposing and deserting an infant a month old in a public place, for the purpose of burthening a parish with its maintenance, is not an offence for which the person in whose care the infant had been, and who so exposed it, can be indicted. *Regina v. Cooper*, 18 Law J. Rep. (N.S.) M.C. 168; 1 Den. C.C. 459; 2 Car. & K. 876.

An indictment alleging that the prisoner "did unlawfully attempt and endeavour fraudulently, falsely and unlawfully to obtain from A B a large sum of money, to wit, the sum of 22l. 10s., with intent thereby then and there to cheat and defraud the said A B," is bad in arrest of judgment, as it does not sufficiently allege an indictable offence. *Regina v. Marsh*, 19 Law J. Rep. (N.S.) M.C. 12; 1 Den. C.C. 505.

(B) WHO MAY BE INDICTED.

An indictment will lie against a corporation for a misfeasance at common law. *Regina v. the Great North of England Rail. Co.*, 16 Law J. Rep. (N.S.) M.C. 16; 9 Q.B. Rep. 315.

(C) VENUE.

[*Regina v. Gompertz*, 5 Law J. Dig. 326; 2 Dowl. & L. P.C. 1001.]

A count in an indictment for misdemeanour, with the venue "Lancashire" in the margin, stating that certain unlawful assemblies were held by evil-disposed persons at "divers places," and that the defendants, "at the parish aforesaid, in the county aforesaid," unlawfully aided and abetted the said evil-disposed persons,—Held, good on motion in arrest of judgment, the "want of a proper or perfect venue" (no place being stated where the unlawful assemblies were holden) being cured by the 7 Geo. 4. c. 64. s. 20.

A count, stating that the defendants, together with other evil-disposed persons, &c., unlawfully did endeavour to excite Her Majesty's subjects to disaffection, &c., no place being stated,—Held, bad on motion in arrest of judgment, there being no words of reference to the venue in the margin, and the defect not being cured by the said statute. *Regina v. O'Connor*, 13 Law J. Rep. (N.S.) M.C. 33.

An indictment, preferred and found at the Central Criminal Court, described the defendants as late of the parish of M, in the county of Middlesex, and alleged the offence to have been committed at the parish aforesaid, in the county aforesaid, and within the jurisdiction aforesaid. This indictment was removed by *certiorari*, before the passing of the statute 9 & 10 Vict. c. 24, and was tried in this court by a Middlesex jury:—Held, that the bill, having been found by a competent authority, and shewing an offence committed in Middlesex, was properly tried in Middlesex by a jury of that county. *Regina v. Hunt*, 17 Law J. Rep. (N.S.) M.C. 14; 10 Q.B. Rep. 925.

(D) CAPTION.

An indictment, the caption of which was in the usual form, commenced "The jurors of our Lady the Queen," and laid the offence as "in the tenth year of our Sovereign Lady Victoria," &c.:—Held, on writ of error, first, that taking the caption and the indictment together, there was no error in the description of the grand jurors; secondly, that the statement of time, if incorrect, was cured by the 7 Geo. 4. c. 64. s. 20. *Broome v. Regina*, 17 Law J. Rep. (N.S.) M.C. 152; 12 Q.B. Rep. 834.

(E) NECESSARY AND IMMATERIAL AVERMENTS.

Where the indictment for stealing a mare, saddle and bridle, omitted the conclusion, *contra formam*, and the verdict was, guilty generally,—Held, that as the stealing the mare as well as the other things was a felony at common law, the offence was well described in the indictment, and that the punishment under the 7 Will. 4. & 1 Vict. c. 90. s. 1. might be given in respect of the mare stolen. *Williams v. Regina*, 7 Q.B. Rep. 250.

In an indictment for stealing 2s. of the current silver coin of the realm, described as the goods and

chattels of Samuel Fitch, the words "of the goods and chattels" are surplusage, and may be rejected, money not falling within the legal technical definition of "goods and chattels"; and the remaining allegation, "of Samuel Fitch," is a sufficient description of the property. *Regina v. Radley*, 18 Law J. Rep. (N.S.) M.C. 184; 1 Den. C.C. 450; 2 Car. & K. 974.

An indictment against a bankrupt which alleged that at the time of his examination under the fiat he was possessed of a certain real estate, and then charged that at the time of his said examination he feloniously did not discover when he disposed of the said estate, with intent to defraud his creditors, was held bad in arrest of judgment, for not containing an averment that the prisoner had in fact disposed of the said estate. *Regina v. Harris*, 19 Law J. Rep. (N.S.) M.C. 11; 1 Den. C.C. 461.

An indictment, preferred at the assizes, under the stat. 7 & 8 Vict. c. 2, for a crime committed on the high seas, need not conclude *contra formam statuti*. *Regina v. Sena*, 2 Car. & K. 53.

An indictment under the statute 7 Vict. c. 2. (for the more speedy trial of offences committed on the high seas), need not contain an averment that the offence was committed "within the jurisdiction of the Admiralty." *Regina v. Jones*, 1 Den. C.C. 101; 2 Car. & K. 165.

[See PERJURY.]

(F) DESCRIPTIVE ALLEGATIONS.

An indictment describing the prosecutor (a foreigner) as Charles Frederick, Duke of Brunswick, that being the title by which he continues to be known, is good, though he be no longer the reigning Duke of Brunswick, and though his proper family surname be omitted. *Regina v. Gregory*, 15 Law J. Rep. (N.S.) M.C. 38; 8 Q.B. Rep. 508.

An indictment alleged that the defendant on Henry Bennett did make an assault, and him the said William Bennett did beat, wound, &c.:—Held, good, on motion in arrest of judgment. *Regina v. Crispin*, 17 Law J. Rep. (N.S.) M.C. 128; 11 Q.B. Rep. 913.

Indictment stated that the prisoner, a single woman, on the 27th of August 1844, brought forth a male child alive; that she afterwards, to wit, on the day and year aforesaid, killed the said child. Objection that the judgment ought to have either stated the name of the child, or that its name was unknown to the jurors, overruled by Coleridge, J. at the trial, on the ground that there was no presumption, from the mere fact of birth, that the child had a name, it being a bastard; that the indictment afforded no presumption of its having acquired a name by reputation or baptism; that an averment that the name was unknown, implied the acquisition of some name.—Conviction held right. *Regina v. Willis*, 1 Den. C.C. 80.

Prisoner indicted under the statute 7 & 8 Geo. 4. c. 29. s. 25, for stealing "sheep." The jury found that the animal so described was a "lamb." Indictment held good. *Regina v. Spicer*, 1 Den. C.C. 82.

The first count of an indictment for murdering a child described the infant "as an infant female child born of the body of S W and of tender years,

to wit, of about the age of two days and not named." The second count described her as the "said infant female child so born of the body of the said S W as aforesaid, and not named." The count then charged that the said S W assaulted the said infant female child, and threw her in and upon a heap of dust and ashes, and left her there exposed to the cold air, and that by reason of such exposure the death was occasioned:—Held, first, that the word "said," in the second count, did not incorporate the averment as to the age of the child in the first count; secondly, that as the indictment charged the death to have been caused by the wrongful act of the prisoner, and the jury had found her guilty, the omission to state the age was immaterial, for it must be taken after verdict that the child was unable to take care of itself, and that the prisoner's act caused its death, and the count therefore was good; thirdly, that the description of the child as "not named" was sufficient. *Regina v. Waters*, 18 Law J. Rep. (N.S.) M.C. 53; 1 Den. C.C. 356; 2 Car. & K. 864.

(G) JUDGMENT AND SENTENCE.

The first count of an indictment charged a stealing in the dwelling-house of D, above the value of 5*l.* The second count charged simple larceny of the monies of D, on the day and year aforesaid. The jury process was to try "whether the prisoners are guilty of the felony aforesaid," and the verdict was "that they are guilty of the felony aforesaid." The Court adjudged the prisoners to be transported for ten years:—Held, first, that the indictment charged two felonies, and in that respect was good; that if the two counts necessarily charged the same offence, the indictment would have been bad in arrest of judgment.

Held, further, that the word "felony" is not *nomen collectivum*; that by the verdict the prisoners were found guilty upon one count only, not saying which; that the verdict was, therefore, bad for uncertainty; that the judgment was also erroneous, not being warranted by the last count, and the Court not being at liberty to apply the judgment to that part of the record, viz. the first count, which would support it.

The Court set aside the verdict and judgment, and awarded a *venire de novo*. *Campbell v. Regina*, 15 Law J. Rep. (N.S.) M.C. 76.

On a conviction for stealing in a dwelling-house above 5*l.* before the 9 & 10 Vict. c. 24, judgment of seven years transportation on error reversed, the 7 Will. 4. and 1 Vict. c. 90, subjecting the party convicted to be transported for not exceeding fifteen years, nor less than ten years.

Semble—a conviction with the county stated in the margin, reciting the names of the grand jurors by whom the indictment had been found, adding their residences, but not stating them to be good and lawful men within the county, nor any mention made of the county, a good ground of error. (*Per Patteson, J.*) *Whitehead v. Regina*, 7 Q.B. Rep. 582.

The first count of an indictment, tried at the Quarter Sessions for the city of C, charged a stealing in the dwelling-house of D above the value of 5*l.*; the second count charged a simple larceny of the monies of D. The jury process was to try

"whether the prisoners are guilty of the felony aforesaid." The record stated that the jury found that the prisoners were "guilty of the felony aforesaid." The recorder adjudged the prisoners to be transported for ten years. On a writ of error to the Exchequer Chamber,—held, (affirming the judgment of the Queen's Bench—see case above) that the entry of the verdict and judgment was uncertain, the word "felony" in this *venire* meaning no more than one felony.

Held, also, (affirming the judgment of the Queen's Bench) that a *venire de novo* may be awarded in a criminal case where there has been a misawarding of the jury process; but

Quare—Whether a *venire de novo* can issue in a case of felony on account of a defective verdict only.

Held, also, that a *venire de novo* may be awarded after judgment on an indictment for felony, and that it may issue to the Court of Quarter Sessions. *Campbell v. Regina*, 17 Law J. Rep. (N.S.) M.C. 89; 11 Q.B. Rep. 799.

Upon the trial of an indictment at Nisi Prius, judgment was pronounced by the presiding Judge under 11 Geo. 4. & 1 Will. 4. c. 70; but a rule nisi to arrest the judgment was afterwards granted by the Court of Queen's Bench, within the first six days of term, and subsequently discharged. Upon writ of error brought, the record was made up without any notice of such rule:—Held, that the judgment could not be impeached upon the ground of such rule having been granted. *Dunn v. Regina*, 18 Law J. Rep. (N.S.) M.C. 41; 12 Q.B. Rep. 1031.

Prisoner indicted in first count for obtaining from prosecutor an order for the payment of 14*l.* 1*s.* 2*d.* by false pretences with intent to defraud him of the same; in second count for obtaining an order for 16*l.* 2*s.* 8*d.* with intent to defraud the prosecutor of part of the proceeds thereof, to wit, 6*s.* 6*d.* Evidence as to first count, that the prisoner only intended to defraud prosecutor of 7*s.*, as the rest of the money was really due. Second count proved as laid. General verdict of guilty:—Held, first count proved. A separate sentence recommended to be passed on the other count. *Regina v. Leonard*, 1 Den. C.C. 304; 2 Car. & K. 514.

(H) REMOVAL BY CERTIORARI.

The Court will not discharge a side bar rule for costs of a prosecution obtained by a party grieved, on the ground that such party is only one of several, who have subscribed together to conduct the prosecution. *Regina v. Williams*, 15 Law J. Rep. (N.S.) Q.B. 98, u.; 6 Q.B. Rep. 273.

The Court will not inquire into any aid which a prosecutor may have received from other parties to enable him to defray expenses of prosecution. *Regina v. Dobson*, 15 Law J. Rep. (N.S.) Q.B. 376; 9 Q.B. Rep. 302.

(I) QUASHING.

[*Regina v. Wilson*, 5 Law J. Dig. 327; 6 Q.B. Rep. 620.]

[And see (A) Indictable Offences.]

INFANT.

[See CONTRACT, When valid or illegal—SETTLEMENT, by the Court of Chancery.]

- (A) MAINTENANCE.
 - (a) Generally.
 - (b) Practice as to granting.
- (B) GUARDIAN.
 - (a) Appointment of.
 - (b) Depriving Father of Guardianship.
 - (c) Restraining undue Influence of.
 - (d) Payments and Allowance to.
 - (e) Changing Guardian.
- (C) WARD OF COURT.
- (D) RIGHTS AND LIABILITIES OF.
- (E) SALE AND DISPOSITION OF PROPERTY.
- (F) CONVEYANCE OF REAL ESTATE UNDER 1 WILL. 4. c. 60.
- (G) Suing by PROchein AMI.

(A) MAINTENANCE.

(a) Generally.

Order made for a liberal allowance for the maintenance and education of a female infant, whose father is living, with a view to her being brought up in a manner suitable to her fortune and expectations. *Ex parte Williams*, 2 Coll. C.C. 740.

Upon the petition of an infant plaintiff for an order for present maintenance and education, and to provide for a future increased allowance on his entering at a specified time and continuing at the University, the Court ordered a present allowance and made a prospective provision for an increased allowance from the future day until twenty-one, or the further order of the Court, to be applied by the testamentary guardian of the infant. *Nunn v. Harvey*, 2 De Gex & S. 301.

Bruin v. Knott, 5 Law J. Dig. 329, overruled. 1 Ph. 572.

A life policy of assurance was settled, on the marriage of A and B, on B the wife, for life, with remainder to A, the husband, for life, with remainder to the children of the marriage, at twenty-one; with remainder, in default of children, as B should appoint. B appointed her interest to A, and died, leaving only one child. After B's death a bonus became payable on the policy. A petition was presented by the trustees and A, stating that A was unable to support his child, and was going to emigrate, and praying that the sum receivable in respect of the bonus might be paid to the trustee, and applied for the maintenance of the child. The prayer of the petition was granted, on condition that A gave up his life interest under the settlement. *Ex parte Hays*, 18 Law J. Rep. (N.S.) Chanc. 441.

(b) Practice as to granting.

Upon a petition, on behalf of infants who had lost their father, for an allowance by way of maintenance, an inquiry to ascertain whether the mother was of sufficient ability to maintain and educate them was refused, as being contrary to established rules. *Douglas v. Andrews*, 19 Law J. Rep. (N.S.) Chanc. 69; 12 Beav. 310.

(B) GUARDIAN.

[*In re Park*, 5 Law J. Dig. 330; 14 Sim. 89.]

(a) Appointment of.

Guardian of the estate of an infant appointed on petition without suit or reference. *Ex parte Bond*, 16 Law J. Rep. (N.S.) Chanc. 147.

The fact of infants being resident in two different parts of the kingdom is no ground for dispensing with the practice of assigning a guardian *ad litem* by commission, or on their appearance. *Mower v. Orr*, 6 Hare, 417.

(b) Depriving Father of Guardianship.

Before the Court will deprive a father of the guardianship of his children, it must be satisfied that he has so conducted himself or placed himself in such a position as to render it essential to the safety or the welfare of the children that the father's rights should be interfered with (except in cases within the 2 & 3 Vict. c. 54).

Although the children being in the mother's custody excludes the operation of the 2 & 3 Vict. c. 54, the provisions of that act should be regarded upon an application by her to retain such custody, and to prevent the father's interference.

Conduct shewing the father to be a person to whose guardianship it would be very objectionable to entrust children,—Held, sufficient ground for depriving him of their custody, and providing otherwise for their care, maintenance, and education, where such a provision can by actual appropriation of property or otherwise be effectually secured.

But where the only security proposed was a deed of covenant of the father's mother-in-law, to provide for the maintenance and education of the children for her life,—Held, that the Court could not interfere. *In re Fynn*, 2 De Gex & S. 457.

(c) Restraining undue Influence of.

[See CONTRACT, Validity of.]

Proceedings at law were stayed where the claim originated in obligations entered into by a young lady who had attained her majority about eighteen months previously, and who was and had been for some time residing in the house and under the care of her near connexion and late guardian; the obligations being for the sole benefit of the guardian and of the obligees, who had a common interest with him, the latter knowing the relationship in which the lady stood to the guardian, and taking no steps to ascertain whether she acted upon her free will and with full knowledge of the liability she was incurring. *Mailand v. Irving*, 16 Law J. Rep. (N.S.) Chanc. 95; 15 Sim. 437.

The plaintiff was a young lady who had been a ward of court; and eighteen months after coming of age, while continuing to reside with her guardian, she had indorsed a promissory note, drawn by her guardian in her favour. The note was given by the guardian to certain creditors in part payment of a debt, and was by them presented to their bankers and discounted. It appeared that the bankers knew the relative position of the plaintiff and her guardian, and also knew that the guardian had been in embarrassed circumstances previous to the note

being presented :—Held, under these circumstances, that it was the duty of the bankers to have investigated the transaction, and an injunction was granted to restrain them from taking proceedings at law upon the note.

Considerations which influence the Court in ordering money to be paid into court, when the title to it is disputed. *Maitland v. Backhouse*, 17 Law J. Rep. (N.S.) Chanc. 121; 16 Sim. 58.

(d) *Payments and Allowance to.*

Order made that the dividends of a very small sum of stock, belonging to six infants, should be paid to their guardian until the youngest should attain twenty-one, or further order. *In re Butterfield*, 19 Law J. Rep. (N.S.) Chanc. 373.

Dividends of a fund in court ordered to be paid to the solicitor of an infant resident abroad with a guardian appointed by a foreign court, he undertaking to remit them to the guardian. *In re Morrison*, 16 Sim. 42.

Upon a petition presented on behalf of an infant, who was residing with her guardian in America, and who was entitled to a sum of money, which had been paid into court for her benefit, an order was made that the dividends of the said sum should be paid to an officer of this court, by whom it should be paid over to her guardian. *In re Morrison*, 17 Law J. Rep. (N.S.) Chanc. 44.

Semble—that the 1 Will. 4. c. 56. s. 32. empowering the Court, on the petition of the guardian of an infant, to direct payment of maintenance out of dividends of stock standing in the infant's name, does not authorize the appointment of a guardian and a direction for payment of dividends upon the same petition, although the guardian appointed is one of the petitioners, but that two petitions are proper. *In re Pongerard*, 1 De Gex & S. 426.

The Court exercises a control as to the allowance ordered to be paid to a testamentary guardian with reference to any change of circumstances. *Jones v. Powell*, 9 Beav. 345.

(c) *Changing Guardian.*

Upon an infant, a boy of the age of nine years, being brought up before the Court by *habeas corpus*, it appeared that upon the occasion of her husband's death, the mother then residing in India, gave over the child into the care of her late husband's mother, who subsequently died, leaving all her property to this grandchild and his brother, and appointing two persons her trustees and executors, and the guardians of the child; these persons acted, and had continued to act, as guardians, and were recognized as such, and approved of by the mother, and their conduct as guardians was not impeached in any way; she, however, marrying again, and still residing in India, suddenly executed, conjointly with her husband, a warrant of attorney, authorizing certain parties, therein named, to demand and receive the custody of the child. This demand had been made upon and refused by the guardians, and in consequence of such refusal application was made, under this warrant of attorney, for the *habeas corpus*. Under these circumstances, the Court refused to disturb the custody of the child.

Semble—that a party who is of right entitled to the custody of an infant cannot, by warrant of at-

torney, empower another person to apply to this Court to change the custody. *In re Preston*, 17 Law J. Rep. (N.S.) Q.B. 21; 5 Dowl. & L. P.C. 633.

(C) *WARD OF COURT.*

[See *TRESPASS*.]

Upon a petition to confirm the Master's report, approving of a settlement on the marriage of a ward of court, the Court varied the proposed terms of the settlement, by giving the intended wife a power to appoint any part, not exceeding one-half part, of the principal of the trust money, in favour of the issue of any subsequent marriage of the intended wife. *Rudge v. Winnall*, 17 Law J. Rep. (N.S.) Chanc. 215; 11 Beav. 98.

A lady who was entitled to property upon attaining twenty-one or marriage, married under age:—Held, that this contingent interest in property was sufficient to entitle her to be made a ward of Court; and that her mother, although in the light of a stranger to the property, might present a petition to have a settlement under a decree of the Court. *Russell v. Nicholls*, 16 Law J. Rep. (N.S.) Chanc. 47.

(D) *RIGHTS AND LIABILITIES OF.*

[See *COMPANY—WINDING-UP ACTS*, *Contributory*.]

The resolution of Trinity term, 3 Vict. declaring the costs of the application to be consequential on making a Judge's order a rule of court, applies where the party sought to be charged is an infant. *Beames v. Farley*, 5 Com. B. Rep. 178.

To an action against the acceptor of a bill of exchange for 500*l.* at nine months, dated the 29th of March 1845, the defendant pleaded infancy, to which the plaintiff replied a written ratification by the defendant after attaining his full age, on which issue was joined. The defendant, after coming of age, in 1846, wrote the following letters to the plaintiff:—"I should feel particularly obliged if you would arrange to keep the bills back for a little time, as my late brother's executors (the Messrs. H) have lost their mother and only sister lately, and which prevents their settling with you. The money will be shortly paid, say 2,000*l.* I have heard from Mr. B this morning; and he tells me a Mr. G has written to him for the money. Please arrange with him, and write to me by return."—"My acceptance for 500*l.*, due on the 1st of January last, will most likely be settled shortly, and would have been settled before, had not a sudden accident occurred, which prevented its being paid."—"I beg to inform you that I have this day forwarded your letter to Messrs. H, and also the letters from Messrs. L and Mr. B. I cannot exactly tell you about what time they will be settled, as I have not the money myself, and, as I have told you before, I have left it entirely in their hands."—"I received your letter of yesterday, and am sorry to find you are not contented with the letter I gave you when you were at my house some time ago. I have heard from the Messrs. H yesterday, and they said they had written to their agents in Dublin to arrange the whole thing. I therefore beg you will immediately see and inform Mr. L, whom I heard from this day. It is not a bit of use writing these sort of letters, as payment

will not be made any the sooner for them. What I tell you is perfectly correct, and the matter will be settled shortly."

Held, that the above letters amounted to a ratification within the meaning of the 9 Geo. 4. c. 14. s. 5.

Semble—that they did not amount to a new promise.

Any act or declaration which recognizes the existence of a promise as binding is a ratification of it. *Harris v. Wall*, 16 Law J. Rep. (N.S.) Exch. 270; 1 Exch. Rep. 122.

Where a person represents to another that he is of age, and executes to him a release upon which the latter acts,—Held, that he could not afterwards impeach the validity of the release on the ground of his minority; and that it was immaterial whether he was aware or not of the incorrectness of the representation.

Where the answer of an executrix alleged a release to have been executed by the plaintiff, a legatee, and that he had then stated that he was of age, but contained admissions from which his minority at the time might be inferred:—Held, that such admissions did not entitle the plaintiff to an inquiry whether he was a minor at the date of the transaction. *Wright v. Snowe*, 2 De Gex & S. 321.

Doctrine as to the liability of persons after attaining their majority, in respect of dealings during infancy, in which they had been silent as to their age.

A broker sold railway shares, registered in the name of B, to C, and delivered to C the certificates for the shares, and a transfer-deed signed by B; and C paid to the broker the purchase-money for the shares. On an application by C at the company's office to register the shares, he was informed that it could not be done, in consequence of a notice having been given to the company not to register the shares, on the ground that B, at the date of the transfer, was an infant. A bill was filed by C against the broker and B; stating that B was of age at the date of the transfer, and that he had held himself out to the world as being of age, and that C had considered B to be, and had held him out as being, of age; and praying for a reference to inquire whether B was of age at the time of the transfer; and that, if it should appear that he was an infant, he might be ordered to assign the shares on the ground of fraud; and that the broker also might be answerable. The broker by his answer, stated that he believed B to be of age at the time. B denied that he had ever held himself out as being of age. It appeared that B was an infant at the date of the transfer, and that the purchase-money had been retained by the broker in respect of a debt alleged to be due to him from B, in respect of dealings in shares during B's infancy:—Held, that C, on this state of facts and these pleadings, had no remedy against the broker or B. *Stikeman v. Dawson*, 16 Law J. Rep. (N.S.) Chanc. 205; 1 De Gex & S. 90.

(E) SALE AND DISPOSITION OF PROPERTY.

The Court cannot (independently of the statute) authorize trustees for infants to grant a mining lease, although the legal estate is vested in the trustees and the lease would be beneficial to the infants. *Wood v. Patteson*, 10 Beav. 541.

The Court has no power under 11 Geo. 4. & 1 Will. 4. c. 65. s. 17. to lease an infant's estate,

unless the infant is indefeasibly seised either in fee or in tail *in possession*. *Ex parte Legh*, 15 Sim. 445.

Petition of tenant for life for an inquiry whether it would be for the benefit of infant tenants in remainder to transpose trust funds from consols to a mortgage security under a power, dismissed, on the ground that the expenses incidental to the latter security generally more than counterbalanced the increase of income. *Barry v. Marriott*, 2 De Gex & S. 491.

On the petition of an infant, an annual sum was ordered to be paid, through the guardian, to the rector of a parish in which the infant had a considerable estate, to be applied by the rector in charity, and for the purposes of education, for the benefit of the poor of the parish. *Langton v. Brackebury*, 15 Law J. Rep. (N.S.) Chanc. 256; 2 Coll. C.C. 446.

(F) CONVEYANCE OF REAL ESTATE UNDER 1 WILL. 4. c. 60.

An infant devisee, ordered to convey real estate sold for payment of the testator's debts, made default and was not amenable to process. The Court under the 1 Will. 4. c. 60. s. 8. directed a person to convey in his place. *Thomas v. Gwynne*, 9 Beav. 275.

(G) SUING BY PROCHAIN AMI.

The petition of an infant plaintiff to be allowed to sue by her *prochein ami*, may be signed by such *prochein ami*, on her behalf; the infant being too young to sign it herself. *Eades v. Booth*, 15 Law J. Rep. (N.S.) Q.B. 263; 8 Q.B. Rep. 718; 3 Dowl. & L. P.C. 770.

INFERIOR COURT.

[See ADMIRALTY—COSTS, Suggestion—ECCLESIASTICAL COURTS—FOREIGN ATTACHMENT—PROHIBITION—STAYING PROCEEDINGS.]

(A) OPERATION OF 9 & 10 VICT. c. 95.

(B) JURISDICTION.

(a) *Extent of.*

(1) *Several Districts.*

(2) *Upon Summons on Charge of Fraud.*

(3) *In granting Warrants of Possession.*

(b) *What Actions may be tried.*

(1) *On Judgments recovered in the Superior Courts.*

(2) *On Bills of Exchange.*

(3) *By Landlord for double Rent.*

(4) *Trespass for special Damage after Interpleader Summons.*

(5) *For Penalties under the Apothecaries Act.*

(6) *For Balance of Account.*

(7) *Splitting Demands and abandonment of Excess.*

(c) *Concurrent Jurisdiction.*

(d) *Ouster of Jurisdiction.*

(1) *To grant Warrant of Possession.*

(2) *By asserting Title.*

(e) *Excess of Jurisdiction.*

(f) *How shewn in Pleading.*

(C) POWER OF COMMITTAL.

(D) LIABILITY OF JUDGE,

(E) MATTERS OF PRACTICE.

(a) *Removal of Cause into the Superior Courts.*

(b) *Process.*

(1) *Teste.*

(2) *Proof of Service of Summons.*

(3) *Summons to save the Statute of Limitations.*

(c) *Certificate of probable Cause.*

(d) *Execution.*

(e) *Notice of Claim in Interpleader Cause.*

(f) *Attornies practising in the County Courts.*

(1) *Must sign the Roll.*

(2) *To what Fees entitled.*

(g) *Procedendo.*

(h) *Judgment.*

(i) *Proceedings after Judgment of Assets Quando.*

(k) *Waiver of Objections.*

(l) *Costs.*

(F) OFFICERS.

(a) *Appointment and Removal of.*

(b) *Liability of.*

(G) COURTS BARON.

County courts for the recovery of small debts established by the 9 & 10 Vict. c. 95; 24 Law J. Stat. 219.

The County Courts Act, 9 & 10 Vict. c. 95, amended by the 12 & 13 Vict. c. 101; 27 Law J. Stat. App. i.

The County Courts Acts extended and amended by the 13 & 14 Vict. c. 61; 28 Law J. Stat. 121.

(A) OPERATION OF 9 & 10 VICT. c. 95.

Where an action for a debt recoverable in a court of requests was commenced in a superior court, after the passing of the 9 & 10 Vict. c. 95, but before any county court had been established in the district, pursuant to the provisions of that act, and the Court of Requests Act provided that a plaintiff should have no costs when he sued in a superior court for a debt recoverable in the court of requests,—Held, that as the 9 & 10 Vict. c. 95, s. 6, repealed the Court of Requests Act only on the establishment of the county court for the district, the plaintiff having commenced his action before that time in the superior court was not entitled to costs. *Warburg v. Read*, 16 Law J. Rep. (N.S.) Q.B. 342; 5 Dowl. & L. P.C. 71.

An action for a matter for which a plaint might have issued under the 9 & 10 Vict. c. 95, was commenced in one of the superior courts, after the passing of that act, but before the Order in Council establishing the County Court of the district in which the cause of action arose and the parties resided:—Held, that the 129th section, which deprives parties of costs who, after the passing of that act, sue in the superior courts for causes "for which a plaint might have been entered in any court holden under that act," did not apply. *Harries v. Lawrence*, 17 Law J. Rep. (N.S.) Exch. 101; 1 Exch. Rep. 697.

The 9 & 10 Vict. c. 95, s. 5, enables Her Majesty to order that any court for the recovery of small debts, established under any of the local acts spe-

cified in the schedule, shall be abolished. The act constituting the Court of Requests for Kidderminster was specified in the schedule. By an Order in Council, made in pursuance of the 9 & 10 Vict. c. 95, Her Majesty ordered that all courts holden for the recovery of small debts under any act cited in the schedule should be abolished, except certain specified courts (not including the Court of Requests of Kidderminster), which were to be continued and holden as county courts:—Held, that the court at Kidderminster was abolished, and that the new county court of Worcestershire held for the district of Kidderminster was not "the same court" as the former court of requests, so as to entitle the officers of it to be re-appointed under section 34 of the 9 & 10 Vict. c. 95. *Regina v. Dyer*, 18 Law J. Rep. (N.S.) Q.B. 285.

(B) JURISDICTION.

(a) *Extent of.*

(1) *Several Districts.*

Under the County Courts Act (9 & 10 Vict. c. 95.) the same person may be appointed Judge of the county court for and to be holden in several districts. *Regina v. Parham*, 18 Law J. Rep. (N.S.) Q.B. 281.

(2) *Upon Summons on Charge of Fraud.*

Under the 98th section of the County Courts Act, 9 & 10 Vict. c. 95, the Court has jurisdiction although the sum due is more than 20*l.* *Byrne v. Knipe*, 18 Law J. Rep. (N.S.) Q.B. 33; 5 Dowl. & L. P.C. 659.

(3) *In granting Warrants of Possession.*

The 122nd section of the 9 & 10 Vict. c. 95, applies to cases where the rent does not exceed 50*l.* per annum, and there is no fine, whatever may be the value of the premises.

A judgment having been given under that section for the plaintiff, but possession ordered to be given on a certain day some months afterwards, the landlord treated it as a nullity, and again applied under that section, and obtained judgment and an order for possession within eight days. Upon a motion for a prohibition, on the ground that the prior judgment was pending and unreversed,—Held, that as the prior judgment was a nullity, the second action was rightly brought. *In re Fearon v. Norval*, 18 Law J. Rep. (N.S.) Q.B. 9; 5 Dowl. & L. P.C. 445.

The 122nd section of the 9 & 10 Vict. c. 95. does not apply, except where there is the relation of landlord and tenant; and, therefore, a mortgagor cannot recover possession under that section from a person who has entered into the occupation subsequently to the mortgage, and has not become tenant to the mortgagee.

A rule *nisi* for a prohibition was obtained on the 5th of June, a warrant of possession under the judgment was executed on the 6th, and the rule for the prohibition was served on the Judge of the County Court in Wales on the 7th:—Held, that it was not too late, and the rule was made absolute, with a clause of restitution. *Jones v. Owen*, 18 Law J. Rep. (N.S.) Q.B. 8; 5 Dowl. & L. P.C. 669.

A warrant of possession under the statute 9 & 10 Vict. c. 95, s. 122, cannot be issued where the lands are situated without the jurisdiction of the Court.

Ellis v. Peachy, 18 Law J. Rep. (n.s.) Q.B. 137; 5 Dowl. & L. P.C. 675.

[And see *post*, (d) (1).]

(b) *What Actions may be tried.*

(1) *On Judgments recovered in the Superior Courts.*

An action on a judgment of one of the superior courts under 20*l.* is a plea in a personal action, and may be brought in the county court.

The proper mode of trying an issue raised upon the existence of the judgment is by *certiorari* and *mittimus* out of Chancery to the county court.

The Judge of the county court tried the plaintiff without any legal evidence of the original record. The defendant afterwards claimed a set-off, and the Judge made an order in favour of the plaintiff:—Held, that the defendant had waived the irregularity of proof by not objecting to it at the time. *In re Winsor v. Dunford*, 18 Law J. Rep. (n.s.) Q.B. 14.

(2) *On Bills of Exchange.*

Bills of exchange are within the jurisdiction of the county courts established by the 9 & 10 Vict. c. 95. *Waters v. Handley*, 6 Dowl. & L. P.C. 88.

(3) *By Landlord for double Rent.*

Rent in arrear, and a demand of double value for holding over after notice to quit, under the statute 4 Geo. 2. c. 28, are separate causes of action within section 63. of the 9 & 10 Vict. c. 95, and therefore may be sued for by separate plaintiffs in the county court.

Separate plaintiffs may be sued in the county court for two or more causes of action, which would require to be stated in distinct counts, though they might be included in the same declaration.

A demand for double value against a tenant holding over under the statute 4 Geo. 2. c. 28, is a "plea of a personal action," and may be sued for in the county court, under section 58. of the 9 & 10 Vict. c. 95. *In re Wickham v. Lee*, 18 Law J. Rep. (n.s.) Q.B. 21; 12 Q.B. Rep. 521.

(4) *Trespass for special Damage after Interpleader Summons.*

By the 9 & 10 Vict. c. 95. s. 118. it is enacted, that if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any county court, a summons may issue, calling before the said Court the party issuing the process as well as the claimant, and thereupon any action which shall have been brought in respect of such claim shall be stayed, and the Judge of the county court shall adjudicate upon such claim, and make such order between the parties in respect thereof as to him shall seem fit. Where the Judge of the county court had made an order adverse to the claimant,—Held, that an order to stay proceedings in an action of trespass for breaking and entering the house of the claimant, and taking the goods in question, was proper. *Jessop v. Crawley*, 19 Law J. Rep. (n.s.) Q.B. 319; 15 Q.B. Rep. 212.

Where under the 9 & 10 Vict. c. 95. s. 118. the Judge of a county court adjudicated in favour of a claimant, whose house had been broken and entered, and his goods seized and taken away as the goods of an

execution creditor in the county court,—Held, that the claimant was afterwards entitled to proceed in an action of trespass, for the special damage occasioned by the wrongful breaking and entry, but not for the trespass in taking away his goods. *Chater or Cater v. Chignell*, 19 Law J. Rep. (n.s.) Q.B. 520; 15 Q.B. Rep. 217.

(5) *For Penalties under the Apothecaries Act.*

A plaintiff was brought in the County Court of C to recover 20*l.*, for practising as an apothecary without a certificate. The particulars of demand stated the cause of action to be that the defendant did, on the 17th of November A.D. 1849, and on divers other days and times, act and practise as an apothecary within the jurisdiction of the Court, that is to say, at U, in the county of C; U, in the county of N; O, in the county of C; and O, in the county of N, by then and there attending, and furnishing medicines for divers persons, to wit, S, P, A, and R, whereby the defendant has forfeited 20*l.* The Apothecaries Act, 55 Geo. 3. c. 194. s. 20, enacts, that any person who shall practise as an apothecary without having obtained a certificate, shall "forfeit for every such offence" 20*l.*:—Held, that whether the facts stated in the particulars amounted to four offences or one, the plaintiff could only recover 20*l.* in this proceeding, and that therefore, there was no ground for a prohibition. *The Apothecaries Company v. Burt*, 19 Law J. Rep. (n.s.) Exch. 334; 5 Exch. Rep. 363; 1 L. M. & P. 405.

(6) *For Balance of Account.*

A claim exceeding 20*l.* reduced by a set-off to a sum less than 20*l.*, is not within the jurisdiction of the county court, under the 58th section of the 9 & 10 Vict. c. 95, as a debt on balance of account; and therefore where an action for such a claim was brought in a superior court, leave was refused to the defendant to enter a suggestion under the 129th section to deprive the plaintiff of costs.

Semble—that if a balance leaving no more than 20*l.* due had been agreed on by the parties, the plaintiff ought to have sued in the county court. *Woodhams v. Newman*, 18 Law J. Rep. (n.s.) C.P. 213.

(7) *Splitting Demands, and Abandonment of Excess.*

The 63rd section of the Small Debts Act, 9 & 10 Vict. c. 95, enacts, "That it shall not be lawful for any plaintiff to divide any cause of action, for the purpose of bringing two or more suits in any of the said courts":—Held, that the term "cause of action" meant *cause of one action*, and was not limited to an action on one separate contract; that that definition, however, did not embrace all contracts executed, however unconnected and dissimilar in character, which could be included in one *indebitatus* count; but applied certainly to the cases of tradesmen's bills, in which one item was connected with another, in the sense that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form an entire demand.

Quere—Whether the 63rd section applies to all debts which can be comprised in one description in one count, *ex. gr.* for "goods sold."

Certain alleged agents of the defendant had given to several persons tickets for goods, which

goods were to be supplied by the plaintiff, and the latter had brought 228 actions in the county court against the defendant, in respect thereof, upon claims none of which exceeded 5*l.*, and many fell short of 20*s.*, the whole amounting to 303*l.* 19*s.*—The Court granted a prohibition.

Quære—Whether a prohibition would have been granted if the whole of the claims had amounted to 20*l.* only, and the items had been separated and sued for in the county court by separate plaints. *In re Grimby v. Aykroyd*, 17 Law J. Rep. (N.S.) Exch. 157; 1 Exch. Rep. 479; 5 Dowl. & L. P.C. 701.

A debt above 20*l.*, being due from the defendant to the plaintiff, the levying of a plaint in the county court for an item less than 20*l.* is not of itself an abandonment of the excess by the plaintiff.

Semble—that to constitute an abandonment under the 9 & 10 Vict. c. 95. s. 63. the plaintiff should do some act of abandonment in court.

The plaintiff sold goods to the defendant for 17*l.*, and sent him in a bill, and then sold another parcel for 21*l.* 10*s.*, and sent in a bill for 38*l.* 10*s.*, the amount of both purchases. Afterwards he levied a plaint in the county court for 17*l.* the price of the first parcel, but did not appear at the hearing. The defendant, however, appeared, and admitted the debt, and judgment was given for the plaintiff. The plaintiff, subsequently, brought an action in the superior court for 21*l.* 10*s.*, the price of the second parcel of goods. The defendant pleaded the proceedings in the county court, and that the plaintiff had abandoned the excess:—Held, that there was no abandonment of the excess on the proceedings as above stated. *Vines v. Arnold*, 19 Law J. Rep. (N.S.) C.P. 98.

The plaintiff brought two suits against the defendant in the county court, one for 19*l.* 0*s.* 8*d.* for money lent between the years 1846 and 1850 and interest, the other for 19*l.* 19*s.* for work and labour and goods sold and delivered between the years 1845 and 1850. It did not appear that the items in the two suits were connected, nor that the parties had ever treated them as forming one demand:—Held, that the plaintiff had not divided any cause of action within the meaning of the 9 & 10 Vict. c. 95. s. 63.

The particulars of demand in one of the suits shewed that the plaintiff reduced his claim, which exceeded 20*l.*, below that sum by giving credit to the defendant for 8*l.*:—Held, that the Judge had jurisdiction to inquire whether the defendant had consented to the plaintiff's claim being so reduced, and that such consent need not be stated in the particulars of demand. *Kimpton v. Willey*, 19 Law J. Rep. (N.S.) C.P. 269; 1 L. M. & P. 280.

The defendant was indebted to the plaintiff for liquors supplied and money lent at different times. The plaintiff had been in the habit of marking down the separate items, and afterwards entering them in his book as one account, and sent the defendant an account including the whole, amounting to 36*l.* 10*s.* 4*d.* The plaintiff levied a plaint in the county court for 20*l.* for goods sold; the particulars of demand comprising no items for money lent. Having recovered judgment and obtained payment of this amount, he levied another plaint for 5*l.* 1*s.* 6*d.* for money lent, being the amount of the loans in-

cluded in the account of 36*l.* 10*s.* 4*d.* At the hearing of the first plaint there was no abandonment:—Held, that these were distinct demands, and that there was no ground for a prohibition. *Brunskill v. Powell*, 19 Law J. Rep. (N.S.) Exch. 362; 1 L. M. & P. 550.

(c) Concurrent Jurisdiction.

By a charter of 33 Edw. 1. (confirming the common law) working tinnars within the stannaries of Cornwall have the privilege of being sued only in the court of the vice-warden of the stannaries in certain causes there mentioned; and the same charter also contains a grant that the warden or vice-warden may hold pleas between the persons and in the causes there specified. By the County Courts Act (9 & 10 Vict. c. 95. s. 67.) "no privilege (except as thereafter excepted) shall be allowed to any person to exempt him from the jurisdiction of the county court," and by section 141, "nothing in this act contained shall be construed to affect the lord warden or vice-wardens of the stannaries in Cornwall; but this provision shall not be deemed to prevent the establishment of any court under this act within the said stannaries, or to limit or affect the jurisdiction of any court so established":—Held, that the effect of these enactments was to take away the personal privilege of the tinner to plead to the jurisdiction of the county court, but to preserve to the court of the vice-warden of the stannaries a concurrent jurisdiction in cases which were cognizable by him under the charter. *In re Newton v. Nancarrow*, 19 Law J. Rep. (N.S.) Q.B. 314.

A clerk in the Privy Council Office is not a person carrying on a "business" within the meaning of the 128th section of the Small Debts Act, 9 & 10 Vict. c. 95. *Sangster v. Cave*, 19 Law J. Rep. (N.S.) Exch. 314.

(d) Ouster of Jurisdiction.

(1) To grant Warrant of Possession.

Where a tenant, after notice to quit, refuses to deliver up possession of the premises occupied by him, and a plaint has been entered in, and a summons thereupon issued out of, the county court, under the 9 & 10 Vict. c. 95. s. 122, the fact of the tenant appearing to such summons, and shewing cause, is not sufficient to oust the county court of its jurisdiction to grant a warrant of possession; but it is for that Court to determine whether the cause shewn is sufficient or not.

So also the question, whether such tenancy has been "duly determined by a legal notice to quit," is one upon which the decision of the county court is conclusive upon the parties. *In re Fearon v. Nowall or Norvall*, 17 Law J. Rep. (N.S.) Q.B. 161; 5 Dowl. & L. P.C. 439.

[And see *ante*, (a) (3).]

(2) By asserting Title.

If a plea asserting a title to the freehold be pleaded in the county court, the Court is immediately ousted of its jurisdiction, and should not proceed.

Therefore, where the defendant in replevin made cognizance for the taking of cattle, that the place in which they were taken was the soil and freehold

of the corporation of the city of Y, and that he, as their bailiff, took them damage feasant, to which the plaintiff pleaded that the defendant was not such bailiff, and did not take them as such bailiff, on which issue was joined; after verdict and judgment for the plaintiff in the county court, it was held, that such judgment was erroneous. *Tinnisswood v. Pattison*, 15 Law J. Rep. (N.S.) C.P. 231; 3 Com. B. Rep. 243.

Under the 58th section of the 9 & 10 Vict. c. 95. the jurisdiction of the county court is not ousted by a mere claim of title, unless such claim appears upon the pleadings. Upon a parol claim it is the duty of the Judge to inquire and decide whether the title really is in question; but his decision is not final, for if the superior Court be satisfied that the title did come in question, a prohibition will be granted. *Lilley v. Harvey*, 17 Law J. Rep. (N.S.) Q.B. 357.

The jurisdiction of the county court is not excluded in an action of trespass *quare clausum fregit*, by a claim of the defendant, as an inhabitant of B, to enter the plaintiff's land for the purpose of asserting a right of fishing there. For, first, a custom for all the inhabitants of B, as such, to enter the close of the plaintiff, and take fish there without limit, is bad; and, secondly, the right claimed under such a custom is not a hereditament, and therefore not within the proviso in the 9 & 10 Vict. c. 95. s. 58. *Lloyd v. Jones*, 17 Law J. Rep. (N.S.) C.P. 206; 5 Dowl. & L. P.C. 784; 6 Com. B. Rep. 81.

A local act of parliament empowered trustees to build a church and to make rates on all houses in the parish, one half on the landlords, the other half on the tenants. It was also enacted, that the tenants should first pay the whole rate and deduct a moiety out of the rent, and that every landlord should allow of such deduction "notwithstanding any agreement to the contrary." After the passing of this act, certain premises in the parish were leased, the tenant covenanting to pay all rates and taxes. The landlord having refused to deduct half the church-rate from the rent, on the ground that the act extended only to agreements in existence at the time of its passing, the plaintiff served him with a writ of prohibition, "the title to any corporeal or incorporeal hereditaments" within the Small Debts Act, 9 & 10 Vict. c. 95. s. 58, not being in question; and *semble*, per Parke, B.,—that the local act did not apply to agreements entered into subsequently to the time of its passing. *In re Gwynne v. Knight*, 17 Law J. Rep. (N.S.) Exch. 168; 1 Exch. Rep. 802.

A plea of not possessed, to an action of trespass *quare clausum fregit*, takes the case out of the jurisdiction of the new county courts. *Timothy v. Farmer*, 7 Com. B. Rep. 814.

Where, in a claim of debt (as in use and occupation) under 20l. in a county court, it is alleged that the title to land comes in question in the action, the Judge has power to inquire into and determine that point; but if he decides that title does not come in question, and the fact is otherwise, a prohibition will lie.

A declaration in prohibition stated that A sued a plaintiff out of the county court against B, for use and occupation of a field, that B insisted that the

Court had not cognizance of the plaintiff, because the title to the field was in question, and that in truth the title to the field was in question, but that the Judge proceeded to hear and determine the plaintiff. The plea stated that on B's insisting that the title was in question, A denied it; and that the Judge, after hearing the evidence and arguments on both sides, decided that the title was not in question, and proceeded to hear and decide the case, and that on the hearing neither party adduced any evidence or argument other than those adduced before. On general demurrer it was held, that the plea was bad; for that it either admitted that the title was in fact in question, in which case the opinion of the Judge that it was not so would not give him jurisdiction under the 9 & 10 Vict. c. 95. s. 58, or it set up the decision of the Judge on that question as conclusive, which it is not, but is open to review by prohibition. *Thompson v. Ingham*, 19 Law J. Rep. (N.S.) Q.B. 189; 1 L. M. & P. 216.

The plaintiff brought a plaintiff in a county court against the defendant for an injury to his reversion, alleging that the defendant had cut down some trees and pulled down a fence separating a garden, occupied by the plaintiff's tenant, from a garden of the defendant, and had erected a new fence encroaching on the plaintiff's land. Before the case came on to be heard, before the county court Judge, the defendant moved for a prohibition, on the ground that the title to the land was in question in the plaintiff. The defendant's affidavit alleged that the fence and trees cut down by him were on his own land, and that the new fence had not passed the boundary of his garden. The plaintiff's affidavit supported the charge in the plaintiff:—Held, that the defendant was entitled to a prohibition, as the title to the land was clearly in question, and that in this instance, it was no objection to the issuing of the writ that the defendants had not first applied to the Judge of the county court to stay the proceedings on the ground that the title was in question. *Sewell v. Jones*, 19 Law J. Rep. (N.S.) Q.B. 372; 1 L. M. & P. 525.

(e) *Excess of Jurisdiction.* [See PROHIBITION.]

Where a cause in the county court is tried by a jury, the Judge has no power to alter their verdict.

A cause having been heard, an entry was made of judgment for the defendants. The defendants then left the court; and subsequently, and as the defendants swore they believed, after the Court had broken up, the Judge rescinded his decision, and ordered a new trial, on which occasion he gave judgment for the plaintiff. The affidavits in answer did not shew affirmatively when the alteration had been made, but a copy of the entry in the register was produced, in which it was stated to have been at the same court:—Held, on application for a prohibition, that the Judge had exceeded his jurisdiction, and the rule for a prohibition was made absolute. *In re Jones v. Jones*, 17 Law J. Rep. (N.S.) Q.B. 170; 5 Dowl. & L. P.C. 628.

(f) *How shewn in Pleading.*

A declaration stated that the defendant, on, &c. within the jurisdiction of an inferior Court, was indebted to the plaintiff for the price and value of goods sold, and money lent, &c., and for money found to be due from the defendant to the plaintiff

on an account then stated between them, which several monies were to be then and there paid on request:—Held, ill, on writ of error. *Cook v. M'Pherson*, 15 Law J. Rep. (N.S.) Q.B. 283; 8 Q.B. Rep. 1030.

To a declaration in debt for goods sold, the defendant pleaded, first, that in an action brought by the now defendant in the County Court of W against the now plaintiff, the now plaintiff then set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15*l.*; that it was adjudged that the now defendant was not indebted to the now plaintiff in the said sum of 15*l.* or any part thereof, and that the now plaintiff had no claim against the now defendant: averment, of the identity of the two debts. Replication, that by the rules of the county court, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court, and that the now plaintiff did not give such notice:—Held, on demurrer that the replication was good.

The defendant pleaded, secondly, that in the County Court of E, holden at W, before J H K, the Judge of the court, and within the jurisdiction of the said Court, the now defendant recovered against the now plaintiff a certain debt of 10*l.* 6*s.* 8*d.* due to the now defendant from the now plaintiff, within the jurisdiction of and recoverable in the said court, and 5*l.* 15*s.* 4*d.* for his costs, by which judgment it was ordered that the now plaintiff should immediately pay the debt and costs to the now defendant, as by the record appears: verification by the record, and set-off of the above sums:—Held, on special demurrer, that the plea was bad. *Stanton v. Styles*, 19 Law J. Rep. (N.S.) Exch. 336; 5 Exch. Rep. 578; 1 L. M. & P. 575.

(C) POWER OF COMMITTAL.

On a return to a *habeas corpus*, it appeared that the prisoner, then being at Fleet Lane, in the city of London, had been summoned under section 1. of the 8 & 9 Vict. c. 127. (the Small Debts Act) to the sheriff's court of the city of London, and on appearance there had been ordered to pay the debt by instalments, and that on his making default in payment of one of the instalments, he was, without being again summoned, committed to the Queen's Prison, as the gaol where debtors are confined in the said city "where he hath been resident." (By *Patteson, J.*, and *Coleridge, J.*, and on a subsequent day by the Court of Common Pleas).—Held, that it was necessary that the debtor should have been summoned to shew cause against his committal; and by *Lord Denman, C.J.* and *Erle, J.* that such a summons was not necessary.

Held, also (by *Lord Denman, C.J.*, *Coleridge, J.*, and *Erle, J.*, dissentiente *Patteson, J.*), that the committal should be to the gaol of the district where the debtor resided when the proceedings commenced, and that the warrant was sufficient in this respect. *Ex parte Kinning*, 16 Law J. Rep. (N.S.) Q.B. 257; 10 Q.B. Rep. 730.

A party was committed under the 8 & 9 Vict. c. 127, by an order under the hand of a Judge of an inferior court (being a barrister-at-law,) for the term of forty days, to the common gaol where debtors under judgment and in execution of the superior courts of justice may be confined within

the county of Middlesex, in which he was then residing:—Held, that it was not necessary that the gaol in which he was imprisoned should be locally situate within the county of Middlesex, if it is the common gaol in which debtors resident within that county are confined.

Held, also, that the forty days would be calculated from the time when the party was taken into custody, and not from the date of the order.

Held, also, that the warrant need not be under seal.

Held, also, that the committal being in the absence of the party did not vitiate it. *In re Bowdler*, 17 Law J. Rep. (N.S.) Q.B. 243; 12 Q.B. Rep. 612.

The defendant in an action brought in the county court, was committed to prison for forty days, on a warrant which recited that judgment had been recovered against him; that having personally appeared and being present in court, he was examined as to the disposal of his property, and then the Judge found that he had made a gift, delivery, or transfer of his property, with intent to defraud his creditors, and therefore committed him. On cause being shewn against a rule nisi for a *habeas corpus*,—Held, that the warrant was good; that the case came within the 101st section of the 9 & 10 Vict. c. 95, and that the defendant being present at the hearing, and the examination taking place at that time, it was unnecessary to serve him with a summons under the 98th and 99th sections.

Held, also, that the commitment was not to be construed with the same strictness as a conviction, and was not bad for alleging the offence in the alternative. *Ex parte Purdy*, 19 Law J. Rep. (N.S.) C.P. 222; *nom. Ex parte Parry*, 1 L. M. & P. 118.

A warrant of commitment granted by the Judge of a county court, under the 9 & 10 Vict. c. 95. s. 113, recited that the party committed had wilfully insulted the Judge, who thereupon ordered him into custody; and it proceeded, "these are therefore to require you," &c. to deliver him to the keeper of the house of correction, to be kept for seven days in custody:—Held, that the warrant was good, and justified the Judge and the officers of the court in imprisoning the party; that it was unnecessary to shew what species of insult had been committed; and that the word "therefore" did not render it uncertain whether the commitment was for the insult, or because the Judge had ordered the party into custody.

Semble—that the county courts, constituted by the 9 & 10 Vict. c. 95. s. 113, are inferior courts. *Levy v. Moylan*, 19 Law J. Rep. (N.S.) C.P. 308; 1 L. M. & P. 307.

(D) LIABILITY OF JUDGE.

The Judge of a county court is not answerable at common law in an action of trespass for an erroneous judgment, or for the wrongful act of his officer done not in pursuance of, though under colour of a judgment, but he is responsible in an action for an act done by his command and authority when he has no jurisdiction.

In an action of trespass against a Judge of the county court of S in Lincolnshire, to which he pleaded only "Not guilty," the facts were, that the plaintiff being resident and carrying on his busi-

ness in Cambridgeshire had been sued, by leave of the Judge, in the County Court of S, where judgment was given against him by default. A summons under the 9 & 10 Vict. c. 95, s. 98, was, afterwards, and while the defendant resided and carried on his business in Cambridgeshire, issued by order of the defendant, calling on the plaintiff to appear at the County Court of S. to be examined as to his not paying debt and costs, &c. This summons was served on the plaintiff in Cambridgeshire, and on his non-appearance at S, the defendant, *bonâ fide* believing that he had power to do so, made a minute in his book ordering the plaintiff to be committed to Cambridge gaol, and he was so committed accordingly:—Held, that the commitment was without jurisdiction, and that the defendant must be taken to be aware of the want of jurisdiction, and was, therefore, liable in trespass. *Houlden v. Smith*, 19 Law J. Rep. (N.S.) Q.B. 170.

(E) MATTERS OF PRACTICE.

(a) Removal of Cause into the Superior Courts.

A case commenced by *justices* in the County Court of Durham cannot be removed by *pone* into any of the superior courts at Westminster. *Robinson v. Mainwaring*, 16 Law J. Rep. (N.S.) Q.B. 223; 10 Q.B. Rep. 274.

An application under the 121st section of the County Courts Act, 9 & 10 Vict. c. 95, to remove a cause from the county court into a superior court, ought to be made to a Judge at chambers, and not to the Court. *In re Bowen v. Evans*, 18 Law J. Rep. (N.S.) Exch. 38; 3 Exch. Rep. 111.

The application, under section 90, of the 9 & 10 Vict. c. 95, to remove a cause from a county court into one of the superior courts, must be made to a Judge at chambers, and not to the Court. *Robertson v. Womack*, 19 Law J. Rep. (N.S.) Q.B. 367; 1 L. M. & P. 490.

(b) Process.

(1) *Teste*.

Justification under a writ out of an inferior court, tested on a day not being a court day, is bad. *Humphries v. Longmore*, 17 Law J. Rep. (N.S.) C.P. 328; 6 Com. B. Rep. 363.

(2) *Proof of Service of Summons*.

The 11th rule of practice under the County Courts Act, 9 & 10 Vict. c. 95, requires that where the service of a summons has not been personal, it must be proved to the satisfaction of the Judge that the service of such summons came to the knowledge of the defendant ten clear days before the return day of the summons:—Held, on motion for a prohibition, that the sufficiency of the proof of service is entirely a question for the discretion of the Judge of the county court, and that a superior court will not interfere where he has exercised such discretion.

Semble, per Coleridge, J., that the observance of such rule of practice is not a condition precedent to the jurisdiction of the county court in a case otherwise within its jurisdiction. *In re Zohrab v. Smith*, 17 Law J. Rep. (N.S.) Q.B. 174; 5 Dowl. & L. P.C. 635.

(3) *Summons to save the Statute of Limitations*.

The plaintiffs described the defendant in a

summons out of the county court as executor of A B, and on the defendant's appearance opened the case against him as executor of C D. The cause of action having accrued in 1842, the Judge directed a fresh summons to be issued, describing the defendant as executor of C D, and bearing the same date as the first summons, in order to save the Statute of Limitations:—Held, that it was not a case in which this Court ought to interfere with what the Judge had done. *Re the Westminster County Court of Middlesex, Foster v. Temple*, 17 Law J. Rep. (N.S.) Q.B. 230; 5 Dowl. & L. P.C. 655.

(c) *Certificate of probable Cause*.

The statute 23 Geo. 2. c. 30, establishing a court of requests for the district of the Tower Hamlets, enacts, that if a person liable to be summoned for a debt cognizable in the court of requests, be sued in one of the superior courts for such debt, and it shall appear to the Judge or Judges of such court that the debt did not amount to 40s., and the defendant prove by sufficient evidence to be allowed by any Judge or Judges of that court, that he was resident within the district, and liable to be summoned to the court of requests for the debt, the Judge or Judges shall not allow the plaintiff his costs, but the plaintiff shall pay the defendant his costs; provided that in any action in the superior courts, if the Judge or Judges who try the cause shall certify there was probable or reasonable cause of action for 40s. or more, the plaintiff shall not be liable to pay costs, but shall recover them. By a subsequent section, it is enacted, that no action or suit for any debt not amounting to 40s., and recoverable in the court of requests, shall be brought in any other court whatsoever. An action of debt having been brought in this court against a person resident within the district, the defendant omitted to plead the statute, and the case was tried before the sheriff, when the plaintiff recovered less than 40s. There was reasonable cause of action for more, but the sheriff, not having the power, refused to certify:—Held, that the defendant had an option of pleading under the prohibitory clause, or applying to enter a suggestion; and that he was not precluded from the latter course by the circumstance that the case was tried before a person incompetent to grant a certificate. *Capes v. Jones*, 15 Law J. Rep. (N.S.) C.P. 209; 2 Com. B. Rep. 911.

(d) *Execution*.

Where it was the practice of an inferior court for the officer of the court, on a verdict for either party, to issue execution in case of non-payment, and levy the amount,—Held, that the fact of the plaintiff's bringing his plaint, and not countermanding the execution, was evidence of his having impliedly authorized the execution. *Coomer v. Latham*, 16 Law J. Rep. (N.S.) Exch. 175; 16 Mee. & W. 713.

Judgment was given in the county court for the plaintiff, and the entry was judgment for the plaintiff, payment to be made within a week of the decision of a cause in the superior court. Subsequently the cause in the superior court was discontinued, and a judgment summons under section 98, was then issued, upon the hearing of which the former order for payment was rescinded, and a fresh order made:—Held, that the proceedings were valid, the order

as to payment being only a suspension of execution and not a part of the judgment. *Byrne v. Knips*, 18 Law J. Rep. (N.S.) Q.B. 33; 5 Dowl. & L. P.C. 659.

(e) *Notice of Claim in Interpleader Cause.*

By the 9 & 10 Vict. c. 95. s. 118, if any claim is made to or in respect of goods taken in execution, an interpleader summons may issue, upon which the Judge of the county court is to adjudicate upon the claim. By the 39th rule of practice, framed under section 78, the claimant shall, five days before the day on which the summons is returnable, deliver a particular of any goods and chattels alleged to be the property of the claimant, and the grounds of his claim:—Held, that a notice stating merely that the goods taken were the property of the claimant and not of the execution debtor, was insufficient, and that the Judge was right in refusing to adjudicate upon the claim. *Ex parte Tanner, in re Cullum v. Ross*, 19 Law J. Rep. (N.S.) Q.B. 318.

(f) *Attornies practising in the County Courts.*

(1) *Must sign the Roll.*

Quære—Whether, in order to enable an attorney of the superior courts to practise in the county court, it is necessary for him to sign the roll there, under the 6 & 7 Vict. c. 73. s. 27. *Clutterbuck v. Hull*, 15 Law J. Rep. (N.S.) Q.B. 310.

(2) *To what Fees entitled.*

The clause of the statute, 9 & 10 Vict. c. 95. s. 91, which limits the sum to be had or recovered by an attorney for appearing and acting in the county court, applies to costs recoverable by the attorney from his client as well as to costs taxed between party and party; and to everything done by an attorney in regard to a suit in that court, whether before, at, or after the hearing.

Costs above the limited amount are not recoverable against the client, though the attorney and he are parties to a prospective general agreement for allowance of such costs on proceedings to be had in the county court by the persons entering into such compact. *In re Clipperton*, 12 Q.B. Rep. 637.

The enactment of the statute 9 & 10 Vict. c. 95. s. 91, that an attorney shall not have or recover more than 15s. for appearing or acting in the county court, is confined to charges for business done in court, and does not prevent the attorney from recovering beyond that amount for services out of court in advising or getting up the case in which he appeared and acted. *In re Foley*, 12 Q.B. Rep. 694.

The 91st section of the County Courts Act, 9 & 10 Vict. c. 95, which provides that no attorney shall have or recover for acting in behalf of any other person in the county courts, any sum where the debt or damages does not exceed 40s., or shall have or recover more than 10s. for his fees and costs where the debt or damage does not exceed 5l., or more than 15s. in any other case, does not apply to services rendered by an attorney in the conduct of a suit out of court and before its commencement. *In re Toby*, 19 Law J. Rep. (N.S.) Q.B. 503; 1 L. M. & P. 426.

The 9 & 10 Vict. c. 95. s. 91. enacts, "that no attorney shall be entitled to recover any sum of

money for appearing or acting on behalf of any other person in the said court, unless the debt or damage claimed shall be more than 40s., or to recover more than 10s. for his fees and costs unless the debt or damage claimed shall be more than 5l. or more than 15s. in any case within the summary jurisdiction given by this act."—Held, that an attorney has a right to be paid a reasonable amount for work done out of court before the commencement of a suit, and that a fair sum for such labour should be allowed by the Master on taxation. *In re Keighley, Keighley v. Goodman*, 19 Law J. Rep. (N.S.) C.P. 166; 1 L. M. & P. 204.

(g) *Procedendo.*

In January 1845, the defendants in an action in the Lord Mayor's Court removed it by *habeas* into this court. No bail was put in above, nor any proceeding whatever taken until April 1846, when the plaintiff obtained the ordinary rule, *ex parte*, for a writ of *procedendo*, unless the defendants put in bail in four days. No bail was put in, and the *procedendo* issued.—The Court refused an application, on the part of the bail below, to set aside the *procedendo* for irregularity. *Blanchard v. De la Crouée*, 16 Law J. Rep. (N.S.) Q.B. 181; 9 Q.B. Rep. 869.

(h) *Judgment.*

[See title JUDGMENT.]

(i) *Proceedings after Judgment of Assets Quando.*

After judgment of assets "*quando acciderint*," on a plea of *plene administravit* in the county court, the proper method of proceeding for assets received from the defendant since plea pleaded, is not by a suggestion of a *devastavit*, but by a summons stating the judgment *quando*, and suggesting assets after plea pleaded. *Ellis v. Watt*, 19 Law J. Rep. (N.S.) C.P. 113.

(k) *Waiver of Objections.*

On motion for a new trial on a plaint in the county court, which had been tried by the Judge alone, the Judge ordered that the second trial should be had before a jury, and that the costs of the application should be paid to the party opposing the application:—Held, that whether the Judge had power to make such order or not, the opposing party had, by accepting such costs, precluded himself from afterwards objecting to the order. *Sparrow v. Reed*, 17 Law J. Rep. (N.S.) Q.B. 183; 5 Dowl. & L. P.C. 633.

The acceptance of costs under a Judge's order, which otherwise could not have been received at all, or the whole or part of which could not have been received so soon, is a waiver of any objection to the order for want of jurisdiction.

Quære—Whether, under the 118th section of the 9 & 10 Vict. c. 95, which empowers the Judge of the county court to adjudicate on all claims "to or in respect of" goods taken in execution under process from that court, and authorizes a Judge of the superior court to stay any action in respect of such claim, extends to trespasses committed in executing the process. *Semble*—that it does, *Platt, B. dissentiente. Tinkler v. Hilder*, 18 Law J. Rep. (N.S.) Exch. 429.

The defendant, who resided out of the jurisdiction of the C County Court, was served with a summons on the part of the plaintiff, dated the 3rd of January 1850, calling on him to appear before that county court on the 25th of January. The defendant was served at the same time with an order of the Judge of that court, dated the 30th of October 1847, giving the plaintiff leave to issue a summons. It did not appear whether any plaint had been levied before the making of that order. On the 19th of January the defendant left a notice with the clerk of the county court, stating that he intended to rely on the Statute of Limitations as a bar to the action.—This Court refused an application of the defendant for a prohibition to prevent the Judge of the county court from proceeding in the suit: because, assuming it to be doubtful whether the order were valid and authorized the summoning of the defendant, the latter, by taking the step of serving the notice relying on the Statute of Limitations, had waived the right of examining into the regularity of the process by which he had been summoned to appear. *In re Jones v. James*, 19 Law J. Rep. (n.s.) Q.B. 257; 1 L. M. & P. 65.

[And see (B) (b) (1).]

(1) *Costs.*

Practice as to costs where verdict entered in particular form to enable the plaintiff to take the opinion of the Court. *Smith v. Pritchard*, 19 Law J. Rep. (n.s.) C.P. 53.

(F) OFFICERS.

(a) *Appointment and Removal of.*

A held the office of clerk of a small debts court under a local act, and B, his son, who was in partnership with him as an attorney, performed the duties, and at the time of the coming into operation of the statute 9 & 10 Vict. c. 95, acted as A's deputy, in consequence of A's being permanently disabled by sickness:—Held, that B was not a person entitled to be appointed the first clerk under the 9 & 10 Vict. c. 95, s. 34, either in respect of his holding the office or performing the duties of clerk. *Regina v. Edye, in re Bishop*, 18 Law J. Rep. (n.s.) Q.B. 6; 12 Q.B. Rep. 936.

A party, removed from the office of clerk of a county court by the Judge of the court, with the approval of the Lord Chancellor, under the 9 & 10 Vict. c. 95, s. 24, for alleged inability, is entitled to try the validity of such removal by a proceeding in the Court of Queen's Bench.

And where, in a *quo warranto* information for that purpose, the jury found that the alleged inability upon which the party had been so removed consisted solely of great pecuniary embarrassment and want of money to pay his debts, existing before and at the time of his removal,—Held, that such embarrassment did not amount to "inability" within the meaning of the 9 & 10 Vict. c. 95, s. 24, and therefore that the party had been improperly removed. *Regina v. Owen*, 19 Law J. Rep. (n.s.) Q.B. 490.

(b) *Liability of.*

The clerk of a county court, established under the 9 & 10 Vict. c. 95, is personally liable upon a contract made by him with a builder, to fit up a hall and offices, in which the business of the county

court is to be transacted. *Autey v. Hutchinson*, 17 Law J. Rep. (n.s.) C.P. 304; 6 Com. B. Rep. 266.

Judgment having been recovered against T S, jun. in the Lambeth County Court, and a warrant issued for his commitment, the warrant was sent to the clerk of the Southwark County Court, who issued it to the high bailiff of that court to execute. Two bailiffs of the Southwark County Court proceeded to the plaintiff's factory to search for T S, jun.; they broke in, and during the search one of them was assaulted by the plaintiff. They then left the factory, and soon after returned and gave the plaintiff into custody for having assaulted them in the execution of their duty, and he was taken before a magistrate. The plaintiff declared in trespass against the high bailiff of each county court and the two bailiffs. The declaration contained two counts, first, for breaking and entering the factory, &c., secondly, for assault and false imprisonment:—Held, that the high bailiff of the Southwark County Court and the two bailiffs were liable on the first count; that the bailiffs were acting under colour of the writ when they broke and entered the factory, and so the high bailiff was liable for the acts of his officers. That the high bailiff was not liable on the second count; that the bailiffs were not then acting under colour of the writ, but by virtue of the 9 & 10 Vict. c. 95, which, by section 114, gives a bailiff power to arrest when assaulted in the execution of his duty. *Smith v. Pritchard*, 19 Law J. Rep. (n.s.) C.P. 53.

(G) COURTS BARON.

The proceedings in a court baron for the recovery of a debt stated the court to have been held "before W K, Esq. the steward of the said court, and W U and W M, and others, free suitors of the said court:—Held, that it need not appear in the proceedings of a court baron that the steward of the court was also steward of the manor.

Held, also, that the style of the court was properly described and that it was not necessarily to be inferred that the steward of the court also acted as a Judge in the course of its proceedings.

Held, also, that it was sufficient to set forth the names of two of the suitors only; and that the names of the other suitors who attended need not be stated.

Semble, also, that a plaint in a court baron need not describe the nature of the demand; and held that, at all events, the omission was a mere irregularity, which the party waived by appearing and pleading to a declaration specifying a demand within the jurisdiction of the court. *Brown v. Gill*, 15 Law J. Rep. (n.s.) C.P. 187; 3 Dowl. & L. P.C. 823; 2 Com. B. Rep. 861.

INFORMATION.

[See CHARITY, Information by the Attorney General—JUSTICE OF THE PEACE—MUNICIPAL CORPORATION ACT, Borough Rate—REVENUE—WITNESS.]

INHERITANCE ACT.

Real estate was devised to A for life, with remainder to B in fee. B died in 1821, in the lifetime of A, leaving C and D her co-heiresses-at-law. C died in 1824, in the lifetime of A, without having in any manner dealt with the property, leaving a son E.—Held, that it was not necessary to trace the descent as to C's moiety from B, but that E, for every purpose, ought to be taken as standing in C's place with reference to that moiety. *Paterson v. Mills*, 19 Law J. Rep. (N.S.) Chanc. 310.

The statute 3 & 4 Will. 4. c. 106. leaves the law of inheritance, in cases absolutely plain, as it found it, and was intended only to lay down rules where any doubt exists. And where G T, being seised in fee of certain hereditaments, died intestate, leaving two daughters, Ellen and Sarah, and both daughters died intestate, each leaving a son, it was held the statute did not apply, and that the moiety of each daughter descended upon her son. *Cooper v. France*, 19 Law J. Rep. (N.S.) Chanc. 313.

INJUNCTION.

[See PARTIES TO SUITS—PATENT—PRACTICE, IN EQUITY—COMPANY—COPYRIGHT—COPYHOLD—LANDS CLAUSES CONSOLIDATION ACT.]

(A) SPECIAL INJUNCTION.

(a) *When granted or decreed.*

(1) *Generally.*

(2) *To protect a legal Right.*

(3) *To restrain the Removal of Documents.*

(4) *To restrain the improper Application of Funds.*

(b) *When refused or dissolved.*

(B) TO RESTRAIN PROCEEDINGS AT LAW.

(a) *Before Verdict.*

(b) *To stay Judgment or Execution.*

(C) BREACH OF.

(D) PRACTICE.

(a) *Application for Injunction.*

(b) *Extending the Injunction.*

(c) *Dissolving the Injunction.*

(d) *Retaining the Bill.*

(e) *Costs.*

(A) SPECIAL INJUNCTION.

[See PATENT, Infringement.]

(a) *When granted or decreed.*

(1) *Generally.*

[See *Spottiswoode v. Clarke*, 2 Ph. 154.]

Where the title to land is in dispute, the Court of Exchequer will not grant an injunction to restrain an act of trespass, but only to prevent an irreparable injury. The Court, therefore, refused an injunction to restrain the owner in fee of a piece of land claimed by the Crown, but denied by the owner to be part of a royal forest, from cutting down holly trees and underwood therein, in the manner in which they had been ordinarily cut down for twenty years previously. *Attorney General v. Hallett*, 16 Law J. Rep. (N.S.) Exch. 131; 16 Mee. & W. 569.

The provisional directors of a joint-stock company having, without the authority of the plaintiff, published a prospectus, stating him to be a trustee of the company, were restrained by injunction. *Routh v. Webster*, 10 Beav. 561.

Special injunction to prevent a place of worship being used otherwise than according to the trusts on which it was founded. *Attorney General v. Welsh*, 4 Hare, 572.

A tenant for life, without impeachment of waste, pulled down a mansion-house and rebuilt it in a more eligible situation, and this act was not complained of by the remainder-man. But an injunction was granted to restrain the tenant for life from destroying timber which had formed an ornament and shelter to the original mansion. *Morris v. Morris*, 16 Law J. Rep. (N.S.) Chanc. 201; 15 Sim. 505.

The Court of Chancery, in the exercise of its jurisdiction in cases of fraud, has power to restrain the East India Company from paying over the principal money and interest secured upon East India bonds. *Glasse v. Marshall*, 15 Law J. Rep. (N.S.) Chanc. 25; 15 Sim. 71.

A railway company, without leave of the Court, took proceedings, under the Lands Clauses Act, to take possession of lands in the hands of the receiver under the court. On an *ex parte* motion, they were restrained. *Tink v. Rundle*, 10 Beav. 318.

Where a work is going on which, though not in itself a nuisance, will manifestly end in operations presenting such a nuisance as the Court restrains, an injunction will be granted at once; *secus*, where the nuisance is only contingent. *Haines v. Taylor*, 10 Beav. 75.

Contractors agreed to perform works for a railway company within a certain time, and were to be paid from time to time for the work certified by the company's engineer to have been duly performed. In default, the company were to be at liberty to take possession of the works and of all the contractor's plant and materials. Some delay in performing the works was occasioned by the acts of the engineer, not repudiated by the company, and the rate of proceeding with them was distinctly varied by him. The company afterwards gave notice to the contractors that they were not proceeding to the satisfaction of the company, and they soon afterwards took possession of the plant and materials. The contractors filed a bill, alleging that certificates had been unjustly withheld, and the payments had improperly fallen into arrear; and it prayed that accounts might be taken of what was due to them, and for an injunction to restrain the company from taking the works and plant. A demurrer, for want of equity, was overruled. *Waring v. Manchester, Sheffield and Lincolnshire Rail. Co.*, 2 Hall & Tw. 289.

Disputes having arisen between a railway company and a contractor employed in making the railway, the company, insisting upon a right under the contract, owing to the alleged default of the contractor, to discharge him, take possession of the line and materials, and complete the works themselves, and the contractor resisting such claim, imputing the backward state of the works to the acts of the company, and holding forcible possession, collisions occurring between the workmen of the

two parties, each being charged with impeding the operations of the other, and the completion and opening of the railway for traffic being in the mean time delayed, the Court, on the application of the company, restrained the contractor from continuing on the line or interfering with the operations of the company, directed an account of what was due to the contractor for works and materials done and provided, without regard to the formal certificates of the company's engineer, and an issue to try whether the company, at the time they proceeded to enter upon the works and remove the contractor, were lawfully justified in so doing; reserving as well the question of the right of the contractor to compensation for loss of profit on unexecuted works, as all other directions, until after the trial and the report. *East Lancashire Rail. Co. v. Hattersley*, 8 Hare, 72.

A being seised in fee of a house and piece of open land near it, sold and conveyed the house to B, and covenanted for himself, his heirs and assigns, with B, his heirs and assigns, that no building whatever should at any time be erected on the piece of land. He afterwards sold and conveyed the piece of land to M in fee, and took a covenant from him in the terms of that into which he had himself entered with B. The house, after divers mesne conveyances, became vested in X in fee; and the piece of land after one mesne conveyance became vested in Y in fee. Y, before the land was conveyed to him, had notice of the covenant, but nevertheless began building on the land. The Court, at the suit of X, restrained him from continuing the building. *Mann v. Stephens*, 15 Sim. 377.

If an agreement consist of two distinct parts, one of which the Court can enforce but not the other, and a bill is filed simply for an injunction to restrain the violation of the former part, the Court will grant the injunction, notwithstanding it would not enforce the agreement *in toto*. *Rolfe v. Rolfe*, 15 Sim. 88.

Order made in a summary way to restrain a person, not a party to the suit, to whom the receiver had let a farm, part of the estates in the cause, from removing hay, straw, &c. therefrom. *Walton v. Johnson*, 15 Sim. 352.

(2) To protect a legal Right.

[See *Stevens v. Keating*, 2 Ph. 333.]

The plaintiff, who was a composer of music and a public singer, composed certain songs and published them with words, the copyright in which had been assigned to him. The plaintiff then performed the songs in public. An injunction was granted to restrain the defendant, who was also a singer, from publicly performing, singing, or reciting the words or music of these compositions. *Russell v. Smith*, 15 Law J. Rep. (N.S.) Chanc. 340; 15 Sim. 181.

The defendant sold a medicine similar to one sold and invented by the plaintiff, and on his labels used the plaintiff's name and certificates in such a way as *prima facie* to apply and appropriate them to his own medicine:—Held, that, although there were other differences, the proceeding was wrongful, and an injunction was granted. *Franks v. Weaver*, 10 Beav. 297.

The right to be protected in the use and enjoy-

ment of property, in specie, is not confined to articles possessing some peculiar or intrinsic value, but extends to all cases where one standing in a fiduciary character has obtained possession of chattels through an alleged abuse of power. *Wood v. Rowcliffe*, 17 Law J. Rep. (N.S.) Chanc. 83; 2 Ph. 382.

In 1808 the plaintiff was the owner in fee simple of a piece of ground forming a public square in London, and also of several houses in the same square. He conveyed the piece of ground to E in fee simple, and E covenanted for himself, his heirs, executors, administrators and assigns, with the plaintiff, his heirs, executors and administrators, to keep this piece of ground and the iron railing round the same in its then present form and in proper repair, as a pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order, and that the plaintiff and his tenants might have keys at their own expense, and the privilege of admission therewith into the pleasure ground. The neighbourhood of the square had become thickly populated, and a thoroughfare had been made through it by act of parliament. The piece of ground had become greatly neglected, and was in a ruinous condition, and for many years neither the plaintiff nor his tenants had used or claimed to use it as a pleasure garden. The defendant, who claimed by purchase under E, removed some of the iron railings, and intended to make foot-paths across the ground, and claimed the right of building thereon:—Held, that this was a breach of the covenant, and he was restrained by injunction, although the plaintiff had not established the validity of the covenant at law, as binding upon the assignee of the land. *Tulk v. Moxhay*, 18 Law J. Rep. (N.S.) 83; 11 Beav. 571; 2 Ph. 774; 1 Hall & Tw. 105.

(3) To restrain the Removal of Documents.

Injunction granted before answer to restrain defendants from parting with documents in their possession belonging to the plaintiff and from preventing the plaintiff and his solicitor from having access to the documents. *Goodall v. Goodall*, 16 Sim. 316.

Injunction decreed to restrain a solicitor from communicating to a party who was suing a former client documents or matters of evidence which had come to the possession or knowledge of the solicitor in respect of his employment for such client, and to restrain the party suing from using in his action or otherwise any documents or matters of evidence which he had so obtained. *Lewis v. Smith*, 1 Mac. & G. 417.

An injunction granted to restrain the defendant, who removed the partnership books from the place of business, from keeping them at any other place. *Greatrex v. Greatrex*, 1 De Gex & S. 692.

(4) To restrain the improper Application of Funds.

The guardians of the poor of Southampton applied for an act of parliament to authorize the levying of poor-rates upon the owners instead of the occupiers of small tenements. The bill, which contained a proviso for payment of the costs incurred in promoting the same out of the poor-rates, was rejected. An injunction was granted to restrain

the guardians from paying these expenses out of the rates. *Attorney General v. Southampton (Guardians)*, 18 Law J. Rep. (N.S.) Chanc. 393; 17 Sim. 6.

A municipal corporation restrained by injunction from soliciting at the expense of the borough fund a bill for improving the navigation of a river flowing through the borough. *Attorney General v. the Corporation of Norwich*, 16 Sim. 225.

Injunction granted to restrain the Commissioners of Waterworks of Southampton from applying the water-rates levied under their act towards the expenses of obtaining a new act of parliament for extending their powers. *Attorney General v. Andrews*, 19 Law J. Rep. (N.S.) Chanc. 197; 2 Mac. & G. 225; 2 Hall & Tw. 431.

(b) *When refused or dissolved.*

The fact that a party is avowedly commencing operations for a purpose which another conceives to be injurious to him and illegal does not warrant an application for an injunction, unless the Court can form an opinion from the existing circumstances of the legality of the meditated purpose, or can put the question into the course of immediate trial. *Haines v. Taylor*, 2 Ph. 209.

A railway company having power to purchase a plot of land for their line, entered upon it for the purpose of surveying it, and dug a trig line or trench across it, but gave no notice to the owner of such entry, as required by the Lands Clauses Consolidation Act. Five days after the trig line was made, the owner discovered the fact, and nine days after such discovery filed a bill for an injunction. On the affidavits of the company that the survey was completed on the day when the trig line was made, and that they had no occasion to enter, and did not intend to enter, upon the land again until they had taken legal steps for permanently using it, the Court refused the injunction, but reserved the costs. *Fooks v. the Wilts, Somerset and Weymouth Rail. Co.*, 5 Hare, 199.

The proprietor of a pier was authorized by act of parliament to demand certain specified tolls for the use of the pier when completed. By an agreement between him and a railway company, he agreed to complete his pier earlier than he was bound to do by the act, and the company agreed to complete a branch railway to the pier at the same time, but the agreement contained no stipulations as to opening the pier or railway, or the terms on which the pier was to be used. The owner of the pier completed it accordingly, but refused to permit the railway company to use it except on terms to which they declined to accede. The Court refused to grant, on motion, an injunction restraining the owner of the pier from obstructing the use of it by the company at the statutory tolls. *Furness Rail. Co. v. Smith*, 1 De Gex & S. 299.

A, in consideration of B engaging him as his assistant at a salary, agreed not to practise as an apothecary in the town of M, nor within seven miles thereof, under a penalty of 500*l*. A being discharged by B, commenced practising at M. B then filed his bill against A, and moved for an injunction to restrain him from so practising, when the motion was ordered to stand over, with liberty to B to bring such action as he might be advised.

B brought his action for breach of the agreement, and recovered 500*l*. liquidated damages, together with the costs of the action, and afterwards proved for such costs under the bankruptcy of A, but not for the damages:—Held, that the legal contract being at an end by the judgment in the action and the proof under the bankruptcy, the plaintiff had no equity for an injunction. *Sainter v. Ferguson*, 19 Law J. Rep. (N.S.) Chanc. 170; 1 Mac. & G. 286; 1 Hall & Tw. 383.

Motion for an injunction to restrain the defendants from using the first three words in the title of their company, refused, upon the ground that no injury was likely to accrue to the plaintiffs. *London and Provincial Law Assurance Society v. the London and Provincial Joint-Stock Life Assurance Co.*, 17 Law J. Rep. (N.S.) Chanc. 37.

A company had been projected and were applying to parliament for powers to reclaim certain lands from the sea, and to divert the water into the Ouze, and the commissioners for maintaining the banks of that river were applying part of their funds in opposing that bill in parliament, on the ground that the scheme would be injurious to the banks of the river. The commissioners were empowered to apply their funds in executing all such matters and things as they should deem necessary for putting the banks into, and maintaining the same in, a state of permanent stability. A bill having been filed by certain landowners liable to contribute to the funds of the commissioners, to restrain them from making such an application of their funds, a demurrer for want of equity was allowed, it being held that such an application was incident to the trust. *Brighton v. North*, 16 Law J. Rep. (N.S.) Chanc. 255; (*Bright v. North*), 2 Ph. 276.

Although the Court will, in a proper case, exercise its jurisdiction by injunction touching proceedings in parliament for a private bill, or a bill respecting property, yet it has no power to deprive a party of the right of applying to parliament for a special law to supersede the rules of property by which he finds himself bound, whether arising from contract or otherwise.

A party agreed with a railway company to withdraw his opposition to their bill in parliament in consideration of their completing their line in a particular manner. The company subsequently found themselves unable to carry their contract into execution, and gave notice of their intention to apply to parliament for an act to authorize them to abandon their scheme. An injunction which had been granted at the suit of the party with whom the company had contracted to restrain the company from making the application was dissolved. *Heathcote v. North Staffordshire Rail. Co.*, 2 Mac. & G. 100; 2 Hall & Tw. 332.

A court of equity will not exercise its jurisdiction by injunction, at the instance of an individual, against an alleged nuisance, without a previous trial at law, or without its being clearly proved that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law. *Elmskirst v. Spencer*, 2 Mac. & G. 45.

A plaintiff who had never been in possession, and whose alleged title first accrued nearly twenty years since, filed a bill against the defendant in possession

of certain real estates, and in respect of which an action of ejectment between the plaintiff and defendant was then pending, praying for an injunction to restrain the defendant from felling certain ornamental and other timber. A demurrer on the ground that a person out of possession must first establish his right at law before he can come into equity, was allowed. *Davenport v. Davenport*, 18 Law J. Rep. (n.s.) Chanc. 163; 7 Hare, 217.

Solicitor and client settled an account, and the client gave a mortgage and covenant to pay. The solicitor sued on the covenant, and the client filed a bill, impeaching the transaction on the ground of surprise, undue influence, and error. This being denied by the answer, a motion for an injunction to stay proceedings on the covenant was refused. *Jones v. Roberts*, 9 Beav. 419.

On a bill filed to restrain a railway company from paying any dividend, either declared or to be declared, contrary to the provisions of an act of parliament, injunction granted as to future dividends, but refused as to a dividend declared, on the ground that the plaintiff shewed no title to share in such dividend, and that the general body of shareholders who were interested in the dividend were not adequately represented. *Carlisle v. South-Eastern Rail. Co.*, 1 Mac. & G. 689; 2 Hall & Tw. 366.

The defendant, a chemist and druggist, had inserted advertisements in the public journals, so expressed as to induce the world at large to believe that certain pills sold by him, and intended for the cure of consumption, were pills prepared and sold by him with the sanction of the plaintiff, who was a physician of great eminence, practising in the metropolis, and celebrated for his skill in cases of consumption:—Held, on application for special injunction to restrain the publication of such advertisements, that the Court had no jurisdiction to grant the same, the injury being that of defamation rather than injury to property. *Clark v. Freeman*, 17 Law J. Rep. (n.s.) Chanc. 142; 11 Beav. 112.

In a suit by some of several registered part owners of a vessel, seeking an account against the master (a part owner), and not raising any dispute as to the shares, the Court refused to interfere by injunction to restrain the sailing of the vessel, but left the plaintiffs to proceed in the Court of Admiralty. *Castelli v. Cook*, 18 Law J. Rep. (n.s.) Chanc. 148; 7 Hare, 89.

An injunction to restrain a defendant from using the particular style or title adopted by the plaintiff, will not be granted if the Court entertains the slightest doubt of the plaintiff's right to sustain his title at law. *Purser v. Brain*, 17 Law J. Rep. (n.s.) Chanc. 141.

The Great Western Railway Company demised to the plaintiffs, for ninety-nine years, at a nominal rent, a plot of land adjoining the Swindon station, in consideration of the expenses incurred and to be incurred by the plaintiffs in the erection of certain refreshment and other rooms on the premises demised; the plaintiffs covenanting to carry on the refreshment rooms in a suitable manner, and the company covenanting in case of the disuser of the station, to purchase the buildings upon certain terms, and also to make compensation to the plaintiffs and their underlessees for the loss of the business profits. And it was by the lease declared to

be the intention of the company, and the understanding of the plaintiffs, that, in consequence of the outlay to be incurred by them, in erecting the refreshment rooms, the company should give every facility to the plaintiffs for enabling them to obtain an adequate return, by means of the rents and profits of the said refreshment rooms; and that all trains carrying passengers, not being goods trains, "or trains to be sent express," or for special purposes, and except trains not under the controul of the company, which should pass the Swindon station either up or down, should, save in cases of emergency, or unusual delay arising from accidents, stop there for the refreshment of passengers for a period of about ten minutes, and that as far as the company could influence the same, trains not under their controul should be induced to stop for the like purpose; and the company engaged not to do any act which should have an effect contrary to the above intention. The refreshment rooms were completed by the plaintiffs, and were then underlet by them to G for seven years, at a yearly rent of 1,100*l.*; and by the underlease, after reciting the covenants of the original lease, the plaintiffs covenanted with G during the continuance of his term, to do all acts necessary for enforcing the recited covenants against the company, for giving him the full benefits thereof during his term, as if he had been assignee of the covenants; and that it should be lawful for G to take any proceedings against the company, in the name of the plaintiffs, indemnifying them against costs. The company began to run fast trains, called in the time bills "express trains," which did not stop at Swindon for the refreshment of passengers. The plaintiffs then filed their bill for an injunction against the company, and against G their sub-lessee. G, by his answer, stated that he had not authorized the institution of the suit, but that he should hold the plaintiffs liable for any loss he might sustain in consequence of the matters complained of in the bill. On a motion for the injunction,—Held, first, that the trains called "express trains" were not "trains sent express," within the meaning of the exception in the covenant; secondly, that the plaintiffs had an interest in the matters in question sufficient to sustain the bill, notwithstanding G did not join in the suit; thirdly, (but afterwards reversed by the Lord Chancellor, on appeal,) that the injury complained of was one which the Court would prevent by injunction before the hearing, as it would be impossible to measure in damages the loss sustained by the breach of covenant, and that the Court could not, in a case like the present, look at the company otherwise than as individuals.

Semble.—Where the mutual rights of parties rest in covenant, each is, *prima facie*, entitled to enforce his rights in a court of law or equity, notwithstanding there are other covenants which may possibly be broken by the other party hereafter. *Rigby v. Great Western Rail. Co.*, 15 Law J. Rep. (n.s.) Chanc. 266; 2 Ph. 44.

The fact that the ecclesiastical court has issued a citation for recalling letters of administration, is not sufficient to induce the Court of Chancery to interfere by injunction to restrain an administrator from transferring stock belonging to his intestate's estate, where no danger is shewn to be likely to arise

therefrom to the estate. *Connor v. Connor*, 16 Law J. Rep. (N.S.) Chanc. 371; 15 Sim. 598; *Newton v. Ricketts*, 16 Law J. Rep. (N.S.) Chanc. 372, n.; 10 Beav. 525.

The Court refused, upon an interlocutory application, to restrain by injunction a banking company from returning to the Stamp Office under the 7 & 8 Vict. c. 113. among the names of the shareholders, that of a person who by his bill and affidavit alleged facts to shew that he had ceased to be a shareholder, his case not being perfectly clear upon the evidence. *Bullock v. Chapman*, 2 De Gex & S. 211.

(B) TO RESTRAIN PROCEEDINGS AT LAW.

(a) Before Verdict.

The plaintiff, a colliery proprietor, desiring to carry a railway over land of the defendant, wrote to him offering to pay for the land at a fair valuation. No reply being given, the railway was made. A year or two afterwards, the plaintiff and the defendant had an interview, but did not agree on the price to be paid for the land, and four years after the railway was made the defendant brought ejectment. The plaintiff filed his bill for an injunction, charging acquiescence. The Court restrained the action upon the plaintiff giving judgment in the ejectment and paying into court the utmost value of the land. *Powell v. Thomas*, 6 Hare, 300.

After a creditor had commenced an action against the administratrix of his debtor a decree was made in a suit by the next-of-kin against the administratrix for the administration of the estate: and the administratrix gave notice of the decree to the creditor. He then gave notice that he should proceed with his action unless he was paid the costs of it, and they not being paid he delivered a declaration. The defendant appeared to the action, and called on the plaintiff, who was abroad, to give security for costs. The Court restrained the creditor from proceeding with the action, but gave him all his costs at law and the costs of the motion and ordered the assets of the estate to be brought into court. *Turner v. Connor*, 15 Sim. 630.

The defendant executed to the plaintiff a transfer of a mortgage, and also a conveyance of lands belonging to himself, as a security for monies advanced by the plaintiff, which the defendant covenanted in the usual manner to repay.—Held, upon appeal, (reversing the decision of the Vice Chancellor), that the plaintiff was not entitled to an injunction to restrain the defendant from proceeding in an action at law against his mortgagor, for the recovery of his mortgage debt, the defendant consenting that the money recovered in the action should be paid to the plaintiff in this suit. *Gurney v. Seppings*, 15 Law J. Rep. (N.S.) Chanc. 385; 2 Ph. 40.

Whether these proceedings on the part of the plaintiff entitled the defendant to a reconveyance of his land, and to a release of his personal liability to the plaintiff, *quære*.—*Ibid*.

A special injunction to stay a trial at law will not be granted until the common injunction has been obtained upon default. *Lord Chesterfield v. Page*, 16 Law J. Rep. (N.S.) Chanc. 258.

An injunction to stay trial of an action does not apply to an issue of law raised by demurrer, but

only to an issue of fact. *Lowe v. Faulkner*, 16 Sim. 250.

A railway company filed a bill against surveyors who had brought an action at law against them in respect of surveys made by them for the company, and other matters connected with those surveys, and for monies expended by them for the company. The bill alleged that with the discovery thereby asked for the company could successfully defend the action. The company afterwards, when the action was nearly ready for trial, applied for an injunction, on the ground that the accounts were too complicated to be taken in an action at law. The application was refused. *South-Eastern Rail. Co. v. Martin*, 18 Law J. Rep. (N.S.) Chanc. 103; 1 Hall & Tw. 69.

The Court refused an injunction to restrain plaintiffs at law from taking out of court money which the defendants at law had paid into court in the action, in ignorance that upon such payment the plaintiffs at law were entitled to stay their action and take the sum so paid. *Great Western Rail. Co. v. Cripps*, 5 Hare, 91.

An equitable tenant for life being in possession, he and his lessee had committed waste, and refused to permit the trustee to examine the condition of the land. The trustee having brought ejectment, the Court under the circumstances refused to continue an injunction to restrain the action, even on the plaintiff's undertaking to cut no more timber and to permit the inspection. *Pugh v. Vaughan*, 12 Beav. 517.

In 1842, the plaintiff granted an annuity, and one solicitor, C, acted on behalf of both parties. In July 1845, an arrangement was made between the plaintiff's solicitor and C, who was supposed by him to be still acting as the solicitor of the annuitant, that 9,850*l.* was to be paid to C, as the agent of the parties entitled to the annuity, and thereupon a release was to be executed of the annuity. On the 24th of September following, the plaintiff's solicitor paid to C part of the 9,850*l.*, but C not having possessed himself of the securities which were on that occasion to be delivered up, a new arrangement was made for a temporary delay; and on the 4th of October following, the two solicitors met to complete the transaction, when the residue of the 9,850*l.* was paid by the plaintiff's solicitor to C, and the annuity deed (which had been previously given by the annuitant to C), and the memorandum of the judgment which had been entered up were delivered up by C, but no release of the annuity was executed by the annuitant. In May 1846, the annuitant employed another solicitor, who made application for payment of the annuity, as if nothing had transpired touching the redemption or re-purchase of it. On bill filed by the plaintiff to restrain proceedings at law to obtain payment of arrears of the annuity, notwithstanding the denial by the annuitant in his answer of C having any authority to enter into any arrangement for the purchase of the annuity, the proceedings at law were restrained upon the plaintiff paying into court the amount of the annuity due and to become due from time to time, and undertaking forthwith to bring an action at law against the annuitant to try the question of C's authority to make the arrangement for

the purchase of the annuity, the annuitant admitting the tender by the plaintiff of a release of the annuity. *Teesdale v. Swindall*, 16 Law J. Rep. (n.s.) Chanc. 165.

(b) *To stay Judgment or Execution.*

An injunction was granted to restrain the sheriff from selling the goods of the plaintiff, found upon lands of a person against whom execution had issued upon a judgment at law:—Held, upon motion to dissolve, that there being no trust, and the plaintiff having his remedy at law, a court of equity had no power to interfere by injunction. *Jackson v. Stanhope*, 15 Law J. Rep. (n.s.) Chanc. 446.

On the 9th of December 1845, a creditor obtained a judgment against the testator. On the 2nd of April 1846, a writ of execution was issued, and on the 7th was delivered to the sheriff, and on the 1st of July the writ was executed. On the 6th of April 1846 the testator died, and on the 6th of June following, a decree was made in a creditors' suit to administer the estate of the testator; and on the 2nd of July notice of the decree was served on the judgment creditor. A motion to restrain the sheriff from selling was refused, on the ground that the writ of execution having issued prior to the death of the testator, the judgment creditor's right was paramount to that of the executor; and that the judgment creditor had been guilty of no laches in following up his rights.

Where a decree in a creditors' suit is so framed as that no accounts of debts and assets are to be taken, except in the event of the plaintiff's security proving deficient, the Court will not restrain a judgment creditor from proceeding at law. *Ranken v. Harwood*, *Ranken v. Boulton*, 15 Law J. Rep. (n.s.) Chanc. 496; 2 Ph. 22; 5 Hare, 215.

(C) BREACH OF.

[See PRACTICE, IN EQUITY, Jurisdiction of the Court.]

On a bill alleging a case of prospective injury, an injunction was granted, restraining the defendants from permitting certain injurious effects to be produced by certain given causes. The contemplated damage took place, and the plaintiff moved to commit for breach of the injunction, whereupon the defendants denied that the damage was effected by their acts. The Court refused to treat the defendants as contumacious until the verdict of a jury had conclusively connected the acts of the defendants and the damage alleged to have resulted therefrom as cause and effect. *Dawson v. Paver*, 16 Law J. Rep. (n.s.) Chanc. 274; 5 Hare, 415.

(D) PRACTICE.

[See COSTS, IN EQUITY.]

(a) *Application for Injunction.*

In November 1847 an order was made for an injunction, but was not drawn up. Upon an *ex parte* application in April 1849 to have it drawn up,—Held, that notice of the application must be given to the defendant. *Bateman v. Wiatt*, 11 Beav. 587.

Bill by a purchaser from a mortgagee against the mortgagor, and A his agent, who was made a de-

fendant, as an accounting party in respect of the receipt of rents of the mortgaged estate. The plaintiff obtained an order for a receiver, and, before the receiver was appointed, proceeded to cut timber upon the estate. An application by A for an injunction against the plaintiff was refused, on the ground that A had no authority from his principal to make the application, and had no interest in the matter. *Hunter v. Nockolds*, 15 Law J. Rep. (n.s.) Chanc. 320.

The plaintiff claimed to be a partner with defendant, and sought by his bill accounts, and an injunction and receiver. Before the answer was put in he gave notice of motion for an injunction and receiver, and filed affidavits in support of the motion. The answer came in on the day for which the motion was given, and before the motion was made, and it denied the existence of any partnership:—Held, that the affidavits could not be read on the motion, which therefore failed, but no costs were given. *Rock v. Mathews*, 2 De Gex & S. 227.

A plaintiff who had obtained an *ex parte* injunction, which was afterwards dissolved on the ground of concealment of facts,—Held, not to be precluded from making an application for another injunction upon the merits. *Fitch v. Rochfort*, 18 Law J. Rep. (n.s.) Chanc. 458; 1 Mac. & G. 784; 1 Hall & Tw. 255.

A motion was made for an injunction to restrain the defendants from proceeding with a shaft and other works, by which the plaintiff was apprehensive that his brine pit and apparatus for the manufacture of salt would be irremediably injured. The evidence of the plaintiff and that of the defendants was altogether conflicting, and an inspection of the defendant's shaft was impracticable, in consequence of its being filled with brine. The Court refused an injunction, and directed that the costs of the defendants should be costs in the cause; but that the question, whether the plaintiff's costs ought to be costs in the cause, should stand over till the hearing. *McCurdy v. Noak*, 17 Law J. Rep. (n.s.) Chanc. 165.

A suit having been instituted for the purpose of establishing the trusts of a will, a decree was made in favour of the plaintiffs, after which certain persons, claiming an interest adverse to the plaintiffs, commenced an action of ejectment against them for the purpose of disputing the will:—Held, that an injunction might be granted upon petition to restrain such action, although no injunction was prayed in the suit. *Turner v. Turner*, 19 Law J. Rep. (n.s.) Chanc. 352.

Special injunction to prevent the infringement of a patent refused on the ground of delay.

The plaintiff succeeded in an action to establish his right to a patent, but a bill of exceptions was tendered by the defendant. An injunction was granted under the circumstances before the bill of exceptions was disposed of. *Bridson v. Benecke*, 12 Beav. 1.

An order for an injunction to restrain Commissioners under a local act from signing their award and from proceeding to enforce payment of rates, although the act gave jurisdiction to the Quarter Sessions, affirmed on appeal, but the condition of

bringing money into court imposed. *Armistead v. Durham*, 11 Beav. 556.

(b) *Extending the Injunction.*

Stratford v. Lewis, 5 Law J. Dig. 341; 14 Sim. 120.

Where there has been great delay the Court will not, on the eve of trial, extend the common injunction.

The dates of the proceedings were as follows:—action, 30th of June; declaration, 12th of July; plea, 6th of August; notice of trial, 25th of November; bill filed, 26th of November; motion to extend injunction, 21st of January following. The motion stood over for an arrangement without prejudice, and with an understanding that the answer should not be pressed for; the negotiation terminating on the 7th of June, and the motion was renewed on the 19th of June, the trial being fixed for the 22nd. The Court thought, that if the case was to be decided as on the 21st of January, the motion ought to be refused; but that, as matters now stood, the plaintiff was taken by surprise, and the motion was granted. *Bawley v. Hancock*, 13 Beav. 75.

By consent an injunction was made perpetual upon motion. *Morrell v. Pearson*, 12 Beav. 284.

The bill alleged that the defendant sold brushes, on which the trade mark of the plaintiff was stamped, and prayed for an account and an injunction. The plaintiff, directly after the filing of the bill, obtained the usual injunction. The defendant by his answer stated, that he had sold such brushes on two occasions only, when he believed that he had sold them to agents of the plaintiff; but that he had had no intention to sell them without the leave or to the injury of the plaintiff; and that, if the plaintiff had made any application to him, he would have undertaken never to stamp any articles with the plaintiff's trade marks. The plaintiff set the cause down on the answer of the defendant, without entering into evidence; and, waiving the account, asked for a perpetual injunction:—Held, that there had not been any unnecessary litigation on the part of the plaintiff; and that he was entitled to a perpetual injunction and the costs of the suit. *Pierce v. Franks*, 15 Law J. Rep. (n.s.) Chanc. 122.

(c) *Dissolving the Injunction.*

Where an injunction had been granted during the long vacation by the Master of the Rolls, in the absence of the Vice Chancellor of England, in a cause which was marked for the Vice Chancellor's Court, a motion to dissolve it should be made before the Master of the Rolls, and not before the Vice Chancellor. *Hammond v. Smith*, 15 Law J. Rep. (n.s.) Chanc. 40.

An injunction was obtained before answer. The defendant filed his answer, but delayed moving to dissolve until several months after replication, and at a period when the evidence would have been published but for the defendant having obtained an enlargement of the publication. The motion was on that ground refused. *Feistel v. King's College, Cambridge*, 10 Beav. 491.

The filing of exceptions for impertinence may, before a reference of them, be shewn as cause against dissolving the common injunction. In such case,

the plaintiff should be put under terms to obtain the Master's report within a limited time, although the general orders do not provide for such a case. *Byng v. Clark*, 12 Beav. 608.

A motion being made to dissolve the common injunction, it appeared that the plaintiff had not been able to procure an office copy of the answer. Time was given to him to elect whether he would shew exceptions or merits as cause. *Byng v. Clark*, 12 Beav. 536.

A bill was filed to restrain proceedings at law after the common injunction was obtained; the defendants answered, and moved to dissolve the injunction, and the plaintiffs undertook to shew cause on the merits. The plaintiffs amended their bill. On the coming on for cause to be shewn against dissolving the injunction, the Court gave defendants the option—1. To have the motion heard on the record as it stood,—2. To have it stand over, with liberty to defendants to give notice of motion to dissolve under the 60th Order of 1845 or otherwise,—or, 3. To have it stand over for the defendants to answer the amended bill. *West Durham Rail. Co., v. Allison*, 3 De Gex & S. 558.

Defendant having filed a plea and answer, obtained at the Rolls an order nisi to dissolve the common injunction:—Held, irregular; but plaintiff having afterwards appeared before a Vice Chancellor and undertaken to shew cause on the merits,—Held, secondly, that there was a waiver of the irregularity; and, thirdly, that the waiver might be taken notice of on a motion to discharge the order of course at the Rolls. *St. John v. Phelps*, 12 Beav. 606.

An injunction having been obtained, the bill was amended by adding a plaintiff:—Held, that the injunction had thereby ceased to exist. *Attorney General v. Marsh*, 18 Law J. Rep. (n.s.) Chanc. 272; 16 Sim. 572.

An injunction having been obtained by the plaintiff to restrain a joint action against him by several defendants, all the defendants but two put in their answers, and obtained an order to dissolve the injunction as against themselves; the other two defendants then put in their answers, but refused to move to dissolve:—Held, that those defendants who had obtained the order to dissolve were now at liberty to move to dissolve as against the other two defendants, without serving them with notice of the motion. *M'Gregor v. Conyngham*, 18 Law J. Rep. (n.s.) Chanc. 41; 16 Sim. 365.

Affidavits filed in support of statements introduced into the bill by amendment, after injunction granted and tending to support the injunction, cannot be read on a motion to dissolve that injunction. *Prince Albert v. Strange*, 1 Mac. & G. 47; 1 Hall & Tw. 26.

The proper mode of proceeding to dissolve the common injunction is by orders nisi and absolute. The circumstance that the time has expired for taking exceptions to the answer will not entitle the defendant to proceed by special application. *Raincock v. Young*, 19 Law J. Rep. (n.s.) Chanc. 135; 1 Mac. & G. 196; 16 Sim. 566; 1 Hall & Tw. 197.

A party is entitled to move to dissolve an injunction if, from ambiguity in its terms, he may, under any construction of the order, be prejudicially affected.

Where the plaintiff obtained an *ex parte* injunction on the facts stated in the bill, but other facts came out in the defendant's answer, raising a question of law on which the right of the plaintiff to the injunction depended:—Held, that it was the duty of the plaintiff to bring these facts before the Court, and his omission to do so was of itself a sufficient ground for dissolving the injunction, and it was no excuse that the plaintiff was not aware of the importance of the omitted facts. *Dalglish v. Jarvis*, 2 Mac. & G. 231; 2 Hall & Tw. 437.

(d) *Retaining the Bill.*

The plaintiff, having obtained a patent for an improved method of making steel by the application of carburet of manganese, brought an action against the defendant for infringing his patent by using two ingredients, which when fused, would produce carburet of manganese. The Court of Exchequer held that the patent had not been infringed, either directly or indirectly, because the defendant was ignorant of the fact that he was using the same substance as that employed by the plaintiff. A motion for an injunction upon a bill filed prior to the action was now opposed, on the ground that the decision of the court of law was final, and the bill ought to be dismissed. The Court considered that although the act was committed unconsciously, the defendant was liable for the injury he had done, and consequently they retained the bill, and gave liberty to the plaintiff to bring another action. *Heath v. Unwin*, 16 Law J. Rep. (n.s.) Chanc. 283; 15 Sim. 552.

A, being in possession of furniture belonging to the plaintiff, contracted to assign it to B, who advertised it for sale. The plaintiff obtained an injunction to restrain the sale of it; and the bill was retained for a twelvemonth, with liberty for the plaintiff to bring an action of trover.

Such a decree should contain a direction that in case the plaintiff should not bring the action within the twelvemonth, the bill should be dismissed. *Wood v. Rowlcliffe*, 17 Law J. Rep. (n.s.) Chanc. 83; 2 Ph. 282.

On a bill for an injunction to protect the plaintiff's coal mines from injury by water flowing from defendant's colliery, the Court, on motion, granted an injunction restraining the defendants from working their coal mines in any places which might injure or endanger plaintiff's mines until answer or further order, but gave no directions for a trial at law. The parties went into evidence, and the cause was brought to a hearing, when the Court refused until the plaintiff had established his right at law to make the injunction perpetual, but retained the bill for a year, with liberty to plaintiff to bring an action, continuing the injunction meantime. *Duke of Beaufort v. Morris*, 6 Hare, 340.

Quere—Whether in any case an injunction will be granted to protect a legal right not admitted without providing for the trial of the right at law. *Ibid.*

(e) *Costs.*

In a suit for an injunction against the use by defendants of a certain mark upon their goods, the defendants set up a right to use the mark as their true name. The plaintiff, without moving for the injunction, went into evidence in equity. The evi-

dence did not establish plaintiff's right to an injunction, but the Court, thinking that defendants had used the mark in a manner which would lead purchasers to believe that their goods were made by plaintiff, gave defendants the option of having the bill dismissed against them without costs or of having the right tried at law.

The bill being retained for a year and an action brought, the plaintiff recovered. The Court then granted the injunction, and ordered defendants to pay all costs at law and in equity, except the costs of the evidence in equity. *Rodgers v. Nowill*, 6 Hare, 325.

On a motion for an injunction being refused, the costs were reserved to the hearing of the cause; and at the hearing, the injunction was decreed and the defendant was ordered to pay the plaintiff the costs so reserved, as well as the general costs of the suit relating to the injunction. But on appeal, this course of proceeding was disapproved of by the Lord Chancellor, and the decree was altered by striking out the order for payment of the reserved costs. *Lewis v. Smith*, 1 Mac. & G. 417.

Where a party proceeded in an action at law, notwithstanding an injunction, but under an impression that the injunction no longer existed, and it was in fact afterwards dissolved,—this Court refused to interfere to deprive him of the costs of the proceedings so taken. *Newman v. Ring*, 16 Law J. Rep. (n.s.) Chanc. 124.

INNKEEPER.

[See LIEN.]

INQUISITION.

[See CORONER—SCIRE FACIAS.]

A coroner's inquisition touching the death of V found, as to the cause of death, that a certain locomotive steam-engine, numbered 48, with a certain tender attached thereto, and worked therewith, and also with divers, to wit, three carriages, used for the conveyance of passengers for hire, on a certain railroad or tramway called "*the Midland Railways*" there situate, and which said carriages respectively were then and there attached and fastened together, and to the said tender, and were then and there propelled by the said locomotive steam-engine, and which said locomotive steam-engine, tender and carriages were then and there moving and travelling along the said railroad or tramway towards the town and county of the town of *Nottingham*; and the jurors aforesaid, upon their oaths aforesaid, do further say that, whilst and during the time that the said locomotive," &c., averring a collision with a train in which V was travelling, and ascribing his death to the collision, but not so as to be intelligible without the earlier part of the finding. The Court quashed the inquisition, holding that the words, "and which said locomotive engine, tender and carriages" could not be rejected as surplusage for the purpose of rendering the previous words sensible. *Regina v. Midland Rail. Co.*, 8 Q.B. Rep. 587.

INSOLVENT.

[See PRISONER.]

- (A) PETITION AND PROTECTION.
 - (a) *Final Order.*
 - (1) *Jurisdiction to grant.*
 - (2) *Effect of.*
 - (b) *How pleaded.*
- (B) DISCHARGE OF.
 - (a) *Effect of Mistake in Schedule.*
 - (b) *Dismissal of Petition after Action brought.*
 - (c) *Limited to Debts specified in Schedule.*
 - (d) *As to what Debts.*
 - (e) *Pleading.*
- (C) ASSIGNEES.
 - (a) *Appointment of.*
 - (b) *Powers and Rights of, over Debtor's Property.*
 - (c) *Suits and Proceedings by.*
- (D) RIGHT OF INSOLVENT TO SUE.
- (E) RIGHTS OF JUDGMENT CREDITORS.
- (F) FRAUDULENT PAYMENTS AND CONVEYANCES.
- (G) EXECUTION AFTER REFUSAL OF FINAL ORDER.
- (H) JURISDICTION OF COUNTY COURT.

(A) PETITION AND PROTECTION.

(a) *Final Order.*

(1) *Jurisdiction to grant.*

The Court of Bankruptcy has jurisdiction to entertain a petition for protection from process, and to grant to the petitioner a final order for protection and distribution, although at the time of presenting such petition and granting such final order the petitioner has no assets.

The general plea shewing that such final order was granted to the defendant is good, without setting out any special preliminary averments for the purpose of shewing that the defendant was entitled to take the benefit of the act. *Laurie v. Bendall*, 17 Law J. Rep. (N.S.) Q.B. 348; 12 Q.B. Rep. 634.

(2) *Effect of.*

An order for protection, made under the 7 & 8 Vict. c. 96, in the case of an insolvent, protects his person only from process, and not after-acquired property, not attached by his assignees. *Toomer v. Gingell*, 15 Law J. Rep. (N.S.) C.P. 255; 4 Dowl. & L. P.C. 182; 3 Com. B. Rep. 322.

A retrospective effect will not be given to a statute unless the statute, by precise words, clearly shews that such was the intention of the legislature.

The Insolvent Debtors Act, 5 & 6 Vict. c. 116, gave no power to a creditor to prove against an insolvent, before the Commissioner, for a sum payable by way of annuity at a future time, by virtue of any security; but by the Amendment Act, 7 & 8 Vict. c. 96, s. 25, it was enacted, that every sum of money which shall be payable by way of annuity at any future time, by virtue of any security, "shall be deemed and taken to be debts within the meaning of the 5 & 6 Vict. and of this act:"—Held, that section 25. had not a retrospective effect, and that it was no answer to an action for a sum which had

been so payable, that the insolvent had obtained a final order for protection and distribution after the 5 & 6 Vict. c. 116, and before the 7 & 8 Vict. c. 96.

A release given to one of two joint and several obligors, without notice to the other obligor, is a release as to both; but where such a release contained a proviso that the release should not be construed to extend to prejudice the obligee's right to enforce payment against the other obligor,—Held, that the proviso restrained the effect of the release, and that the debt of the other obligor was not therefore extinguished. *Thompson v. Lack*, 16 Law J. Rep. (N.S.) C.P. 75; 3 Com. B. Rep. 540.

A final order obtained by an insolvent under the 7 & 8 Vict. c. 96. constitutes an absolute bar to an action for the debt as to which it is a protection.

To an action of debt the defendant pleaded that after the accruing of the debt, and after the passing of the 5 & 6 Vict. c. 116, and before the passing of the 7 & 8 Vict. c. 96, and before the commencement of the suit, &c., a petition for protection from process was duly presented by the defendant to the Court of Bankruptcy, and afterwards filed therein; and that thereupon and after the passing of the secondly-mentioned act, a final order for protection and distribution was made in the matter of the petition, by a Commissioner of the Court of Bankruptcy; and that the debt accrued before the filing of the petition:—Held, that the plea was good both in form and substance. *Platell v. Beville, Jacobs v. Hyde*, 17 Law J. Rep. (N.S.) Exch. 249; 2 Exch. Rep. 508.

(b) *How pleaded.*

A plea, under the statute 5 & 6 Vict. c. 116. s. 10, to an action for debt, stating that the debt was contracted before the date of the defendant's petition, and that he duly presented his petition for protection from process to the Birmingham District Court of Bankruptcy, and that, afterwards, a final order for protection was made by a Commissioner duly authorized,—Held, bad, it not appearing that the order was made for the protection of the defendant, or in the matter of his petition.

Quare, also, whether the plea shewed jurisdiction to make the order; the Commissioner not being named, and it not being averred that the defendant was within the jurisdiction of the district court. *Tyler v. Shinton*, 15 Law J. Rep. (N.S.) Q.B. 204; 8 Q.B. Rep. 610.

In an action of assumpsit, defendant pleaded, in bar of the further maintenance of the action, that before the commencement of the suit, he then not being a trader, and having resided twelve calendar months in London, and, according to the provisions of the statute, 5 & 6 Vict. c. 116, having then given due notice, did then duly present a petition for protection from process to the Court of Bankruptcy, which contained all such matters and things as are required by the act; that on the presenting of the petition all the estate of the defendant forthwith became vested in W W, then being an official assignee duly nominated by Mr. Commissioner Fane, then acting in the matter of the said petition; that after the contracting of the debts in the declaration mentioned, and after the commencement of the

action, the said Commissioner then being a Commissioner of the said court duly authorized in that behalf, &c., did then make a final order, according to the provisions of the said act, for the protection of the person of the defendant from all process, and for the vesting of his estate, &c. in the said W W, being an official assignee as aforesaid, according to the provisions of the said act:—Held, on special demurrer, first, that the plea was properly pleaded to the further maintenance of the action, as the demurrer admitted the final order to have been made after the commencement of the suit; secondly, that the plea sufficiently alleged that the notice of the defendant's intention to petition had been given; but, thirdly, that the plea was defective, as it appeared that the final order vested the defendant's estate in the official assignee only, without any mention of the creditors' assignee, as required by the statute 5 & 6 Vict. c. 116. s. 4. *Nicholls v. Payne*, 15 Law J. Rep. (N.S.) C.P. 23.

To a declaration by indorse against the acceptor of a bill of exchange, the defendant pleaded that he had resided for twelve months within the Birmingham district, and that in pursuance of the 6 Vict. c. 116. he duly presented his petition for protection from process to the Court of Bankruptcy for the said district, and that such proceedings were had in the said court, that afterwards, a final order was made by a Commissioner of the court duly authorized, for the protection of the person of the defendant from process, and for vesting the estate and effects of the defendant in J B, one of the official assignees of the said court, and that no assignee was appointed by the creditors of the defendant, whereby the defendant was discharged from the said cause of action; verification:—Held, on special demurrer, *Erle, J. dissentiente*, that this was not a good plea under the 10th section of the above act, because, as it purported to follow the short form given by that section, it ought to have followed it exactly, and ought, therefore to have stated that the order was "for distribution" as well as "for protection," and that the words "for vesting," &c., did not cure the defect.

Seemle, per Coltman, J., that the plea might have been good, though no assignee was appointed by the creditors.

Per Maule, J., the plea would have been sufficient, though it did not follow the words of the 10th section, if it had shewn with certainty that the requisites of the 4th section had been complied with.

Such a plea properly concludes with a verification. *Gillon or Gillan v. Deare*, 15 Law J. Rep. (N.S.) C.P. 25; 3 Dowl. & L. P.C. 412; 2 Com. B. Rep. 309.

The defendant pleaded, in an action against her as acceptor of a bill of exchange, that she was discharged under the Insolvent Debtors Act, 5 & 6 Vict. c. 116. s. 10. The plea did not state at length the proceedings required to be taken, nor did it designate the order in the same terms as described by the act:—Held, a bad plea; it should either have set out the order, or have described it in the terms of the act. *Wright v. Hutchinson or Hutchison*, 16 Law J. Rep. (N.S.) C.P. 226; 5 Dowl. & L. P.C. 149; 4 Com. B. Rep. 569.

To an action on a bill of exchange the defendant pleaded that he, not being a trader, &c., at the time

of the passing of the 5 & 6 Vict. c. 116, duly presented his petition for protection to the Court of Bankruptcy in London, which had annexed to it a full schedule of debts containing all matters mentioned in the statute; and that the said petition was filed, &c., and that a final order for protection and distribution was made by the Commissioner for protecting the person of the defendant from all process, and for the vesting his estate in T M A, one of the official assignees of the said Court of Bankruptcy, and that the debts in the declaration mentioned accrued before the filing of the said petition, and that the order was still in force, &c.:—Held, that the plea was good, both in form and substance, as shewing the effect of a final order under the 10th section of the above statute, though it did not shew the appointment of a creditors' assignee. *Lewis v. Harris*, 17 Law J. Rep. (N.S.) Q.B. 129; 11 Q.B. Rep. 724.

Since the passing of the 7 & 8 Vict. c. 96, which in some respect modifies the 5 & 6 Vict. c. 116, an insolvent cannot plead, in the form allowed by section 10. of the earlier act, the final order in bar of an action brought against him for a debt; but in order to make such plea good, it must state that the debt accrued before his petition was filed, and that it was inserted in the schedule affixed to his petition. *Phillips v. Pickford*, 19 Law J. Rep. (N.S.) C.P. 171.

(B) DISCHARGE OF.

(a) Effect of Mistake in Schedule.

The statute 1 & 2 Vict. c. 110. enacts, (s. 71,) that the Insolvent Court shall cause notice of the vesting order, &c. to be given to creditors of an insolvent whose debts shall amount to 5*l.*; and section 93. enacts, that where a debt is specified in an insolvent's schedule, "at an amount which is not *exactly* the actual amount thereof, without any culpable negligence, or fraud, or evil intention on the part of such prisoner," the insolvent shall nevertheless be entitled to the benefit of the act. The defendant, an insolvent, being indebted to "Mrs. Hoyles" (the plaintiff) in 7*l.* 15*s.*, made, without culpable negligence, fraud, or evil intention, the following insertion of the debt in his schedule, "Mrs. Isle, 3*l.*" No notice of the vesting order, &c. was given to the plaintiff:—Held, that the 93rd section did not apply, inasmuch as the error in the description materially altered the condition of the creditor; and that the defendant was not discharged from the debt.

Quære—Whether an insolvent is discharged from a debt where the description of his creditor, as inserted in the schedule, although not fraudulent, is calculated to mislead. *Hoyles v. Blore*, 15 Law J. Rep. (N.S.) Exch. 28; 14 Mee. & W. 387.

(b) Dismissal of Petition after Action brought.

To a declaration in debt defendant pleaded, that after the accruing of the cause of action, and before commencement of the suit, plaintiff had petitioned the Court for the Relief of Insolvent Debtors, under the 1 & 2 Vict. c. 110, and that by virtue of an order of that Court all his rights and property had, before the commencement of the suit, become vested in the provisional assignee. Replication, that after that order the plaintiff's petition was dismissed by

that Court, and he was discharged from custody without taking the benefit of the act;—Held, that the replication was bad, inasmuch as the dismissal of the petition must be taken to have been since action brought, and could not give a right to sue where none existed at the time the action was commenced. *Yorston v. Feather*, 15 Law J. Rep. (N.S.) Exch. 31; 14 Mee. & W. 851; 3 Dowl. & L. P.C. 297.

(c) *Limited to Debts specified in Schedule.*

The defendant being the maker of two promissory notes of which the plaintiff was the payee, became insolvent, and obtained his discharge under the 1 & 2 Vict. c. 110, having inserted the plaintiff in his schedule as a creditor, in respect of two sums of money, without mentioning the promissory notes:—Held, that the defendant was not discharged from his liability on the notes. *Leonard v. Baker*, 15 Law J. Rep. (N.S.) Exch. 177; 15 Mee. & W. 202.

(d) *As to what Debts.*

An insolvent inserted in his schedule, among his creditors, the name of a person to whom he had given two bills to get discounted, and who had appropriated them to his own use. The schedule was amended by introducing the name of a person to whom the bills had been indorsed, and to whom notice of the hearing was given. The indorsee, however, brought an action on the bills against the insolvent, and proceeded to judgment:—Held, that by the 1 & 2 Vict. c. 110. s. 90, the insolvent was entitled to his discharge as to the debt and costs, though the costs were incurred after the filing of the schedule. *Berry v. Irwin*, 19 Law J. Rep. (N.S.) C.P. 110.

The words "debts growing due" in the 1 & 2 Vict. c. 110. s. 69. (Insolvent Act), mean debts ascertained in amount but payable at a future time. *Skelton v. Mott*, 19 Law J. Rep. (N.S.) Exch. 243; 5 Exch. Rep. 231.

(e) *Pleading.*

Replication of Discharge to Plea of Set-off.

A discharge under the Insolvent Act cannot be given in evidence under the replication of *nil debet*, to a plea of set-off, but must be replied specially. *Ford v. Dornford*, 15 Law J. Rep. (N.S.) Q.B. 172; 8 Q.B. Rep. 583.

Debt. Plea, set-off. Replication, that after the set-off had become due, the plaintiff by an order of the Court for the Relief of Insolvent Debtors, was duly discharged, according to a certain act of parliament made and passed in the first and second years of Her Majesty, intituled, &c., from the said set-off, without this, that the said order and discharge still remain in full force:—Held, that the order and adjudication and discharge would be a legal answer to the plea of set-off, if properly pleaded. But that the 91st section of the 1 & 2 Vict. c. 110, which allows the discharge to be "pleaded generally," only applies to a plea and not to a replication, and that the replication was therefore bad in form, for not sufficiently shewing that the plaintiff was entitled to his discharge under the statute. *Francis v. Dodsworth*, 17 Law J. Rep. (N.S.) C.P. 185; 4 Com. B. Rep. 202.

(C) ASSIGNEES.

(a) *Appointment of.*

An appointment of a person claiming to be a creditors' assignee of the estate and effects of an insolvent debtor in the place of a deceased assignee, on condition that he shall prove his debt by affidavit on taking out his appointment, such debt having been afterwards proved accordingly, is a valid appointment, entitling the party so appointed to sustain a suit for the purpose of recovering property claimed as part of the estate of the insolvent. *Cole v. Coles*, 6 Hare, 517.

(b) *Powers and Rights of, over Debtor's Property.*

To a declaration by the assignee of an insolvent, which stated that after the making of the vesting order, and before the final discharge of the insolvent, the defendant was indebted to the plaintiff as such assignee in 141*l.* for work and labour, &c., of the insolvent, due by him before his discharge, and on an account then stated between the plaintiff as such assignee and the defendant, alleging a promise to pay to the plaintiff as such assignee after the vesting order, the defendant pleaded that the said work and labour, &c. were merely the personal labour of the insolvent done after the making of the vesting order for the necessary present maintenance and support of the insolvent and his family, and that the money due in respect thereof was not more than sufficient for the necessary maintenance and support of the insolvent and his family: and that before the plaintiff, as such assignee, had interfered or demanded the said monies from the defendant, the defendant paid the same to the insolvent. Replication, that the defendant did not before the plaintiff, as such assignee, had interfered or demanded the said monies pay to the insolvent the said monies. General demurrer:—Held, that the action could not be maintained for a debt claimed to be due directly to the assignee for the personal labour of the insolvent. *Williams v. Chambers*, 16 Law J. Rep. (N.S.) Q.B. 230; 10 Q.B. Rep. 337.

The official assignee of an insolvent appointed under the 5 & 6 Vict. c. 116. s. 1. may immediately on his appointment sue in his own name for an outstanding debt due to the insolvent; and the insolvent after such appointment cannot sue for it.

Therefore to an action by the insolvent, a plea shewing the petition of the plaintiff and protection granted, and an assignee appointed within the terms of the statute, is a good plea in bar. *Sayer v. Dufaur*, 17 Law J. Rep. (N.S.) Q.B. 50; 11 Q.B. Rep. 325.

A provisional assignee, in whom a prisoner's estate and effects are vested by an order of the Insolvent Debtors Court, under the 37th section of the 1 & 2 Vict. c. 110, has power where such prisoner is a beneficed clergyman, to apply for a sequestration under the 55th section of that statute. *Smith v. Wetherell*, 17 Law J. Rep. (N.S.) Q.B. 57; 5 Dowl. & L. P.C. 278.

An annuity granted to a Commissioner of Bankruptcy under the 1 & 2 Will. 4. c. 56. and the 5 & 6 Vict. c. 122. passes to his assignee under the Insolvent Act. *Spooner v. Payne*, 18 Law J. Rep. (N.S.) Exch. 401; 4 Exch. Rep. 138.

Case by an insolvent beneficed clergyman

against an attorney. The first count charged the defendant with negligence in defending an action brought against the plaintiff by one L, in consequence whereof judgment was given against the plaintiff for 14,500*l.*, and he was brought up on a writ of *habeas corpus* before the Court and remanded to the Queen's Prison charged in execution for that amount, and was put to expense in endeavouring to reverse the judgment:—Held (on general demurrer to a plea), that the cause of action did not pass to the plaintiff's assignees.

The second count charged the defendant with negligence in setting aside a writ of *sequestrari facias*, issued against the plaintiff's benefice, by reason whereof the writ remained in force longer than it otherwise would have done, whereby the plaintiff lost the rents, &c.:—Held (on general demurrer to a plea), that the cause of action did pass to the plaintiff's assignees. *Wetherell v. Julius*, 19 Law J. Rep. (n.s.) C.P. 367.

The annuity awarded as compensation to a Commissioner of Bankruptcy, whose duties were abolished by the 5 & 6 Vict. c. 122, passes to his assignee on his insolvency.

But if the insolvent will not make the affidavit (required by the order for payment of the annuity) that he does not hold any office of emolument, &c., the Lord Chancellor cannot dispense with it, and *semble*, the assignee is without remedy. *Spooner v. Payne*, 2 De Gex & S. 439.

The omission by assignees of an insolvent debtor to sell or take possession of copyhold estate of the insolvent, or to cause an entry of the assignment or copy of the appointment of the assignee to be made on the court rolls, or to possess themselves of the copies of court roll for nineteen years after the insolvency, whereby the insolvent is enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, does not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignee.

A trustee for sale of testator's estates sold part and paid the proceeds into court. A party entitled to a share of the testator's property, assigned his interest to S by way of mortgage, and S gave notice of the assignment to the trustee, but did not obtain a stop order. The remainder of the estates was afterwards sold, and the proceeds paid into court under the decree in the suit. Subsequently, the assignor took the benefit of the Insolvent Debtors Act:—Held, that the notice to the trustee was sufficient to take the assigned share out of the order and disposition of the assignor. *Matthews v. Gabb*, 15 Sim. 51.

The 1 & 2 Vict. c. 110. s. 20. is only directory. *Cole v. Coles*, 6 Hare, 517.

(c) Suits and Proceedings by.

A bill by an assignee in insolvency need not allege that the consent of the creditors has been obtained to the institution of the suit. *Spooner v. Payne*, 2 De Gex & S. 439.

(D) RIGHT OF INSOLVENT TO SUE.

In 1842, A mortgaged certain leasehold property to B. In May 1843, A filed his petition under the

5 & 6 Vict. c. 116, and in July following obtained his final order and protection. In November 1843, A filed his bill against B and the official assignee in bankruptcy, to redeem, alleging that he had fully satisfied all his scheduled creditors under the insolvency. The official assignee by his answer disclaimed, and submitted to act as the Court should direct. Upon objection, at the hearing, that A had no title to sue, his whole property being vested in the official assignee by the final order made in the insolvency, the Court refused to dismiss the bill on the ground of want of title, there being no power in bankruptcy, under the act or otherwise, even after all the insolvent's debts were satisfied, for superseding the insolvency or re-conveying the property to the insolvent.

Quare—Whether the objection would have been good if taken by way of demurrer. *Preston v. Wilson*, 16 Law J. Rep. (n.s.) Chanc. 137; 5 Hare, 185.

(E) RIGHTS OF JUDGMENT CREDITORS.

An insolvent within a year previous to his insolvency executed a mortgage upon certain property, with a power of sale for the mortgagee to pay himself off, and the residue to go to the insolvent, his appointees and assigns. The insolvent had subsequently executed a warrant of attorney to the plaintiff, on which judgment was entered up, and he was taken in execution. He then presented his petition under the Insolvent Act, and before his discharge the mortgagee sold under his power of sale:—Held, that the plaintiff was entitled to priority in respect of his judgment over the other creditors of the insolvent. *Robinson v. Hedger*, 19 Law J. Rep. (n.s.) Chanc. 463.

(F) FRAUDULENT PAYMENTS AND CONVEYANCES.

Where a debtor conveys property in trust for creditors, to whom the conveyance is not communicated, and who are not privy to it, the conveyance operates not as an assignment, but only as a power to the trustee revocable by the debtor. *Smith v. Keating*, 6 Com. B. Rep. 136.

A bill of sale as to personal property was given by an insolvent to a creditor more than a year before his insolvency, but possession was not taken by the creditor till one month prior to the insolvency:—Held, that the creditor must be restrained from proceeding to sell the property, and could only avail himself of the bill of sale under the insolvency. *Parrott v. Congreve*, 18 Law J. Rep. (n.s.) Chanc. 279; 16 Sim. 579.

(G) EXECUTION AFTER REFUSAL OF FINAL ORDER.

The defendant, who had been taken in execution upon a judgment, having obtained an interim order for his protection from process, under the 7 & 8 Vict. c. 96, afterwards attended upon his first examination before the Commissioner, who dismissed his petition under the 24th section, upon the ground of a debt having been fraudulently contracted. The defendant not being then in custody, the Commissioner did not make any order remanding the defendant to his former custody, and the defendant therefore went at large. He was afterwards, on the 20th of August, taken in execution upon a fresh *ca. sa.* in the usual form upon the same judgment.

Upon motion made on the 6th of November to set aside this writ, and to discharge the defendant out of custody,—Held, first, that under the 6th section of the above statute the plaintiff was authorized in taking the defendant in execution upon the same judgment. Secondly, that if there was any irregularity in the form of the process, the application to set it aside on that ground was made too late.

Semble—First, that such was the correct form of process to use. Secondly, that under the circumstances the Commissioner had power to make an order remanding the defendant to his former custody. *Parker v. Bayley*, 17 Law J. Rep. (N.S.) Q.B. 45; 5 Dowl. & L. P.C. 296.

(H) JURISDICTION OF COUNTY COURT.

Where an insolvent had petitioned the Insolvent Court in 1839, and acquired property in 1848, being resident more than twenty miles from London,—Held, that the Judge of the County Court had no power under the 10 & 11 Vict. c. 102. to examine him relating to his estate and effects, the provisions of that act being prospective; and that the circuits of the Commissioner of the Insolvent Court being abolished, the proper tribunal for such examination was the Court of Insolvent Debtors in London. *In re Willcox*, 18 Law J. Rep. (N.S.) Q.B. 244.

INSURANCE.

[See SHIP AND SHIPPING—STAMP.]

(A) ON LIVES.

- (a) *Concealment.*
- (b) *Suicide.*
- (c) *Covenant for Payment of Premiums.*
- (d) *Revival of Policy.*
- (e) *Assignment of Policy.*

(B) AGAINST FIRE.

(A) ON LIVES.

[See INFANT, Maintenance.]

(a) *Concealment.*

By a life policy of assurance it was stipulated that it should be void if anything stated by the assured in his declaration to the directors should be untrue. In his declaration he stated that "he was at that time in good health and not afflicted with any disorder, nor addicted to any habit tending to shorten life; that he had not at any time been afflicted with insanity, rupture, gout, fits, &c., that he had not had any spitting of blood, consumptive symptoms, asthma, cough, or other affection of the lungs; and that one T W was at that time his usual medical attendant." The plaintiffs averred in their declaration the truth of the above statement of the assured. The first five pleas alleged that the declaration of the assured was untrue in this, that he had had spitting of blood, consumptive symptoms, an asthma of the lungs, an affection of the liver, and a cough of an inflammatory and dangerous nature; sixthly, that he was afflicted with a disorder tending to shorten life; seventhly, that he was not at that time in good health; and eighthly, that he had falsely averred that T W was his usual medical

attendant:—Held, that the plaintiff was entitled to begin at the trial, as the issue on the seventh plea, and *semble* of the other pleas also, lay upon him.

It appeared that four years before the policy the assured had spit blood, that he had since evinced consumptive symptoms, and ultimately died of consumption three years after the making of the policy. The Judge directed the jury to say whether the assured when he made his declaration had *such* a spitting of blood, and *such* affection of the lungs, and inflammatory cough as tended to shorten his life:—Held, that this was a misdirection, as the assured was bound to state to the company the fact of a single spitting of blood, to enable them to ascertain whether it proceeded from the *disorder* called by that name. *Geach v. Ingall*, 15 Law J. Rep. (N.S.) Exch. 37; 14 Mee. & W. 95.

(b) *Suicide.*

To an action upon a policy of insurance effected by S on his own life, expressed to be subject to a condition that the policy should be void if the assured should *commit suicide*, or die by duelling or the hands of justice, the defendants (the insurance office) pleaded that S did commit suicide. It was proved that S died by reason of having taken sulphuric acid voluntarily, and for the purpose of killing himself, being at the time of unsound mind. The Judge directed the jury that to find for the defendants the jury must be satisfied "that S died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act so as to be a responsible moral agent." On a bill of exceptions it was held, in the Exchequer Chamber (by *Parke, B., Alderson, B., Patteson, J., and Rolfe, B.*), that the direction, as to the necessity of S being a responsible moral agent, and capable of distinguishing between right and wrong, was erroneous, the terms in the policy, "*commit suicide*," including all cases of *voluntary* self-destruction, whether felonious or not (*dissentientibus Pollock, C.B. and Wightman, J.*). *Clift v. Schwabe*, 17 Law J. Rep. (N.S.) C.P. 2; 3 Com. B. Rep. 437; 2 Car. & K. 134.

(c) *Covenant for Payment of Premiums.*

Covenant for non-payment by the defendant as surety of certain annual premiums in respect of a policy of assurance effected on the life of G F, and assigned by G F to the plaintiff. Pleas—first, that before the making of the assignment, and in the lifetime of one E S, it was, by an agreement in writing between G F and the plaintiff, after reciting that G F was in expectation of becoming devisee in fee simple under the will of E S of a certain messuage and premises, &c., agreed that in consideration of 500*l.* then paid, and 1,500*l.* to be paid on the 11th of October then next, G F would within three calendar months from and after the decease of E S, in case he should become the devisee of the said messuage and premises, convey and assure the same to the plaintiff, his heirs and assigns, subject only, &c., and in case G F should not become such devisee in fee simple, or should not be able to make out a sufficient title to the said messuage and premises within three calendar months, the said sum of 2,000*l.* was to be repaid by G F without interest.

That as a further security for such repayment, the policy in the declaration mentioned was assigned to the plaintiff, subject to an agreement by the plaintiff to re-assign the same to G F in case the conveyance contracted for should be perfected. That G F further agreed to pay the premiums becoming due on the policy, and to procure the defendant and another to enter into a sufficient assurance for the payment of such premiums. That afterwards and in the lifetime of E S, the defendant, G F and another executed the assignment in the declaration mentioned, in pursuance and part performance of the said agreement, whereby the said agreement and indenture in the declaration mentioned were and each of them was wholly void. The defendant's second and third pleas stated an agreement and indenture, &c. in the same terms as the first plea, and then concluded, the second by alleging that at the time of the sale of the second pretended title, neither G F nor any person by whom he claimed the messuage and premises, had been in possession of the same or of the reversion or the remainder thereof, &c. by the space of one whole year before the making of the said sale, whereby the same was rendered void by the 32 Hen. 8. c. 9; and the third, by alleging that at the time of making the said contract the defendant was not the heir-at-law of E S, nor had he then or at any time any interest in the said event, or in the life and death of E S, whereby and by force of the 14 Geo. 3. c. 38, the said agreement, policy, and assignment were each of them void:—Held, upon demurrer, that all these pleas were bad. *Cooke v. Field*, 19 Law J. Rep. (N.S.) Q.B. 441; 15 Q.B. Rep. 460.

(d) *Revival of Policy.*

A loan was granted by an insurance company upon a bond with sureties, and a policy on the life of the borrower, as a collateral security. The premiums were not paid within the days of grace, but were demanded by the company, who brought actions against the sureties of the bond; they refused to pay, and pleaded *non est factum* and payment. Upon a suit instituted to restrain such actions, and it being contended that the demand by the company, after the policy "was actually void," had revived it,—Held, that such revival was neutralized by the fact of refusal to pay, and the bill was dismissed, with costs. *Edge v. Duke*, 18 Law J. Rep. (N.S.) Chanc. 183.

(e) *Assignment of Policy.*

[See INTERPLEADER SUIT.]

W C O deposited a policy of assurance upon his life with W O to secure a debt and any further advances. Notice of the deposit was given to the directors of the assurance office; W C O afterwards assigned the policy to W O, and appointed him his attorney to receive what should be due upon the policy, and declared that it should not be necessary for the assurance office to inquire if any money was due to the assignee, and it also empowered W O to give receipts for the money. On the decease of W C O the assurance office refused to pay the policy; they alleged that the signature of the executor to any receipt for the money was requisite,

and they insisted that he was a necessary party to the bill; he was accordingly made a party to the bill, but disclaimed any interest in the money:—Held, that the plaintiff was entitled to receive the money, and that the company was bound to pay the whole sum assured, with interest at 4½ per cent. from three months after the decease of W C O, but without costs, there being no substantial object in view by either party, except to fix the other with costs. *Ottley v. Gray*, 16 Law J. Rep. (N.S.) Chanc. 512.

(B) AGAINST FIRE.

Increase of Risk by Alteration of Premises.

Assumpsit on a policy of fire insurance, by the plaintiffs, as varnish-manufacturers, to recover from the Norwich Union Fire Insurance Society 100*l.* and 50*l.* on account of stock in trade, &c., burnt in a fire. The declaration stated the insurance of 100*l.* to have been on the stock in trade in the oil store-room marked No. 7, and 50*l.* on the stock in trade in the open part of the yard, and that the policy was subject to a condition, that if any alteration or addition were made to any building insured by which the risk of fire to the building or any insured property was increased, such alteration or addition must be immediately notified to the society, in order to its being allowed by indorsement on the policy, otherwise the policy would be void. The declaration then stated a waiver by the defendants of the warranty of the oil store-room No. 7 having no manufacturing process carried on therein. Plea first, that an alteration had been made in the oil store-room, by which alteration the risk of fire to the building and the stock in trade was increased, and that the alteration was not notified to the society. Second plea, that the plaintiffs erected the two boilers in the policies mentioned in the oil store-room No. 7, and used the same therein, by which said premises the risk of fire to the room and stock in trade was increased, and that the increase of risk was not notified to the society. Third plea to the whole declaration, that the plaintiffs carried on, in the oil store-room No. 7, the hazardous trade of a varnish-maker, whereby the risk of fire to the room and stock in trade was increased; averment of want of notice to the society. Replication, *de injuriâ*.—Held, that the Judge misdirected the jury in desiring them to consider whether the addition and alteration increased the risk of fire in the case of the oil store-room No. 7; the question being, whether the use of the boilers in the ordinary way as boilers and not for boiling varnish would have increased the risk.

Semble—that the second and third pleas were bad. *Barrett v. Jermyn*, 18 Law J. Rep. (N.S.) Exch. 215; 3 Exch. Rep. 535.

INTEREST.

[See GUARANTEE—LIMITATION OF ACTIONS AND SUITS.]

Effect of Payment of, as Evidence of Principal being due.

"Five months after date I promise to pay Mr. L P, or order, the sum of 23*l.* 2*s.* 6*d.*, being the

amount of interest due on a promissory note from the undersigned to the late W N, for 117*l.* 4*s.* Dated the 6th of July 1838, up to the 6th of July 1844. (Signed J S)" :—Held, evidence to go to the jury of an account stated by J S with L P, so as to raise a promise to pay the 117*l.* 4*s.* *Penny or Penny v. Slade*, 15 Law J. Rep. (N.S.) Q.B. 10; 8 Q.B. Rep. 115.

On Debenture Bond.

Covenant for the recovery of interest on a debenture bond in the following form given to the plaintiffs :—"Great Western Railway Company Debenture Bond, No. 5,729. B 1,000*l.* By virtue of an act of parliament passed, &c., for making a railway from Bristol, &c., to be called the Great Western Railway, &c., we, the Great Western Railway Company, in consideration of 1,000*l.* to us paid by T P and W G, do assign to the said T P and W G the said undertaking, and all future calls, and all the estate, right, title, and interest of the said company, in and to the same, to hold unto the said T P and W G until the said sum of 1,000*l.*, together with interest for the same after the rate of 5*l.* per cent., payable as hereinafter mentioned, shall be fully paid and satisfied. And it is hereby stipulated, that the said principal sum of 1,000*l.* shall be so payable and paid on the 15th of January 1844, and that in the mean time the said company shall, in respect of interest as aforesaid on the said principal sum, pay to the bearer of the coupons or interest warrants the several sums mentioned in such warrants respectively, at the times specified therein." In January 1844, the previous interest having been duly paid, the last of the coupons was presented and the interest paid; but the company did not pay the principal, nor give notice to the plaintiffs that they were ready to pay it :—Held, that the plaintiffs were entitled, in an action of covenant, to recover the interest accrued since the 15th of January 1844. *Price v. Great Western Rail. Co.*, 16 Law J. Rep. (N.S.) Exch. 87; 16 Mee. & W. 244.

On a Judgment Debt.

Interest on a judgment debt, under the 1 & 2 Vict. c. 110. s. 17, runs from the date of the entry of the *incipitur*, and not merely from the time of perfecting the judgment after the taxation of costs. *Newton v. Grand Junction Rail. Co.*, 16 Law J. Rep. (N.S.) Exch. 276; 16 Mee. & W. 139.

Liability of Testator's Estate for.

Testator covenanted to pay a sum of money to trustees on the trusts of his settlement. He made default,—Held, that his estate was liable to pay 4*l.* and not 5*l.* per cent. interest. *Smith v. Copleston*, 11 Beav. 482.

INTERNATIONAL LAW.

If a bill of exchange is drawn in one country and payable in another, and the bill is dishonoured, the drawer is liable, according to the *lex loci contractus*, and not the law of the country where the bill was made payable.

But where a bill is drawn generally, the liabilities

of the drawer, acceptor, and indorsers are governed by the laws of the countries in which the drawing, acceptance and indorsement respectively take place.

The principle of compensation in the civil law, adopted by the Dutch-Roman law, applies to bills of exchange; and a debt due by a creditor to the debtor is extinguished by a liquid debt of the same amount due from the creditor to the debtor.

A, resident in Demerara, drew a bill of exchange in favour of B, also resident in Demerara, payable in London, upon C, resident in Scotland, and C accepted the same, making it payable in London. B indorsed the bill to D, who shortly afterwards became bankrupt. When C's acceptance became due, he held two bills of exchange accepted by D, which were dishonoured and protested for non-payment. D's assignees did not proceed against C, but brought an action in Demerara against A and B, the drawer and indorser, who pleaded a right of set-off to the extent of the two bills accepted by D, which the Supreme Court disallowed, and found for the plaintiffs :—Held, by the Judicial Committee, reversing such sentence,

First, that the bill having been drawn in Demerara, the Dutch-Roman law, in force in that colony, must govern the case, and that, by that law, the bill accepted by C was compensated or extinguished, *pro tanto*, by the bills accepted by D;

Secondly, that a surety was entitled to avail himself of this rule of law, in respect of a debt due to the principal debtor; and,

Thirdly, that the drawer and indorser were to be deemed sureties for the acceptor, and entitled to plead this right of set-off. *Allen v. Kemble*, 6 Moore, P.C. 314.

INTERPLEADER ORDER.

- (A) WHEN GRANTED.
- (B) AFFIDAVIT BY CLAIMANT.
- (C) RESERVING QUESTION OF COSTS.
- (D) SECURITY FOR COSTS.
- (E) STAYING PROCEEDINGS.
- (F) ENTRY OF JUDGMENT.
- (G) ORDER TO PAY PROCEEDS PENDING WRIT OF ERROR.
- (H) TRIAL.

(A) WHEN GRANTED.

On the 16th of January 1847, the sheriff, under a *fi. fa.* against the defendant, seized certain bills of exchange and promissory notes not then due, and which remained in his hands. On the 3rd of February he received notice of a fiat having issued; on the 4th he was ruled to return the writ; and on the 11th he made his return. On the 18th of February notice was served on him that assignees had been appointed, and that they claimed the bills and notes :—Held, that an application on the 29th of April, under the Interpleader Act, was too late, it appearing that the sheriff had postponed making the application at the request of the assignees, that they might have time to investigate the matter and satisfy themselves of the sufficiency of their claim. *Mutton v. Young*, 16 Law J. Rep. (N.S.) C.P. 165; 4 Com. B. Rep. 371.

The plaintiff, who had obtained a quantity of tea, *bond fide*, from a party who had no right to dispose of it, sold it to the defendant; the owner of the tea claimed it from the defendant, and brought trover against him; the plaintiff also sued the defendant for the price of the tea:—Held, that the defendant was not entitled to relief under the Interpleader Act, 1 & 2 Will. 4. c. 58. s. 1. *Slaney v. Sidney*, 15 Law J. Rep. (N.S.) Exch. 72; 14 Mee. & W. 800; 3 Dowl. & L. P.C. 250.

The sheriff is not entitled to call upon parties to interplead, where he has already exercised a discretion in the matter.

The sheriff, on the 20th of May, entered for the purpose of making a levy upon the goods of B, under a *fi. fa.* at the suit of A. Finding that B's person and property were protected by an order of a commissioner of bankrupts, under the 7 & 8 Vict. c. 96, the sheriff withdrew. On the 21st C purchased the goods from the official assignee; and, on the 3rd of June, B's petition having been dismissed, the sheriff, who had been ruled to return the writ, entered a second time for the purpose of making a levy. Being then met by C's claim, the sheriff obtained a Judge's order directing an issue under the Interpleader Act, to try whether or not the goods seized by him were, at the time of the second levy, the property of C. The plaintiff thereupon obtained a rule calling upon the sheriff and C to shew cause why that order should not be set aside, on the ground that the sheriff had by his laches, in not applying on the 20th of May, precluded himself from the benefit of the Interpleader Act; or why the order should not be amended, by substituting the date of the first, for that of the second, levy. The Court made the rule absolute for setting aside the order, but directed that A should pay C's costs of appearing on the rule, inasmuch as the appearance of C was necessary for the purpose of opposing an amendment, the effect of which would have been to require him to sustain a title he had never set up. *Crump v. Day*, 4 Com. B. Rep. 760.

Interpleader does not lie where the plaintiff's claim against the defendant rests not merely upon the right of property, but also on the personal contract of the defendant. *Lindsey v. Barron*, 6 Com. B. Rep. 291.

A being in possession of iron lying on the premises of the defendants, who were wharfingers, transferred it to the plaintiff, whereupon the defendants, at the plaintiff's request, placed it to his account in their books, and informed him that they had done so. A claim to the iron having been made by other parties, suggesting that it had been fraudulently transferred by A to the plaintiff, the defendants refused to deliver the iron to the plaintiff, who brought an action against them:—Held, that the defendants, having agreed to hold the iron for the plaintiffs, were not entitled to an interpleader order. *Horton v. the Earl of Devon*, 19 Law J. Rep. (N.S.) Exch. 52; 4 Exch. Rep. 497.

(B) AFFIDAVIT BY CLAIMANT.

Goods having been seized under a *fi. fa.*, the sheriff received notice that they were the property of W. On summons before a Judge at chambers for an interpleader order, W's attorney appeared and made affidavit that W, the claimant, was abroad,

and that from documents in his (the deponent's) possession, he verily believed the goods to be the claimant's property. The Judge held the affidavit insufficient, and made an order under the 1 & 2 Will. 4. c. 58. s. 3. barring the claim.

The Court, *Williams, J. dissentiente*, made a rule to rescind the Judge's order absolute; and it was held,—

First, *per totam Curiam*, that an affidavit by the claimant himself is not necessary to give the Judge or Court power to make an interpleader order.

Secondly, *dissentiente Williams, J.*, that the affidavit of the attorney in this case was sufficient.

Thirdly, *per Maule, J.*, that no affidavit is necessary, in order to enable a party to call upon a Judge to make an interpleader order. *Webster v. Delafield*, 18 Law J. Rep. (N.S.) C.P. 186; 7 Com. B. Rep. 187.

(C) RESERVING QUESTION OF COSTS.

Where a Judge, by an interpleader order, directed that the claimant should pay a sum of money into court, and that an issue should be tried between him and the execution creditor, and reserved the question of costs and all further questions until after the trial of the issue, the issue having been tried, and a verdict found partly for the plaintiff and partly for the defendant, the Court, on the defendant's application, refused to direct that the money should be paid out of court to him, or that the plaintiff should pay his costs. *Marks v. Ridgway*, 16 Law J. Rep. (N.S.) Exch. 241; 1 Exch. Rep. 8.

(D) SECURITY FOR COSTS.

Plaintiff resided in Scotland, and having obtained judgment issued a *fi. fa.*, under which the sheriff was in possession of the goods of defendant, when the latter became bankrupt, and his assignees claimed the goods. The sheriff applied to a Judge under the Interpleader Act, who ordered the assignees to take the goods; and upon paying the amount of the execution into court, an issue was directed to be tried between the assignees, plaintiffs, and the execution creditor:—Held, that the defendant in the issue must give security for costs. *Williams v. Crossling*, 16 Law J. Rep. (N.S.) C.P. 112; 4 Dowl. & L. P.C. 660; 3 Com. B. Rep. 657.

(E) STAYING PROCEEDINGS.

The sheriff, under an execution from the Court of Exchequer against M, having entered the apartments of H in his house, and taken H's goods which H claimed, an interpleader order was made, to which M was a party, under which an issue as to the goods was directed, which was decided in favour of H. H, thereupon, brought an action of trespass against the sheriff, for breaking and entering her apartments, in this court:—Held, that the Interpleader Act, 1 & 2 Will. 4. c. 58. s. 6, only applied to claims for goods, and that the Court had no jurisdiction to stay the present action under that statute.

Semble, also, that the proper course, if the action were a violation of the interpleader order, was to apply to the Court of Exchequer, and that the Court of Common Pleas could not interfere. *Holler or Hollier v. Laurie*, 15 Law J. Rep. (N.S.) C.P. 294; 4 Dowl. & L. P.C. 205; 3 Com. B. Rep. 334.

A Judge's order, under the Interpleader Act,

directed goods seized under a *fi. fa.* to be sold, and the money to be paid into court to abide the event of an issue between the claimant and the execution creditor. A verdict was found for the claimant, who thereupon brought an action against the sheriff for breaking and entering his dwelling-house, and *seizing and converting his goods*. The Court made absolute a rule to strike out of the declaration so much as charged the defendant with seizing and converting the plaintiff's goods.

And, *semble*, the proceedings ought in such a case to be stayed altogether. *Abbott v. Richards*, 15 Law J. Rep. (N.S.) Exch. 330; 15 Mee. & W. 194; 3 Dowl. & L. P.C. 487.

(F) ENTRY OF JUDGMENT.

The judgment on an issue under the Interpleader Act ought to be entered as directed by the statute, and not as in an ordinary suit. *Dickenson v. Eyre*, 7 Q.B. Rep. 307, n.

(G) ORDER TO PAY PROCEEDS PENDING WRIT OF ERROR.

Where an issue was taken, in which the assignees of the debtor were made plaintiffs and the execution creditor defendant, the money levied by the sheriff being in the mean time paid into court, and at the trial the assignees recovered, and a bill of exceptions having been tendered, and on error brought in the Exchequer, the writ was quashed; but before an order made under the Interpleader Act for payment of the money over to the plaintiffs, the defendant brought a writ of error in the House of Lords; the Court refused, pending the writ of error, to make any order, there being no proof of its being frivolous. *King v. Birch*, 7 Q.B. Rep. 669.

(H) TRIAL.

On an interpleader issue, where the question was whether certain goods, &c., which had been seized by the sheriff under a *fi. fa.*, issued upon a judgment, were the property of the plaintiffs, as assignees of a bankrupt, or of the defendant, the execution creditor, the defendant pleaded that by virtue of the said *fi. fa.*, and as against the plaintiffs, he was entitled to the proceeds of the goods, &c.:—Held, that the plaintiffs were entitled to begin at the trial.

The fact of the Judge having directed the wrong party to begin at Nisi Prius is not a ground for a new trial, unless it also appears that a substantial injury has been thereby done.

Semble—that in the case of an issue directed to inform the conscience of the Court, if the Court are satisfied with the result, they will not grant a new trial, although the Judge who tried the cause may have directed the wrong party to begin. *Edwards v. Matthews*, 16 Law J. Rep. (N.S.) Exch. 291; 4 Dowl. & L. P.C. 721.

INTERPLEADER SUIT.

A life insurance company received notice of an assignment by an insurer of a policy, and the insurer afterwards became bankrupt. Soon after the

death of the assured, the assignee of the policy applied for payment of the sum due, and the company inquired of the assignees of the bankrupt whether there was any objection to payment being made to the claimant. The assignees did not assent to the payment, but made no positive claim to the policy. In the mean time, the claimant brought an action in the name of the bankrupt against the company:—Held, that the company were entitled to file their bill of interpleader against the plaintiff in the action, the bankrupt and his assignees, and that the assignees who had in the suit shewn no title to the policy must pay the costs. *Fenn v. Edmonds*, 5 Hare, 814.

The right of the plaintiff in interpleader is to be protected not only from double liability, but from double vexation; and he is not therefore bound to shew an apparent title in each of the claimants who are defendants.

The stakeholder is entitled to relief by interpleader, and is not bound to accept an indemnity from either of the claimants, although such claimant shews an apparent title to the property.

A defendant in interpleader cannot generally be ordered to interplead by bringing or defending a suit in respect of the property in question, until he has put in his answer, or the bill is taken *pro confesso* against him; but where he seeks for time to answer he must satisfy the Court that the case cannot be put into a course for determination without further delay, and terms may be imposed on granting further time.

The plaintiff in interpleader undertakes to use all proper diligence to get in the answer of, or to take the bill *pro confesso* against each of the defendants; and if any delay should occur, any defendant may apply as against the plaintiff for a dissolution of the injunction or delivery up of the subject of interpleader, as the case may be. *East and West India Dock Co. v. Littledale*, 7 Hare, 57.

A bill was filed by A, stating that B was a mortgagee, with a power of sale, of an estate belonging to D, and mortgagee of some chattels also belonging to D; that C had also an interest in the said chattels; that B, with the assent and concurrence of C, had instructed A to sell all the property; that A had sold it, and had the money in his hands; and that A had afterwards received a notice that D had been made a bankrupt, and that he was required by the assignees not to part with the money, and praying that B, C, and the assignees of D might interplead together. To this bill B demurred. The demurrer was overruled. *Forebrother v. Beale*, 19 Law J. Rep. (N.S.) Chanc. 149.

INVENTORY.

A release in general terms, given to an executor, is no bar to a claim for an inventory and account. The Court has power of itself, though it seldom exercises the right, to call for an inventory and account. *Acaster v. Anderson*, 1 Robert. 672.

JOINT-STOCK COMPANY.

[See COMPANY.]

JOINT TENANTS AND TENANTS IN COMMON.

Testator devised property, then in lease at a rent of 26*l.*, to the principal of Brasenose College, the bailiff of Birmingham, and the mayor of H for the time being, to hold to them and their successors for ever. The said rent to be paid as follows:—8*l.* 13*s.* 4*d.* to the schoolmaster of Birmingham; 8*l.* 13*s.* 4*d.* to Brasenose College for a scholar, and 8*l.* 13*s.* 4*d.* to the schoolmaster of H; and he directed that at the expiration of the lease the land should be "sett forth and improved by the said principal bailiff and mayor for the time being or their successors, either by fine or otherwise, and the fine so sett should be equally divided betwixt the said schools and college:"—Held, that this was a devise to the three as joint tenants in fee and descended to the heir of the last survivor; and that the college took no beneficial interest in the increased rents or fines afterwards reserved. *Attorney General v. Gilbert*, 10 Beav. 517.

Two women being joint tenants of copyhold lands, one of them and her husband surrendered their estate and interest, to the intent that the lord should re-grant the same to such person or persons as the husband should by will appoint. The wife died in the lifetime of the husband and sister. The husband afterwards died, having by his will appointed the surrendered share to his executors:—Held, that there was a severance of the joint tenancy. *Edwards v. Champion*, 1 De Gex & S. 75.

Real and personal property was given by will to A, B and C and their heirs, share and share alike, as soon as they should have attained twenty-one; it being testator's will that if one of them should die before he attained that age, his share should vest in and belong to the survivors. A died under twenty-one, leaving B and C surviving:—Held, that the share which A would have taken vested in B and C as joint tenants. *Jones v. Hall*, 16 Sim. 500.

A tenant in common, occupying the premises held in common, but not excluding his co-tenants, is not chargeable by them with an occupation rent. *M'Mahon v. Burchell*, 5 Hare, 322.

JUDGE.

[See PRACTICE, AT LAW—PRACTICE, IN EQUITY; Jurisdiction of the Court.]

JUDGMENT.

[See ANNUITY—INTEREST—WARRANT OF ATTORNEY.]

(A) SIGNING AND ENTERING UP.

- (a) *In general.*
- (b) *For Want of a Plea.*
- (c) *Nunc pro tunc.*
- (d) *After Certificate for immediate Execution.*

- (e) *Where there are Issues of Law and Fact.*
- (f) *On Scire Facias by Executors.*
- (g) *Waiver of Irregularity in.*

(B) BY CONSENT UNDER JUDGE'S ORDER.

(C) OF NON PROS.

(D) NON OBSTANTE VEREDICTO [See PROHIBITION.]

(E) AS IN CASE OF NONSUIT.

- (a) *Rule for, when granted generally.*
- (b) *Peremptory Undertaking.*
 - (1) *Generally.*
 - (2) *Enlarging the Undertaking.*
 - (3) *Rule discharging the Undertaking.*
- (c) *Enlarging Rule for.*
- (d) *Waiver of Right to.*

(F) REVIVAL OF.

(G) ARREST OF.

(H) SETTING ASIDE.

(I) JUDGMENT RECOVERED.

(K) FOREIGN JUDGMENT.

(L) SATISFACTION OF.

(M) REGISTRATION OF.

(N) CHARGING STOCK UNDER 1 & 2 VICT. c. 110. s. 14.

(O) CHARGE ON LANDS UNDER 1 & 2 VICT. c. 110. s. 13.

- (a) *What is charged.*
- (b) *Upon what Property charged.*

(P) PROCEEDINGS UPON IN EQUITY.

(Q) RIGHTS OF JUDGMENT CREDITOR.

(A) SIGNING AND ENTERING UP. [See ARBITRATION.]

(a) *In general.*

The expression in the 3 & 4 Will. 4. c. 42. s. 18. that judgment may be signed "at the return" of the writ of trial, means at the return day named in the writ, and a judgment signed before the return day, though after the sheriff has actually returned the writ, is irregular. *Holmes v. London and South-Western Rail. Co.*, 18 Law J. Rep. (N.S.) Q.B. 87; 13 Q.B. Rep. 211.

Upon demurrer to a declaration upon a bond, the judgment of the Court is upon the declaration, and not upon the breaches assigned. Where, therefore, a declaration upon a bond assigned two breaches, one of which was good and the other bad, the Court gave judgment generally for the plaintiff for the penalty of the bond, and not for the plaintiff upon the good breach for the damages to be assessed upon it, and for the defendant as to the bad breach. *Kingsford v. Dutton*, 1 L. M. & P. 479.

(b) *For Want of a Plea.*

When the time for pleading expires on the 10th of August, the case falls within the 12th rule of Reg. Gen. Mich. term, 3 Will. 4. and the plaintiff cannot sign judgment on the 11th of August. *Savery v. Lister*, 18 Law J. Rep. (N.S.) Q.B. 13; *nom. Severin v. Leicester*, 12 Q.B. Rep. 949.

In an action for calls, the declaration stated that the board of directors met to make a call, that another board of directors met to determine how notice of a call should be given, and that another board

met to determine when the call should be paid. The abstract of the fifth plea was, that the persons alleged as having made the call did not constitute a board of directors. The plea was, that the persons in the declaration mentioned as constituting a board of directors did not constitute such board:—Held, that judgment signed by the plaintiff, on the ground of a variance between the abstract and the plea, was regular. *Wills v. Robinson*, 19 Law J. Rep. (N.S.) Exch. 248.

(c) *Nunc pro tunc*.

A cause was tried at the Summer Assizes, in 1839, and the plaintiff had a verdict. In Michaelmas term following, the defendant obtained a rule *nisi* for a nonsuit, which was made absolute in Trinity term 1841. The plaintiff having died on the 29th of November 1839, the Court ordered judgment to be entered up for the defendant, as of Michaelmas term 1839. *Abington v. Lipscomb*, 11 Law J. Rep. (N.S.) Q.B. 15.

In an action there were issues of law and of fact, and the issues of fact were tried in August 1843, and a verdict found for the plaintiff, and a rule for a new trial was discharged in Trinity term 1844, in which term the demurrers were set down in the special paper, but did not come on for argument until May 1845, when judgment was given upon them for the plaintiff. The plaintiff having died in March 1845, a rule to enter judgment as of Trinity term 1844 was made absolute. *Miles v. Bough*, 15 Law J. Rep. (N.S.) Q.B. 30.

A record contained an issue in fact as well as issues in law. The issue in fact was tried in 1843, and found for the plaintiff, and a rule *nisi* for a new trial discharged in Trinity term 1844. Afterwards, in the same term, the demurrer was set down for argument, but did not come on to be argued till Trinity term 1845, when judgment was given for the plaintiff. The plaintiff having died in March 1845,—Held, that judgment might be entered *nunc pro tunc*, as of Trinity term 1844. *Miles v. Williams*, 16 Law J. Rep. (N.S.) Q.B. 56; 9 Q.B. Rep. 47.

Judgment *nunc pro tunc* cannot be entered unless the delay is the act of the Court.

The cause was tried in December 1845; there were numerous defendants, who severed in pleading. R and S each pleaded non assumpsit; the other defendants pleaded special pleas only, on which issues were joined, and from finding on any of which the jury were, by consent, discharged. R and S succeeded on non assumpsit, subject to a bill of exceptions, tendered by the plaintiffs. The bill of exceptions was settled and sealed in May 1846, and the *postea* delivered to the defendants on the 3rd of June. Negotiations took place between the parties as to the mode of entering up judgment; the defendants submitted two forms of judgment to the plaintiffs, one of which was altered and approved of by them, and returned to defendants on the 22nd of August. The defendant R assented to the form as altered and returned to him, and was about to sign judgment, when, on the 27th of October, R died. On application by R's executors to enter up judgment *nunc pro tunc*,—Held, that the delay was not the act of the Court, and therefore the Court would not assist the executors.

Held, also, that R might have signed judgment, notwithstanding the pendency of the bill of exceptions.

Held, also, that though the plaintiffs were parties to the negotiations which produced the delay, they were not thereby prevented from resisting the application made by R's executors. *Fishmongers Company v. Robertson*, 16 Law J. Rep. (N.S.) C.P. 118; 4 Dowl. & L. P.C. 656.

(d) *After Certificate for immediate Execution*.

Since the General Rule Trin. t. 4 Vict., when a Judge certifies under the statute 1 Will. 4. c. 7. s. 2, for immediate execution, the plaintiff may sign judgment and take out execution, not only without a four day rule, but without any delay. *Alexander v. Williams*, 8 Q.B. Rep. 931.

A verdict having passed for the plaintiff at the trial of the cause, which took place in the vacation, the Judge granted a certificate for immediate execution. The same day the plaintiff gave notice of taxation of his costs, and on the following day taxed them, signed judgment, and issued execution:—Held, on motion to set aside the judgment and subsequent proceedings, that the plaintiff was regular in the course that he had pursued, and that he was not bound to take out a rule for judgment, or to wait four days before proceeding to sign judgment. *Alexander v. Williams*, 4 Dowl. & L. P.C. 132.

(e) *Where there are Issues of Law and Fact*.

Where upon demurrer there has been judgment for the defendant upon pleas going to the whole cause of action, and issues of fact are also upon the record (which have not been tried), the Court will not compel the defendant to enter up judgment of *nil capiat per breve*, so as to enable the plaintiff to go to a court of error before trying the issues in fact. *Hinton v. Acraman*, 16 Law J. Rep. (N.S.) C.P. 2; 4 Dowl. & L. P.C. 462; 3 Com. B. Rep. 737.

(f) *On Scire Facias by Executors*.

The Court refused to permit judgment recovered by the testator to be entered up on a *scire facias*, where the affidavits stated that the plaintiffs had been appointed her executors, but not that they had obtained probate. *Vogel v. Thompson*, 16 Law J. Rep. (N.S.) Exch. 309; 1 Exch. Rep. 60; 5 Dowl. & L. P.C. 114.

(g) *Waiver of Irregularity in*.

Signing judgment on a warrant of attorney for a sum larger than that mentioned in the warrant is only an irregularity, which may be waived by the laches of the defendant. *Stoford v. Fitzgerald*, 16 Law J. Rep. (N.S.) Q.B. 310; 4 Dowl. & L. P.C. 725.

The omission to enter an appearance before signing judgment upon a Judge's order to confess judgment is an irregularity only, and may, therefore be waived. Where, after a judgment so signed, and delivery of bill of costs containing no charge for entering an appearance, the defendant's attorney attended the taxation, and obtained time to pay the debt and costs, it was held a waiver of the irregularity in the judgment. *Grandin v. Maddans*, 18 Law J. Rep. (N.S.) Q.B. 31; 5 Dowl. & L. P.C. 241.

(B) BY CONSENT UNDER JUDGE'S ORDER.

The rule of the 12th of June 1845, as to obtaining Judge's orders for signing judgment, which requires that the defendant's "written consent be attested by an attorney acting on his behalf," has not the force of a rule of court; and, where a Judge's order for signing judgment was obtained, on a written consent, attested by an attorney acting for the plaintiff, the Court held the attestation sufficient in law, and refused to set aside the order and judgment signed thereon. *Dixon v. Leyden or Sladdon*, 15 Law J. Rep. (N.S.) Exch. 284; 15 Mee. & W. 427; 3 Dowl. & L. P.C. 697.

(C) OF NON PROS.

After leave given to amend the declaration upon payment of costs, the defendant did not serve a rule to plead several matters, or produce to the Master the draft pleas as meant to be amended, with 6s. 8d. costs for the amendment. The plaintiff replied to the old pleas, and made up and delivered the issue, with notice of trial, though the defendant was not under terms to rejoin gratis. The delivery of the issue was set aside; but—Held, that, as no production of the intended new pleas took place on taxing the costs of amendment, the defendant had no right to sign judgment of *non pros*. *Rishworth v. Dawes*, 16 Mee. & W. 440.

(D) NON OBSTANTE VEREDICTO.

[See PROHIBITION.]

(E) AS IN CASE OF NONSUIT.

(a) Rule for, when granted generally.

Where a town cause was made a remanet from the sittings after Easter term to the sittings after Trinity term, and the plaintiff then made default, a rule for judgment as in case of nonsuit made in Michaelmas term was discharged on a peremptory undertaking. *Ladbroke v. Williams*, 15 Law J. Rep. (N.S.) Q.B. 46; 3 Dowl. & L. P.C. 368.

The plaintiff, being under a peremptory undertaking to go to trial on the 10th of January, obtained the usual order to discontinue, on payment of costs, and a consent in case of non-payment to the defendant's signing a *non pros*. The defendant protested against the taxation, which was appointed for the 12th, and on that day obtained a rule absolute for judgment as in case of a nonsuit:—Held, on motion to set aside this rule, that the rule to discontinue did not operate as a stay of proceedings, and that the defendant was not precluded from obtaining judgment as in case of a nonsuit. *Beeton or Baker v. Jupp*, 15 Law J. Rep. (N.S.) Exch. 120; 15 Mee. & W. 149; 3 Dowl. & L. P.C. 474.

In an action of tort against two defendants, one of whom has suffered judgment by default, the other, who has pleaded to issue, may have judgment as in case of nonsuit against the plaintiff for not proceeding to trial against him. *Hadrick v. Haslop*, 16 Law J. Rep. (N.S.) Q.B. 442.

In a country cause a plaintiff suffered two assizes to elapse after notice of trial without proceeding to trial. Upon a rule *nisi* for judgment as in case of a nonsuit, the plaintiff stated in excuse that the action was against provisional commitment; the

uncertain state of the law; and his anxiety to wait the result of other cases and especially one then pending in the Exchequer Chamber:—Held, that as the defendants might have made the application in the previous term, and had not done so, the excuse was sufficient to discharge the rule upon a peremptory undertaking. *Edwards v. Ward*, 16 Law J. Rep. (N.S.) C.P. 164; 4 Com. B. Rep. 315.

In an action against four defendants, two died before issue joined, and issue was joined against the two survivors. The plaintiff neglected to make up the record and proceed to trial; and on application by the surviving defendants,—Held, that the surviving defendants against whom issue has been joined cannot obtain a rule for judgment as in case of a nonsuit, unless the deaths of their co-defendants against whom issue has not been joined appear by suggestion on the record.

Semble—If, in such a case, the plaintiff fail to make up the record and enter a suggestion of the death, the course for a defendant to pursue is to call upon the plaintiff to do so, and if he fail, to apply for leave for the defendant to do it; and then (the suggestions having been entered) to move for judgment as in case of a nonsuit. *Pinkus v. Sturch*, 17 Law J. Rep. (N.S.) C.P. 120; 5 Dowl. & L. P.C. 515; 5 Com. B. Rep. 474.

Where a cause, sent down to be tried before the sheriff under a writ of trial, is not reached on the day for which it is set down, it goes over to the next sitting day, as a *remanet*, and no fresh notice of trial is necessary; therefore, if the plaintiff omits to alter the return day of the writ of trial, where such alteration is requisite, and the cause is not proceeded with, he is guilty of a default which will entitle the defendant to move for judgment as in case of nonsuit. *Crockford v. Tucker*, 18 Law J. Rep. (N.S.) Q.B. 114; 6 Dowl. & L. P.C. 542.

Issue was joined on the 15th of April 1849. There were issues in law and issues in fact. Judgment was given on the issues in law at the sittings after Hilary term 1850. No step was taken by the plaintiff to bring the case to trial. In Trinity term 1850 the defendant moved for judgment as in case of a nonsuit:—Held, that the application was premature. *Chrisp v. Atwell*, 19 Law J. Rep. (N.S.) Q.B. 416; 1 L. M. & P. 454.

An action to recover compensation for services rendered to the defendant as a member of the provisional committee of a railway company after notice of trial given stood for trial as a special jury cause for the sittings after Hilary term 1850. In the November previous, the Vice Chancellor had made an order for winding up the affairs of the company under the Joint-Stock Companies Winding-up Act, 11 & 12 Vict. c. 45. An official manager was appointed some time in January 1850. After his appointment the plaintiffs withdrew the record, stating their intention of carrying in their claim and proving it before the Master in Chancery. The defendant having moved for judgment as in case of a nonsuit for not proceeding to trial at the sittings after Hilary term, the Court discharged the rule, holding that as by section 73, after the appointment of an official manager, the plaintiffs were bound to prove their debt before the Master before they could proceed with the action, and as they had not been shewn to have been guilty of any neglect

or delay in making such proof, they had given a reasonable excuse for not proceeding to trial. *Birch v. Lowndes*, 19 Law J. Rep. (N.S.) Q.B. 431; 1 L. M. & P. 541.

A judgment as in case of nonsuit may be entered in a feigned issue, under the 8 & 9 Vict. c. 118. s. 56. (the General Inclosure Act). *Hancock v. Earl of Carlisle*, 19 Law J. Rep. (N.S.) Exch. 45; 4 Exch. Rep. 447.

The deponent in an affidavit was described as M. B. clerk—S. N. (the word "to" being omitted): Held, insufficient. *Shakespear v. Willan*, 19 Law J. Rep. (N.S.) Exch. 184.

It is no ground for discharging the rule without a peremptory undertaking that the plaintiff has discovered since the action that the debt was recoverable in the Court of Requests; and, *quære*, whether a writ of trial may be carried down by proviso. *Nicholson v. Jackson*, 1 Com. B. Rep. 622.

An order staying all further proceedings in the cause "until the further order of the Court," cannot be waived by a notice of abandonment of such order from the defendant, so as to enable him to move for judgment as in case of a nonsuit. *Wilson v. Uppill*, 5 Com. B. Rep. 245.

An affidavit of the plaintiff's attorney that he had not an opportunity of suing the plaintiff, who resided some distance off, and that he believed he was not prepared to go to trial earlier,—Held, sufficient to discharge a rule for judgment as in case of a nonsuit, upon the plaintiff giving a peremptory undertaking. *Richards v. Hamer*, 5 Com. B. Rep. 582.

Upon motion for judgment as in case of a nonsuit for not going to trial after notice, the affidavit need not allege that due notice of trial has been given: and held, no objection to such a rule that such notice was given at an earlier period than, for anything shewn by the defendant, it need have been given. *Butler v. Frost*, 7 Com. B. Rep. 969.

An action of debt was brought in the joint names of the official and trade assignees of a bankrupt, but without the knowledge or consent of the former, who, as soon as he was made acquainted with it, obtained a rule against his co-plaintiff to stay the proceedings until he gave security for the costs. This rule was made absolute, and served on the defendant in the action. The cause had stood for trial at the sittings in the same term, but had been made a *remanet* to the sittings after the term, on the application of the defendant, on the ground of the absence of a material witness. At the latter sittings the record was withdrawn:—Held, that the defendant was entitled to move for judgment as in case of a nonsuit.

The Court will discharge a rule for judgment as in case of nonsuit on a peremptory undertaking to try given by one of two plaintiffs, though the other protests against it. *Laus v. Bott*, 16 Mee. & W. 362.

Judgment as in case of a nonsuit may be moved for by one of several defendants, though other defendants have moved for costs of the day for not proceeding to trial. *Bridgeford v. Wiseman*, 16 Mee. & W. 439.

Issue was joined on the 3rd of June 1844, and notice of trial given for the adjourned sittings after Trinity term 1844, which was afterwards postponed by consent to the sittings after Michaelmas term in

the same year. The record was at those sittings withdrawn, on the ground of the absence of some material witnesses on the part of the plaintiff. In Trinity term 1845, the plaintiff obtained commissions to examine his witnesses abroad, and in July in the same year the defendants also obtained a Judge's order for a commission to issue to examine witnesses on their behalf, which order contained the usual proviso, that the trial of the cause should not be proceeded with till the return of the commission. The defendants did not issue any commission:—Held, that they had waived any right they might have had to move for judgment as in case of a nonsuit. *Bordier v. Barnett*, 3 Dowl. & L. P.C. 370.

Issue was joined in a country cause on the 19th of March. On the 20th an agreement to consent to an order to refer was entered into by the attorneys on both sides, the award to be made on the 1st of June. No step was taken to draw up the order to refer by either party; nor was any further proceeding taken by the plaintiff in the cause:—Held, that a motion for judgment as in case of a nonsuit in the ensuing Michaelmas term was regular. *Fontaine-moreau v. Encontre*, 4 Dowl. & L. P.C. 425.

On a motion for judgment as in case of a nonsuit, the affidavit stated "that no notice of trial had been given in this cause," without negating that a trial had, in point of fact, been had:—Held, sufficient. *Woolmer v. Collins*, 5 Dowl. & L. P.C. 306.

(b) Peremptory Undertaking.

(1) Generally.

Where plaintiff, being under a peremptory undertaking to try a cause before the sheriff within two months, gave notice of trial for a court day within the time, but no causes were then tried on account of the occurrence of the assizes, and the plaintiff then gave notice of trial for the next court day, which was beyond the two months, and obtained a verdict,—in the subsequent term, the Court refused to give judgment as in case of nonsuit, but set aside the trial, as had without authority, and compelled the plaintiff to give a peremptory undertaking to try within a limited time. *Bushell v. Slack*, 16 Law J. Rep. (N.S.) Q.B. 3; 4 Dowl. & L. P.C. 388.

A rule nisi for judgment as in case of a nonsuit was discharged in Michaelmas term upon the plaintiff's giving a peremptory undertaking to try at the sittings after that term. The plaintiff entered the cause for those sittings; but it was not reached in the course of business, and was made a *remanet*. On the fifth day of Hilary term, the defendant obtained a rule absolute for judgment as in case of a nonsuit. On application to set the rule aside,—Held, that a peremptory undertaking to try is not an engagement to try at all events: a *bond fide* attempt to fulfil the undertaking is a compliance therewith. *Rizzi v. Foletti*, 17 Law J. Rep. (N.S.) C.P. 213; 5 Dowl. & L. P.C. 808; 5 Com. B. Rep. 852.

A defendant is not entitled to judgment as in case of a nonsuit for the non-performance of a peremptory undertaking, where, on the cause being called on, the plaintiff applies to amend the pleadings, an order for which, and also for the postponement of the cause, is made by the Judge. *Jackson v. Carrington*, 18 Law J. Rep. (N.S.) Exch. 385; 4 Exch. Rep. 41.

Though a peremptory undertaking is by Judge's order, and not by rule of court, if the plaintiff makes default, the rule for judgment as in case of a nonsuit will be absolute in the first instance. *Rowlinson v. Gibbs*, 19 Law J. Rep. (N.S.) Q.B. 16; 7 Dowl. & P. C. 320.

(2) *Enlarging the Undertaking.*

Where the plaintiff entered a cause for trial at the sittings at which he was under a peremptory undertaking to try, but was prevented from trying on account of the absence of a material witness, the Court discharged a rule which had been granted absolute for judgment as in case of a nonsuit, and enlarged the peremptory undertaking, although it appeared that the cause had been, in fact, struck out of the list on account of the record having been improperly entered. *Rogers v. Vandercom*, 15 Law J. Rep. (N.S.) Q.B. 313; 4 Dowl. & L. P.C. 102.

The venue in two actions had been changed at the instance of the defendants, on the ground that the same question was involved in both, and one was tried, but a verdict being found for the defendants, the record in the other action was withdrawn, and a rule *nisi* for judgment as in case of nonsuit which had been obtained therein was discharged on a peremptory undertaking. A rule *nisi* for a new trial having been obtained in the first action, but being still pending, a rule to enlarge the peremptory undertaking (moved for before the time limited for trial) was under the circumstances made absolute, on the terms of the plaintiffs paying the costs of the day for not proceeding to trial. *Rose v. Port Talbot Company*, 15 Law J. Rep. (N.S.) Q.B. 316.

Where the plaintiff neglects to try his cause after a second peremptory undertaking has been given, and seeks to be allowed further to enlarge such peremptory undertaking, he may be required, as a condition, to pay within a fixed time the costs occasioned by his previous defaults, as well as the costs of the application, although as a matter of strict right he appear to be entitled to enlarge the time. *Griffin v. Jackson*, 18 Law J. Rep. (N.S.) Q.B. 224.

An affidavit for the purpose of enlarging a peremptory undertaking, on the ground of the absence of a material witness, need not state the name of such witness. *Wilkinson v. Willats*, 18 Law J. Rep. (N.S.) Q.B. 4.

In order to entitle the plaintiff to an enlargement of a peremptory undertaking, he must satisfy the Court that he has done all in his power to comply with the undertaking; and where the cause assigned for the second default was that a material witness was absent abroad, and that the plaintiff had always endeavoured to procure his attendance, but had not succeeded, it was held insufficient. *Baldwin v. Padwick*, 19 Law J. Rep. (N.S.) Q.B. 15.

The Court enlarged a rule for a peremptory undertaking on an affidavit of the illness of a material and necessary witness, made by a party described as a solicitor, but not stated to be connected with the cause, the affidavit also not shewing that the witness was likely to be forthcoming at the next assizes. *Eastern Union Rail. Co. v.*

Symonds, 19 Law J. Rep. (N.S.) Exch. 111; 4 Exch. Rep. 502.

(3) *Rule discharging the Undertaking.*

According to the practice of this court, the plaintiff is bound to draw up and serve a rule, discharging a rule *nisi* for judgment as in case of nonsuit on a peremptory undertaking. *Nathan v. Storey*, 18 Law J. Rep. (N.S.) Q.B. 25; 12 Q.B. Rep. 956.

(c) *Enlarging Rule for.*

A rule for judgment as in case of a nonsuit having been obtained against the managing committee of a railway company, suing the defendant as an allottee of shares for non-payment of his deposit, the Court enlarged the rule till the sittings after Trinity term next, the defendant undertaking to be bound by the result of a special case about to be settled between the same plaintiffs and another defendant, and which the deponent was advised and believed raised all the principal questions of law and fact which were at issue in the present cause, and would decide the same. *Duke v. Tucker*, 16 Law J. Rep. (N.S.) Exch. 311.

(d) *Waiver of Right to.*

The record having been withdrawn at the sittings after Michaelmas term, an order was obtained by the defendant, in Trinity term following, for a commission to examine witnesses, by which it was ordered that the trial should be postponed until after the return of the commission. On motion for judgment as in case of nonsuit, after the making of the order, and before the return of the commission, it was held, that the defendant had waived his right to such judgment. *Waddy v. Barnett*, 15 Law J. Rep. (N.S.) Q.B. 8.

(F) *REVIVAL OF.*

A writ of scire facias will issue to revive a judgment, although more than twenty years have elapsed since it was signed, if payments within that time have been made on account of it. *Williams v. Welch*, 3 Dowl. & L. P.C. 565.

(G) *ARREST OF.*

That the damage is too generally stated in the declaration is no ground for arresting the judgment. *Rogers v. Nowell*, 17 Law J. Rep. (N.S.) C.P. 52; 5 Com. B. Rep. 109.

Covenant by the plaintiff as secretary of an insurance company to recover from the defendant 600*l.* the amount of a call. The company was established under a recent act of parliament which recited that difficulties might arise in legal proceedings by or against the company, since by law all the members must be named in such proceedings, and that it was expedient that the company should be rendered capable of suing and being sued in the name of a nominal party. It then enacted that in all actions instituted "by or on behalf of the company" it shall be sufficient to proceed in the name of the secretary as the nominal plaintiff. The declaration stated that by an indenture (the deed of settlement) made by the several persons whose names and seals were or might thereafter be thereunto subscribed, and who had sealed and delivered,

or who might seal and deliver the same, of the first part, and M W and T F M, persons nominated to be covenanters for the benefit of the company, of the second part, afterwards and whilst the defendant was such shareholder and proprietor of 200 shares in the company, and after the execution by the defendant of the indenture as aforesaid, the directors made a call. Breach—non-payment of such call. The defendant being under terms of pleading issuably demurred generally to the declaration on the ground that it did not shew that the defendant had sealed and delivered the indenture. This demurrer was by a Judge's order set aside as frivolous on the terms of the defendant pleading fair issuable pleas. The defendant having pleaded a plea which had been previously disallowed, judgment was signed for want of a plea:—Held, on motion in arrest of judgment, on the ground that the declaration did not state that the defendant had signed, sealed and delivered the deed, first, that the defendant was not precluded by the fact of the previous demurrer from moving in arrest of judgment, the ground of demurrer being different from that urged in arrest of judgment. Secondly, that the secretary was entitled to sue on behalf of the company. Lastly, that the words "after the execution by the defendant by the indenture as aforesaid" were, on a motion in arrest of judgment, equivalent to an averment that the defendant did execute the deed of settlement as aforesaid. *Wills v. Sutherland*, 18 Law J. Rep. (N.S.) Exch. 450; 4 Exch. Rep. 211.

Where a count for work and labour and money paid for the testator, and on an account stated with him, was joined with a count for work and labour done for the defendants as executors, money paid for them as executors, and an account stated with them as executors, the Court arrested the judgment.

Where all the counts in a declaration are good, but are misjoined, and the jury find general damages, the judgment will be arrested.

Where general damages are found on counts, one of which is good and the other bad, the Court will not arrest the judgment, but will grant a *venire de novo*. But where the jury find damages on a single count, containing two demands, for one of which an action lies, but not for the other, the Court will not arrest the judgment or grant a *venire de novo*. *Kitchingman or Kitchenman v. Skeel*, 18 Law J. Rep. (N.S.) Exch. 23; 3 Exch. Rep. 49.

(H) SETTING ASIDE.

After judgment for defendant on demurrer to one of several counts, the plaintiff took out a side bar rule to discontinue the action generally, (see Reg. Gen. Hil. term, 2 Will. 4, art. 106). The defendant's costs, not of the demurrer only, under the 3 & 4 Will. 4. c. 42. s. 34, but of the whole action, were taxed on the rule to discontinue, treating that rule as the termination of the action, and were received by defendant's attorneys as defendant's costs "on discontinuance of the action." Judgment was entered up on the record for the defendant on the first count only:—Held, that the discontinuance, being issued after judgment without leave of the Court, was irregular, and that the judgment was also irregular. The judgment was set aside, without costs. *Benton v. Polkinghorne*, 16 Mee. & W. 8.

(I) JUDGMENT RECOVERED.

[*Dawson v. Gregory*, 5 Law J. Dig. 365; 7 Q.B. Rep. 756.]

Where a plea of *nul tiel record* concluded to the country, and the plaintiff replied, that there is such a record, concluding with a verification by the record, and gave notice of trial by the record, it was held, that as the plea tendered a perfect issue without the conclusion to the country, the plaintiff was entitled to treat those words as surplusage, and to reply over. *Townsend v. Smith*, 15 Law J. Rep. (N.S.) Q.B. 93; 3 Dowl. & L. P.C. 323.

The declaration on a judgment stated it to have been obtained in the Court of our Lady the Queen of her Bench here at Westminster, to which the defendant pleaded "that there was not any record of the said supposed recovery remaining in the said Court of our Lady the Queen, before the Queen herself at Westminster, named in the said declaration the Court of our Lady the Queen of her Bench at Westminster, in manner and form as in the declaration alleged;" to which the plaintiff replied, that there is such a record of the said recovery remaining in the said Court of our Lady the Queen of her Bench here, in manner and form as in the declaration alleged. Upon motion for judgment, upon production of a record of this court,—Held, that the description in the declaration was a sufficient description of the court of Common Pleas, and that a sufficient issue was joined by the plea, and that the plaintiff was entitled to judgment. *Bradley v. Grey*, 16 Law J. Rep. (N.S.) C.P. 26; 4 Dowl. & L. P.C. 458; 3 Com. B. Rep. 726.

A declaration on a replevin bond for not prosecuting a suit with effect, according to the condition, stated (after setting out the bond), that the plaintiff made his plaint at the Whitechapel County Court, and "that it was adjudged by the said Court that the said plaintiff should take nothing by his said plaint." Plea, *nul tiel record*. Replication, there is such a record. The order made in the minute book of the county court was: "struck out for want of jurisdiction, a disputed title having been sworn to:—" Held, that the above entry did not support the allegation in the declaration of a judgment against the plaintiff in the county court, and that the defendant was entitled to judgment. *Tubby v. Stanhope*, and *Tubby v. Fisher*, 17 Law J. Rep. (N.S.) C.P. 190; 5 Dowl. & L. P.C. 781; 5 Com. B. Rep. 790.

The ordinary replication of *nul tiel record* to a plea of a former judgment recovered in respect of the same causes of action, against a joint contractor with the defendant, is a proper form of pleading, where such judgment has been reversed in error; although the former action and judgment were against a different defendant, and it appeared from the record that such reversal had been by consent of the parties. *Baily v. Turner*, 18 Law J. Rep. (N.S.) Q.B. 232; 6 Dowl. & L. P.C. 730.

On a plea of *nul tiel record* to a declaration, which stated that judgment had been recovered for 52*l.* 9*s.*, it appeared from the roll that judgment had been recovered for 55*l.* 9*s.*:—Held, a fatal variance, and that the motion to amend must be made the subject of a separate application. *Billing v. Hitchings*, 18 Law J. Rep. (N.S.) Exch. 192.

When the plaintiff has to produce the record in

court, after issue joined on a plea of *nul tiel record*, it is sufficient if he gives the defendant two days' notice of his intention to produce it. *Hopkin v. Doggett*, 19 Law J. Rep. (N.S.) Q.B. 417; 1 L. M. & P. 541.

In an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded a plea of judgment recovered by him in a former action brought by the plaintiffs on the same bill. This plea set out the pleadings, the finding of the jury, and the judgment of the Court in the former action. It alleged that the plea therein was, that the plaintiffs and the defendant had agreed that if the defendant dishonoured the bill when due, the plaintiffs should extend the time for the payment of the amount till the 28th of December 1848, and the defendant should execute a warrant of attorney for the payment of the amount, with charges and interest, on that day; and that the defendant, having dishonoured the bill, offered to execute the warrant of attorney, which the plaintiffs refused to accept; that the plaintiffs replied *de injuriâ* to that plea, and that the defendant had judgment. To the present plea of judgment recovered, the plaintiffs replied that they did extend the time for the payment of the bill till the 25th of December 1848, that that day had elapsed before the commencement of the present suit, and that the defendant did not execute the warrant of attorney. On demurrer, the replication was held bad, and the plea was held a good plea of judgment recovered, containing unnecessary details of the grounds of the judgment. *Overton v. Harvey*, 19 Law J. Rep. (N.S.) C.P. 256; 1 L. M. & P. 233.

In debt for 400*l.* Pleas as to the residue (after plea as to 43*l.* parcel, &c.), 1st, that the plaintiff impleaded the defendant, in respect of the said residue, in assumpsit to plaintiff's damage of 400*l.* and recovered against defendant 314*l.* as well for his damages in the said action as for his costs, &c.; 2ndly, as before, and that the defendant, before the plaintiff had declared in the present action, paid plaintiff the amount recovered, and plaintiff acknowledged himself to be satisfied the damages, &c., so recovered; replication, that the said debt was not the cause of action in respect of which the judgment was recovered:—Held, reversing the judgment below, that the pleas were good after verdict, and defendant entitled to judgment. *Todd v. Stewart*, 9 Q.B. Rep. 759.

It is necessary, in order to try the issue joined on a plea of *nul tiel record*, that the issue roll should be made up and carried in, notwithstanding the Reg. Gen. Hil. term, 4 Will. 4. pt. II. r. 15. *Jackson v. Oates*, 5 Dowl. & L. P.C. 231.

(K) FOREIGN JUDGMENT.

Plea to a declaration on a judgment obtained in the court of the Tribunal of Commerce at Brussels, that the defendant was not at any time served with any process issuing out of that court, nor had he at any time notice of any such process; nor did he at any time appear in the said court to answer the plaintiff in that action on which the judgment was obtained:—Held, that the plea was bad on general demurrer. *Reynolds v. Fenton*, 16 Law J. Rep. (N.S.) C.P. 15; 3 Com. B. Rep. 187.

(L) SATISFACTION OF.

Where a judgment debtor, taken in execution, was, after a month's imprisonment, released from prison by the judgment creditor, who, three years afterwards, registered the judgment pursuant to the 1 & 2 Vict. c. 110. and the 2 & 3 Vict. c. 11, the Court made absolute a rule to enter up satisfaction of the judgment, or to strike out the registration, the debtor paying the expenses of whichever alternative he adopted. *Lambert v. Parnell*, 15 Law J. Rep. (N.S.) Q.B. 55.

(M) REGISTRATION OF.

The Court will not interfere to direct the senior Master to receive and register a memorandum for the purpose of binding real estate, pursuant to the provisions of the 1 & 2 Vict. c. 110. s. 19.

The Master received such a memorandum, the object of which was to bind the lands of a member of a banking company by a judgment recovered against the public officer. *Ex parte Ness*, 17 Law J. Rep. (N.S.) C.P. 15; 5 Dowl. & L. P.C. 339; 5 Com. B. Rep. 155.

(N) CHARGING STOCK UNDER 1 & 2 VICT. c. 110. s. 14.

The defendant held shares in the Union Bank of London, and judgment having been obtained in an action against him, a Judge at chambers made an order, under the 1 & 2 Vict. c. 110. s. 14, charging such shares with the judgment debt. On application to set aside such order, it appeared that the bank consisted of a great number of shareholders, and was carried on pursuant to the terms of a deed of settlement, by which it was provided that the shares should not be transferred except by the consent of the directors, and also that if any order or decree was made against any proprietor by which his shares became charged, they were to be forfeited to the company. The company was not registered under the 7 & 8 Vict. c. 110, but was entitled to sue and be sued by a public officer under the 7 & 8 Vict. c. 113. s. 47. and the 7 Geo. 4. c. 46:—Held, *per Parke, B. and Alderson, B.*, that it being doubtful whether the company was a public company or not, the order ought not to be set aside.

Quære—Whether the Court has jurisdiction to set aside such order. *Graham v. Connell*, 19 Law J. Rep. (N.S.) Exch. 361; 1 L. M. & P. 438.

(O) CHARGE ON LANDS UNDER THE 1 & 2 VICT. c. 110. s. 13.

(a) What is charged.

Judgment debt payable at a future day and subject to be defeated in the event of the death of the debtor, held to be a charge under the 1 & 2 Vict. c. 110. s. 13. upon an annuity bequeathed to the debtor and payable out of real estate, but not so as to affect growing payments accruing due before the judgment debt became payable. *Younghusband v. Gisborne*, 1 De Gex & S. 209.

Decree for specific performance, with reference to the Master to compute interest and tax costs, and ordering the defendant to pay purchase-money and interest and costs when ascertained:—Held,

to constitute a judgment debt. *Duke of Beaufort v. Phillips*, 1 De Gex & S. 321.

(b) *Upon what Property charged.*

An annuity, secured by an assignment of leaseholds, is liable to be charged with the payment of a judgment debt, under the 1 & 2 Vict. c. 110, s. 13. *Harris v. Davison*, 15 Law J. Rep. (N.S.) Chanc. 255; 15 Sim. 128.

(P) PROCEEDINGS UPON IN EQUITY.

[See MORTGAGE—Accounts.]

The plaintiff, the solicitor of the defendant in an administration suit, upon being discharged brought his action against the defendant for costs, and obtained judgment; and in respect of that judgment, which was registered under the 1 & 2 Vict. c. 110, filed his bill against the defendant to foreclose her interest in the property, the subject of the administration suit, and obtained an order of foreclosure absolute. Upon the application of the defendant to enlarge the time for payment, the cause shewn was that the debt in respect of which the judgment was recovered was the costs incurred in the administration suit; that that suit was upon the point of being wound up; and that the interest of the defendant in the result of that suit was four times the amount of the plaintiff's debt; and that the plaintiff had no means of payment other than her rights under that suit:—Held, sufficient ground on the merits for enlarging the time. *Ford v. Wastell*, 16 Law J. Rep. (N.S.) Chanc. 372; 6 Hare, 229.

(Q) RIGHTS OF JUDGMENT CREDITOR.

The right of a judgment creditor in possession under an *elegit* is not analogous to that of a purchaser for value without notice, so as to give him a preference over a prior equitable claimant; the judgment only affecting that which was properly the estate of his debtor. *Whitworth v. Gaugain*, 15 Law J. Rep. (N.S.) Chanc. 433; 1 Ph. 728.

JUDICIAL AND OFFICIAL PERSONS.

(A) AMOTION.

(B) FEES.

(A) AMOTION.

The statute 22 Geo. 3. c. 75, empowering the governor and council of a colony or plantation to remove persons holding patent offices, for neglect or misbehaviour, includes judicial offices. But the Governor and Council of New South Wales, having removed a Judge without giving him notice, or affording him an opportunity of answering the charges brought against him, and upon which the order of amotion was founded, such order was held illegal, and reversed. *Willis v. Gipps*, 5 Moore, P.C. 379.

On a memorial presented to the Queen in Council by the House of Assembly of the Island of Grenada, complaining of the judicial conduct of the Chief Justice of that Island, as illegal and oppressive, being referred to the Judicial Committee of the Privy Council, it appeared from the

evidence, that during the fourteen years in which the Chief Justice had held office he had displayed on the Bench several instances of intemperate, and in some cases illegal, conduct, but these acts were committed many years before the presentation of the memorial, without any complaint at the time of the Chief Justice's misconduct; the only act of recent date complained of being the fining of two magistrates for taking depositions in the third instead of the first person. In these circumstances, the Judicial Committee reported to the Crown, that, having regard to the length of time which had elapsed since all the acts complained of, except that of fining the magistrates, (which, though erroneous and improper, had been committed by the Chief Justice in the execution of his duty,) they could not, sitting judicially, advise the Crown to remove the Chief Justice for misconduct. *The Island of Grenada v. Sanderson*, 6 Moore, P.C. 38.

The governor and council of a colony or plantation have power, under the statute 22 Geo. 3. c. 75, to remove a Judge from his office, for misbehaviour or neglect of duty.

Where a Judge availed himself of his judicial office, through an incident connected with the constitution of the Supreme Court in Van Diemen's Land, to obstruct his creditor from recovering a debt due from him, and, upon an investigation by the Governor and Council, was found to be involved to a large extent in bill transactions and pecuniary embarrassment,—Held, by the Judicial Committee, sufficient to justify the Governor and Council in removing him from office.

The amotion was made, under an order of the Governor and Council, calling upon the Judge to shew cause why he should not be suspended from office:—Held, that although there was some irregularity in pronouncing an order for amotion, when the Judge had only been called upon to shew cause against an order of suspension, yet, that as the facts justified the order of amotion, and the Judge had sustained no prejudice by such irregularity, the order of amotion ought not to be reversed. *Montagu v. the Executive Council of Van Diemen's Land*, 6 Moore, P.C. 489.

(B) FEES.

By the statute 11 Geo. 4. & 1 Will. 4. c. 58, all persons holding offices in or belonging to any of the superior courts at Westminster, were to furnish an account of the fees of their offices to the Commissioners appointed under that act, who were to inquire into the legality and amount of such fees, and all fees that were then legally received were to continue to be received until otherwise ordered, and an account to be rendered to the Treasury. By the 1 & 2 Will. 4. c. 35, all fees which the Commissioners deemed to be reasonable, and which had been received for fifty years before the 24th of May 1831, were to be taken to be legal fees. The clerk of the papers of the Queen's Bench Prison was in the appointment of the marshal, under the 27 Geo. 2. c. 17, and a list of the fees received for fifty years in respect of that office was submitted to the Commissioners, and such fees were by them deemed reasonable, and continued to be received and accounted for to the Treasury. By the 5 & 6 Vict. c. 22, all offices of the Fleet and Marshalsea Prisons were

abolished, and the Queen's Bench Prison was under the name of the Queen's Prison constituted the sole prison for the superior courts at Westminster. Most of the officers of the Queen's Bench Prison (and among them the clerk of the papers) remained, but the appointment was given to the Secretary of State, and the clerk of the papers was thenceforth paid by a salary. He, however, continued to receive the legalized fees, and to account for them as before:—Held, that the office of clerk of the papers was an office belonging to the Court within the 11 Geo. 4. & 1 Will. 4. c. 58, and that the fees approved of by the Commissioners were legally receivable; and also that, as the 5 & 6 Vict. c. 22. did not expressly give the salary in lieu of fees, they might still be legally demanded by the clerk of the papers. *Markwell v. Dyson*, 19 Law J. Rep. (N.S.) Q.B. 193.

JURISDICTION.

[See EXCHEQUER, COURT OF—INFERIOR COURT—PARLIAMENT—WITNESS.]

A foreign sovereign, coming to England, cannot be made responsible in the courts there for acts done by him, in his sovereign character, in his own country.

Held, therefore, that the King of Hanover, who was also a British subject, and was in England exercising his rights as such subject, could not be made to account in the Court of Chancery for acts of state done by him in Hanover and elsewhere abroad, in virtue of his authority as a sovereign and a British subject. *Duke of Brunswick v. the King of Hanover*, 2 H.L. Cas. 1.

To an action on a deed the defendant pleaded that at the time the deed was made he was a sovereign prince, and that the deed was made within his dominions, and that from the time of the making thereof continually until and at the time of the commencement of the suit the defendant had been and still was entitled to all rights and privileges appertaining to him as such sovereign prince:—Held, that the plea was bad in substance, for not distinctly shewing that the defendant was a sovereign at the time of the action brought or plea pleaded. *Munden v. the Duke of Brunswick*, 16 Law J. Rep. (N.S.) Q.B. 300; 10 Q.B. Rep. 656.

The Supreme Court at Madras (established by the Madras Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in England, over charities.

By the 53 Geo. 3. c. 155. s. 111, the Advocate General is entitled to appear and represent the Crown, in informations for the administration of charitable funds. *Attorney General v. Brodie*, 4 Moore, In. App. 190.

The colony of the Islands of Bermuda was settled by a chartered company of adventurers, under a grant from Jac. 1. Under the government of this company, three officers were appointed, for the local administration of the islands, namely, a sheriff, secretary, and provost-marshal. Each of these officers was paid, partly by fees, and partly by grants of certain parcels of public lands, made to each officer respectively. In 1688,

the company was dissolved, and their charter evicted, and the government of the islands became absolutely vested in the Crown. From that period, one person only had been appointed to perform the duties of the three offices, and the Crown appropriated these emoluments, and made certain alterations from time to time in their amount; this state of things continued down to the year 1819, when the office of provost-marshal was separately appointed, and some division of the lands was made. In 1839, the respondent was appointed provost-marshal, and in 1846 he filed a bill in the Court of Chancery, in the island, against the secretary of the island, for an account of the rents and profits of the lands, and other monies received by him in respect thereof, as appertaining to the office of sheriff, which office was included in that of provost-marshal. The Court at Bermuda sustained the bill, and ordered an account to be taken:—Held, reversing such decree, that supposing a right to exist in the respondent, the Court of Chancery had no jurisdiction to entertain such a suit, as such right or title to the office of sheriff was not of an equitable nature, and—

Semble—the only ground for coming into Chancery was the existence of several offices in one individual during a long series of years, and a consequent confusion of boundaries of the lands respectively allotted to the several offices. *Kennedy v. Trot*, 6 Moore, P.C. 449.

JURY.

- (A) GRAND JURY.
- (B) SPECIAL JURY.
- (C) VIEW BY.
- (D) DISCHARGING.
- (E) CONSTRUCTION OF 6 Geo. 4. c. 50. s. 46.

(A) GRAND JURY.

Where a bill was preferred before the grand jury at an assizes against a parish for non-repair of a road, the liability to repair which was denied by the parish, in which two of the members of the grand jury were large landed proprietors, and took part in the proceedings on the bill, and put questions to the witnesses examined before the grand jury, and one of whom stated to the foreman that the road in question was useless, and the bill was thrown out,—the Court granted a criminal information against the parish. *Regina v. the Inhabitants of Upton St. Leonards*; *Regina v. the Inhabitants of Barnwood*, 16 Law J. Rep. (N.S.) M.C. 84; 10 Q.B. 827.

(B) SPECIAL JURY.

It is not sufficient to make a party guilty of laches that he has delayed for an unnecessary time to serve a rule, unless it be shewn that the other party is prejudiced by the delay.

Where, therefore, notice of trial had been given for the 16th, and on the 9th a rule for a special jury was obtained, but not served till the 13th, but, owing to the intervention of Easter, no jury could have been struck before the 15th if the rule had been served on the day on which it was obtained, the Court refused to set aside the rule for the

special jury. *Gurney v. Gurney*, 15 Law J. Rep. (N.S.) Q.B. 265; 3 Dowl. & L. P.C. 734.

No rule for a special jury can be had before issue joined. *Sayer v. Ducroix*, 16 Law J. Rep. (N.S.) Q.B. 120; *nom. Sayer v. Dufaur*, 9 Q.B. Rep. 800.

The subject's right to try a case by a special jury is not affected by any suggestion of the Attorney or Solicitor General, without affidavit that the Crown is interested in the defendant's estate; though that suggestion would be sufficient to obtain a trial at bar. *Dunn v. Cox*, 16 Mee. & W. 439.

A defendant having obtained a rule for a special jury, and the jury having been struck and reduced, but not summoned, and the cause having been tried by a common jury as undefended, the Court set aside the trial, with costs. *Haldane v. Beauchamp*, 18 Law J. Rep. (N.S.) Exch. 227; 3 Exch. Rep. 658.

(C) VIEW BY.

The defendant being sued in assumpsit, for work done by the plaintiff as a carpenter and bricklayer, and for bell-hanging, painting, and papering done to the defendant's house, applied to the plaintiff to appoint a shewer on his part, for the purpose of a view by the jurors; and, on the plaintiff's refusal, obtained a side-bar rule for a view which contained the name of the defendant's shewer only, with blanks for the time and place of the meeting of the jurors:—Held, by *Parke, B.*, that this was not a case for a view, and that the side-bar rule must be set aside. And, *semble*, that the rule was irregular in not containing the names of *both* shewers, and the time and place of the meeting of the jurors. *Stones v. Menhem*, 17 Law J. Rep. (N.S.) Exch. 215; 2 Exch. Rep. 382.

(D) DISCHARGING.

Where a prisoner has been put upon his trial for a capital offence, and the jury after the lapse of a reasonable time are unable to agree in a verdict, it is in the discretion of a presiding Judge to discharge them, if he thinks a case of necessity for so doing is made out.

The fact of a jury having been locked up from 2 p.m. to 8 a.m. on the following morning, and there being then no prospect of their agreeing, and the duty of the Judge requiring his presence at the next circuit town on that day, is a sufficient case of necessity to justify the discharge of the jury.

The propriety of the discharge of the jury cannot be questioned on a *habeas corpus*; at all events until the lapse of two assizes after the committal of the prisoner, the warrant of commitment being a justification of the detention under 31 Car. 2. c. 2. s. 7.

Quare—as to the proper mode of raising the question. *Regina v. Newton*, 18 Law J. Rep. (N.S.) M.C. 201.

(E) CONSTRUCTION OF 6 Geo. 4. c. 50. s. 46.

The 6 Geo. 4. c. 50. s. 46. imposes penalties upon "the sheriff or under-sheriff," for an improper insertion or omission of names from the special jury list. In an action for such penalties, the declaration describing the defendant as being "the acting under-sheriff," it was proved that the defendant was

the person who in the county acted as under-sheriff, so far as receiving writs, making returns, appearing in public, &c.; but that a Mr. T was the appointed under-sheriff, pursuant to the 3 & 4 Will. 4. c. 90. s. 5. It also appeared that the defendant had on one occasion signed his name as under-sheriff, although he stated at the same time that he was not the under-sheriff, but that Mr. T was, and in an affidavit had stated himself to be the acting under-sheriff:—Held, that there was no evidence of the defendant's liability, and that the plaintiff was properly nonsuited. *Williams v. Thomas*, 19 Law J. Rep. (N.S.) Exch. 50; 4 Exch. Rep. 479.

JUSTICES OF THE PEACE.

[See SESSIONS.]

(A) JURISDICTION.

(B) ACTIONS AGAINST.

The performance of the duties of Justices of the Peace out of Sessions with respect to persons charged with indictable offences facilitated by the 11 & 12 Vict. c. 42; 26 Law J. Stat. 79.

Similar provisions with respect to summary convictions and orders made by the 11 & 12 Vict. c. 43; 26 Law J. Stat. 97.

Justices protected from vexatious actions for acts done by them in the execution of their office by the 11 & 12 Vict. c. 44; 26 Law J. Stat. 118.

Provisions for holding petty sessions in boroughs, and for providing places for such petty sessions in counties and boroughs, 12 Vict. c. 118; 27 Law J. Stat. 25.

Doubts as to the authority of Justices to act in certain matters relating to the poor in boroughs removed by the 12 & 13 Vict. c. 64; 27 Law J. Stat. 90.

Justices of boroughs having separate gaols may commit assize prisoners to such gaol, and the jurisdiction of borough Justices extended to all offences and matters arising in the boroughs by the 13 & 14 Vict. c. 91; 28 Law J. Stat. 239.

(A) JURISDICTION.

On a dispute between the members of a friendly society, called "The Leeds Philanthropic Society," and A B, whom they had expelled, the arbitrators appointed by the rules of the society made an award that A B should be expelled the society. A B thereupon made complaint to a Justice of the Peace under the 4 & 5 Will. 4. c. 40. s. 7. that he had been wrongfully expelled, and that arbitrators had been appointed who had neglected and refused to make any award; and two Justices by their order, after reciting the above complaint, adjudged that "all and singular the allegations were true," and ordered that A B should be re-instated in the said society:—Held, that the statement in the order that the arbitrators had neglected to make an award was not conclusive; but that on motion to quash the order of Justices, the circumstances under which the award was made might be gone into on affidavit.

There were contradictory affidavits as to whether the arbitrators wrongfully refused to hear evidence on the part of A B:—Held, that there being suffi-

cient evidence to warrant the conclusion to which the Justices had arrived, it was to be presumed that they were right as to the fact.

Also, that such fact warranted the statement that the arbitrators had neglected to make an award, and that the order of Justices was therefore good.

Though the meetings of the society were held at Leeds, yet as the society was open to country members, and A B himself resided at Wakefield, where the circumstance occurred which was the ground of his expulsion, the Justices of the West Riding had locally jurisdiction to determine the matter. *Regina v. Grant*, 19 Law J. Rep. (N.S.) M.C. 59.

A supersedeas under the hands and seals of Justices indorsed upon, and purporting to supersede an order previously made by them, has *per se* no annulling effect. *Regina v. Brisby*, 18 Law J. Rep. (N.S.) M.C. 157; 1 Den. C.C. 416; 2 Car. & K. 962.

Upon a charge of perjury before two Justices it appeared that the perjury was alleged to have been committed in a deposition made in a suit then pending in the ecclesiastical court, to which both the informant and the person charged were parties. The Justices having thereupon declined further to proceed in the matter, the Court refused to compel them to proceed, as they had a discretion in the matter, which they had properly exercised. *Regina v. Ingham*, 19 Law J. Rep. (N.S.) M.C. 69.

Where an act of parliament in one section provided that all penalties imposed by it should be recoverable by information before two Justices, and in another section provided that where an information was laid before one Justice, such Justice should issue a summons for the appearance of the party before two Justices, and the form of information given by the schedule to the act recited the appearance of the informant "before us, two of Her Majesty's Justices,"—Held, that an information exhibited before one Justice was sufficient, and that two Justices were thereupon bound to hear it. *Regina v. the Justices of Harwich, in re Russell*, 18 Law J. Rep. (N.S.) M.C. 106; 13 Q.B. Rep. 237.

It is not competent for magistrates to levy distresses upon a vessel in the custody of the Court of Admiralty at the suit of seamen for their wages, under the statute 7 & 8 Vict. c. 112.

Monition decreed against an auctioneer who had acted upon the magistrates' warrants, and had removed part of the tackle and furniture of the ship. *The Westmoreland*, 2 Rob. 394.

(B) ACTIONS AGAINST.

The power of a magistrate to accept or refuse bail in cases of misdemeanour is a judicial duty, and an action will not lie against him for refusing to take bail in such cases without proof of express malice; even though the sureties tendered are found by the jury to have been sufficient. *Linford v. Fitzroy*, 18 Law J. Rep. (N.S.) M.C. 108; 13 Q.B. Rep. 240.

An action against a magistrate for an act done by virtue of his office is a local action; and, therefore, if (since the division of the county of Lancaster, by virtue of the 3 & 4 Will. 4. c. 71. s. 4.) the venue in such action be laid in the "southern division" of that county, but it appear that the cause of action arose in the "northern division" the de-

fendant will be entitled to a verdict thereon under the 21 Jac. 1. c. 12. s. 5. *Atkinson v. Hornby*, 2 Car. & K. 335.

LANCASTER.

The practice and proceedings of the Court of Chancery of the County Palatine of Lancaster amended by the 13 & 14 Vict. c. 43; 28 Law J. Stat. 71.

LANDLORD AND TENANT.

[See LEASE—PLEADING—WASTE.]

(A) OF THE TENANCY.

- (a) *When and how created.*
 - (1) *By Underletting.*
 - (2) *By Attornment.*
 - (3) *Between Mortgagor and Mortgagee.*
 - (4) *Contract creating it.*
- (b) *Commencement of the Holding.*
- (c) *Length of Term.*
- (d) *Holding over.*
- (e) *Determination of Tenancy.*
 - (1) *Surrender.*
 - (2) *By Assignment of Term.*
 - (3) *By partial Eviction.*
 - (4) *By Service of Declaration in Ejectment.*
- (f) *Yearly Tenancy.*
- (g) *Weekly Tenancy.*
- (h) *Tenancy at Will.*
- (i) *Custom of the Country, to what Tenancies applicable.*
- (k) *How averred in Pleading.*

(B) CONTRACTS BETWEEN.

- (a) *Construction of.*
- (b) *For quiet Enjoyment.*

(C) OF THE RENT.

- (a) *At what Period payable.*
- (b) *Payment to Ground Landlord.*
- (c) *When Payment of, Evidence of Title.*
- (d) *Penal Rent.*

(D) LANDLORD'S REMEDIES.

- (a) *Distress.*
 - (1) *At Common Law.*
 - (2) *Notice of.*
 - (3) *What may be distrained.*
 - (4) *Fraudulent Removal of Goods.*
 - (5) *Retention of Goods.*
 - (6) *Tender of Rent.*
 - (7) *Time to replevy.*
 - (8) *For Penalty under a Demise.*
- (b) *Re-entry.*
- (c) *Restitution of deserted Premises.*
- (d) *Use and Occupation.* [See (A) (d).]

(E) LANDLORD'S LIABILITIES.

- (a) *Wrongful Distress.*
- (b) *To double Value under 2 W. & M. c. 5. s. 4.*

(F) TENANT'S RIGHTS AND LIABILITIES.

(G) NOTICE TO QUIT.

(H) ASSIGNEE OF REVERSION.

(A) OF THE TENANCY.

(a) *When and how created.*

(1) *By Underletting.*

The plaintiff, being tenant of premises from May to the 13th of December, let them by parol to the defendant until the latter day, reserving a weekly rent, the intention of the parties being to create the relation of landlord and tenant, and to pass the right of possession by lease:—Held, that the transaction did not amount to an assignment, and that use and occupation might be maintained on the lease. *Pollock v. Stacey*, 16 Law J. Rep. (N.S.) Q.B. 132; 9 Q.B. Rep. 1033.

(2) *By Attornment.*

The defendant, a mortgagee, avowed for rent due to him from the plaintiff, by virtue of a certain demise to him for two years, ending on the 29th of September 1842. It appeared that the plaintiff was tenant of the mortgage, and that he with other tenants subsequently to the mortgage, on the 14th of October 1842, attorned to the defendant. Opposite the plaintiff's name in the instrument of attornment was entered "Rent 55*l.*, from Michaelmas 1840:—Held, that the avowry was well supported. *Gladman v. Plumer*, 15 Law J. Rep. (N.S.) Q.B. 79.

(3) *Between Mortgagor and Mortgagee.*

A mortgage deed, executed by the mortgagor only, contained, in addition to the usual clauses, the following: that "for better securing the interest, the mortgagor does hereby attorn and become tenant of the premises to the mortgagee at the yearly rent of 40*l.*, payable half-yearly, so long as the principal sum shall remain secured." The mortgagor having continued in possession of the premises, and having made several of these half-yearly payments, which, however, were described in the receipts given by the mortgagee, as being "for interest,"—Held, that the relationship of landlord and tenant existed between the parties, and that the former had the right to distrain for the amount of a half-year's arrears. *West v. Frith*, 18 Law J. Rep. (N.S.) Exch. 50; 3 Exch. Rep. 216.

(4) *Contract creating it.*

A held premises of B under a lease for three, seven or ten years, determinable on notice; with a stipulation that the amount of a quarter's rent should be paid by A on taking possession, which was to be allowed to him for the last quarter's rent, "on the determination of the said tenancy." After a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that A should continue tenant for another year, no express mention being made of the terms of the tenancy:—Held, that the above was in substance a stipulation for a forehand rent, and that in the absence of any express mention of other terms, A continued to hold subject to the terms of the original lease; and, consequently, that the payment made on taking possession was applicable to the last quarter of the fourth year. *Finch v. Miller*, 5 Com. B. Rep. 428.

Where a contract was made by plaintiff and one H, that H "should build certain houses on plaintiff's land and procure tenants for the same at a given

rate, and himself pay the rent till he so procured tenants, from the Michaelmas then next ensuing,"—Held, that under the contract no tenancy was created between the plaintiff and H. *Taylor v. Jackson*, 2 Car. & K. 22.

(b) *Commencement of the Holding.*

The defendant held under a lease from A, for fourteen years and a half from Christmas 1831, and paid rent to A until the expiration of the lease on the 24th of June 1846; after that time he continued in possession, and paid rent to the lessor of the plaintiff, who had become entitled to the premises:—Held, that a notice to quit expiring on the 24th of June was good. *Doe d. Buddle v. Lines*, 17 Law J. Rep. (N.S.) Q.B. 108; 11 Q.B. Rep. 402.

(c) *Length of Term.*

By a written agreement the tenancy was to be "from year to year from Michaelmas next, at the yearly sum of 55*l.*, payable half-yearly at Lady-day and Michaelmas, except the last half-year, which portion of the rent shall be paid on or before the 1st of August in that year; the tenant to dress the lands in the due course of husbandry, &c., and to allow the landlord or incoming tenant in the last year to enter on the 1st of May to make fallows, &c., the tenant to be allowed the use of the barns for stacking and threshing the crops, &c. of the last year, until the 1st of May after the tenancy:—Held, that the agreement did not create a tenancy for more than a year, and that notice to quit might be given, expiring at the end of the first year. *Doe d. Plumer v. Nainby*, 16 Law J. Rep. (N.S.) Q.B. 303; 10 Q.B. Rep. 473.

(d) *Holding over.*

B being tenant to A from year to year, and under notice to quit at Michaelmas, C entered into an agreement with A for a lease of the premises from Michaelmas, at an increased rent, A undertaking to put the premises in repair before the commencement of the term. A afterwards accepted C as tenant, in lieu of B, for the remainder of B's term. A did not put the premises in repair, and no lease was executed:—Held, that C was not necessarily to be considered as continuing tenant after Michaelmas at the rent previously paid, but that he was liable to A for such reasonable rent as the premises were worth. *Mayor, &c. of Thetford v. Tyler*, 15 Law J. Rep. (N.S.) Q.B. 33; 8 Q.B. Rep. 95.

A and B were tenants to the plaintiff of certain premises for a term of three years. B never occupied the premises, but A, on the expiration of the term, held over. No assent of B to the holding over was proved. An action for use and occupation having been brought by the plaintiff against A and B, in which A suffered judgment by default, the plaintiff tendered in evidence a letter written by his agent to B, after the expiration of the term, in which he demanded rent alleged to be due subsequently to the term: no answer was returned to this letter:—Held, that as one tenant cannot bind his co-tenant by holding over without his assent, according to the doctrine of *Christy v. Tancred*, which was in effect confirmed by the case of *Tancred v. Christy*; and as there was no evidence of B's assent in this case, the defendant B was not liable

for the rent, and therefore the letter to him, although admissible, was not entitled to much weight. *Draper v. Crofts*, 15 Law J. Rep. (N.S.) Exch. 92; 15 Mee. & W. 166.

In debt for double value under the 4 Geo. 2. c. 28, the declaration stated that the plaintiffs were seised in their demesne as of freehold in right of the plaintiff, Caroline Mary H, during her life, of a messuage held by the defendant as tenant to the said plaintiffs for a year, terminable on the 11th of October 1844, the reversion thereof belonging to the plaintiffs in right of the said Caroline Mary. That the plaintiffs, on the 1st of September, gave notice in writing and demanded of the defendant to deliver up possession of the said premises to the plaintiffs on the 11th of October, which the defendant refused to do. Plea, *nil debet*, by statute.

The defendant became tenant to Mr. H, one of the plaintiffs, for one year, from the 11th of October 1843 to the 11th of October 1844, of a house, farm, &c., at a certain rent, and occupied the same as tenant to him for that year. The contract for this tenancy was by parol, and was made by the defendant expressly with Mr. H alone in his own right, and Mrs. H was no party thereto. A demand and notice in writing for delivering up of the possession by the defendant was made by the agent of the plaintiffs. The defendant retained possession of the premises:—Held, that the two plaintiffs were not entitled to recover in this joint form of action, the defendant not being the tenant of the two plaintiffs, and the reversion not being in the two plaintiffs, but in the husband alone, and that neither the averment of the tenancy, nor the words “to the said plaintiffs” in the allegation of the tenancy, could be rejected. *Harcourt v. Wyman*, 18 Law J. Rep. (N.S.) Exch. 453; 3 Exch. Rep. 817.

(e) Determination of Tenancy.

(1) Surrender.

Defendant being tenant to the plaintiff after having given up possession of the premises, wrote to his lessor as follows, during the term: “I trust you may be able to let the rooms to some other person and on better terms;” the plaintiff afterwards without any further communication with the defendant let the premises at an increased rent to a third party, who entered and paid rent for some time. In an action of debt on the original demise, —Held, that these facts constituted a surrender by act and operation of law. *Nicholls v. Atherstone*, 16 Law J. Rep. (N.S.) Q.B. 371; 10 Q.B. Rep. 944.

Defendant was tenant to A B of certain apartments under a written agreement for a term of years, at a rent payable quarterly. A B became bankrupt. Defendant having occupied for a short time after the bankruptcy and after appointment of the assignees, sent the key to the office of one of the plaintiffs, the official assignee, by a person who left it there with one whom he supposed to be the clerk, stating that it was the key of the apartments in question, and that he brought it from the defendant. A tin plate was fixed outside the door of the apartments, announcing that the defendant had removed to another address. The plaintiffs having, eighteen months afterwards, demanded six quarters’ rent due since the bankruptcy,—Held, that there was no evidence from which a jury could properly find

that there had been a surrender by operation of law, assuming that the delivery by the defendant and acceptance by the official assignee of the key of the apartments would have amounted to such surrender, within the Statute of Frauds. *Cannan v. Hartley*, 19 Law J. Rep. (N.S.) C.P. 323.

[See *Doë d. Hull v. Wood*, post (f).]

(2) By Assignment of Term.

The declaration alleged that, in consideration that B had become tenant to A, upon terms that B should, during his said tenancy, keep the premises in repair, B promised A to keep the premises in repair during his said tenancy upon the terms aforesaid; that the said tenancy continued until the commencement of the action, but that B did not, during his said tenancy, keep the premises in repair. Plea, that after B had become tenant to A, and before the committing of the breach, A, by due course of law, assigned to C all his interest in the demised premises and in the reversion expectant on the determination of B’s said tenancy; and A, thenceforth, ceased to have anything in the demised premises, and B thence ceased to be tenant thereof to A:—Held, that the plea was no answer to the declaration, the contract to repair being a contract to repair during the tenancy; and that the tenancy was not put an end to by the assignment. *Bickford v. Parsons*, 17 Law J. Rep. (N.S.) C.P. 192; 5 Com. B. Rep. 918.

(3) By partial Eviction.

In an action by a landlord against his tenant for a breach of promise to use the demised premises in a tenant-like manner during the tenancy, the defendant pleaded, first, that before the breach the plaintiff had evicted him from part of the premises, and that he had relinquished possession of the residue; and, secondly, that before the breach the defendant’s interest in the premises was surrendered by operation of law by the defendant relinquishing and the plaintiff accepting possession of the premises:—Held, that these pleas were bad; that though the eviction from part created a suspension of the entire rent during its continuance, it did not, even along with the relinquishment of the residue, put an end to the tenancy or relieve the tenant from other covenants besides that for payment of rent; that the plea of surrender did not shew a surrender by operation of law, but that if it did, it was bad in form, being an argumentative denial that there was any breach during the tenancy. *Morrison v. Chadwick*, 18 Law J. Rep. (N.S.) C.P. 189; 7 Com. B. Rep. 266.

(4) By Service of Declaration in Ejectment.

The service by lessor upon lessee of a declaration in ejectment for the demised premises, for a forfeiture operates as a final election by the lessor to determine the term; and he cannot afterwards (although there has not been any judgment in the ejectment) sue for rent due, or covenants broken after the service of the declaration. *Jones v. Carter*, 15 Mee. & W. 718.

(f) Yearly Tenancy.

In 1786 the Dean and Chapter of Canterbury and one P granted a lease of premises for ninety-nine

years, reserving a rent to the dean and chapter, and another rent to P. This lease purported to be made in pursuance of leasing powers given by a private act of parliament, but was in fact not in accordance with them. The rents reserved by the lease had been from time to time regularly paid to and received by the successive deans and chapters and to and by P and his representatives.

Quere—Whether the lease of 1786 was void or only voidable: but held, that if voidable, it had been set up by acceptance of rent by each successive dean and chapter; and if void, the payment and receipt of rent was evidence from which a demise from year to year by the dean and chapter would be presumed.

Though to enforce an executory contract against a corporation, it may be necessary to shew that it is by deed, yet where a corporation have acted as upon an executed contract, it is to be presumed against them, that everything necessary to make it a binding contract on both parties was done, the corporation having had all the advantage they would have had if the contract had been regularly made. *Doe d. Pennington v. Tanier*, 18 Law J. Rep. (N.S.) Q.B. 49; 12 Q.B. Rep. 998.

By the 7 & 8 Vict. c. 76. s. 4. (since repealed by the 8 & 9 Vict. c. 106.) it is provided that no lease in writing "shall be valid as a lease unless the same shall be by deed, but any agreement in writing to let any land shall be valid and take effect as an agreement to execute a lease; and the person who shall be in possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year."—Held, that the meaning of the statute is, that the person in possession under the lease (which is thereby turned into an agreement to let) is to be deemed from payment of rent or other circumstances a tenant from year to year not indefinitely, but only for the term specified in the agreement.

Where during the operation of that statute, by an agreement (not under seal) A agreed to let to B premises for three years from Michaelmas 1845, with a power for B six months previous to the end of the said term of three years, by a notice to that effect, to renew the tenancy for a further term of three years, and B entered and paid rent and gave due notice of his desire to renew, but no further lease was granted,—Held, that a tenancy from year to year was created, determinable during the three years by a notice to quit, but expiring at the end of that period by effluxion of time, when A might recover in ejectment without giving any notice to quit. *Doe d. Devenish v. Moffatt*, 19 Law J. Rep. (N.S.) Q.B. 438.

A mere permission to occupy constitutes a tenancy at will only; and, in order to create a tenancy from year to year, there must be some circumstances to shew an intention to do so, such as payment of rent quarterly, or some other aliquot part of a year.

W H, being tenant from year to year to H, died, leaving his widow in possession. J H, some time after, took out administration to deceased, and the widow continued in possession, paying rent to H, with the knowledge of J H, who never objected to such payment or made any demand for the rent:—Held, first, that there was no evidence of a surrender by operation of law so as to create the relation

of landlord and tenant between H and the widow; secondly, that there were no circumstances from which a tenancy from year to year to the administrator could be presumed. *Doe d. Hull v. Wood*, 15 Law J. Rep. (N.S.) Exch. 41; 14 Mee. & W. 682.

Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication. *Doe d. Lord v. Crago*, 17 Law J. Rep. (N.S.) C.P. 263; 6 Com. B. Rep. 90.

(g) Weekly Tenancy.

Where the only evidence of the terms on which a furnished house was taken was the following receipt put in by the landlord: "Received from C 126l. for rent of furnished house, from the 8th of May to the 1st of August 1846;"—Held, that the jury might properly infer that the tenancy was weekly.

Quere—Whether, in the absence of any other evidence of the contract, a notice to quit, from the tenant, was necessary. *Towne v. Campbell*, 16 Law J. Rep. (N.S.) C.P. 128; 3 Com. B. Rep. 921.

(h) Tenancy at Will.

A, under a mortgage deed, agreed to become tenant to B of the premises demised, "henceforth at the will and pleasure of B, at the yearly rent of 25l. 4s. payable quarterly:"—Held, that this was a tenancy at will; and that occupation for two years, and payment of rent under the agreement, did not make B tenant from year to year. *Doe d. Basto or Barstow, v. Cox*, 17 Law J. Rep. (N.S.) Q.B. 3; 11 Q.B. Rep. 122.

In ejectment upon the demise of a corporation, held, that the jury might infer that H, as servant of the corporation, by whose permission the defendant had taken the land, and that F, another servant, who had given him notice to deliver up possession, were authorized by the company so to act; and that a tenancy at will, commencing and determining before the coming into effect of the 3 & 4 Will. 4. c. 27, was no bar, under ss. 2, 7, to an ejectment commenced in 1847. *Doe d. Birmingham Canal Co. v. Bold*, 11 Q.B. Rep. 127.

[See DOWER.]

(i) Custom of the Country, to what Tenancies applicable.

Where a custom of the country is proved to exist, it is to be considered applicable to all tenancies, in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the written terms themselves. *Wilkins v. Wood*, 17 Law J. Rep. (N.S.) Q.B. Rep. 319.

(k) How averred in Pleading.

Trespass *quare clausum* *fregrit*. Plea, that the close was the soil and freehold of B; that the plaintiff held the same as tenant to B, upon condition that B, or his incoming tenant, at any time after notice to quit given or received by the plaintiff, should be at liberty to enter on the close, &c.; that B had given the plaintiff notice to quit, and had agreed to let to the defendant, and the defendant had

agreed to take the said close, &c. as tenant thereof, and the defendant thereupon became the incoming tenant of B, justifying the trespass as such incoming tenant. Replication, admitting that the close was the soil of B, *de injuriâ absque residuo causæ*:—Held, on special demurrer, that the replication was ill, as improperly putting in issue an authority in law derived from the plaintiff.

Held, also, that the plea was good, upon general demurrer. *Milner v. Myers*, 15 Law J. Rep. (N.S.) Q.B. 157; *nom. Milner v. Jordan*, 8 Q.B. Rep. 615.

(B) CONTRACTS BETWEEN.

[See (A) (a) (4).]

(a) Construction of.

Where by a memorandum in writing the plaintiff agreed to let a house at a yearly rental of 50*l.*, with a proviso that in consideration of the yearly rent as aforesaid being duly paid, &c., and the memorandum concluded "likewise the stable and loft now occupied by H (a third party) at a further rental of 25*l.* per annum, to be paid on the usual quarter day:"—Held, that the quarterly payment applied only to the latter rent. *Coomber v. Howard*, 1 Com. B. Rep. 440.

A railway company agreed with the landlord for part of a farm; and afterwards by a mistake he; on the same day, conveyed the part to the company, and granted a lease of the whole to a tenant. A question arose whether the landlord or the company should make compensation to the tenant. The company took possession, and the tenant brought ejectment:—Held, that the company could maintain a suit to stay the ejectment and ascertain the rights, and an inquiry was directed. *Norwich Rail. Co. v. Wodehouse*, 11 Beav. 382.

(b) For quiet Enjoyment.

A, in 1841, agreed to let to B premises, "subject to the same conditions as were mentioned in an agreement to A from F," at a certain yearly rent, for the term of eight years and a quarter, and that if F was willing to accept B as tenant instead of A, B was willing to take the remainder of the lease or memorandum from F, and become his tenant. F was tenant to D, and F's term expired in 1844, whereupon F brought an action of ejectment against B, and recovered possession:—Held, in an action by B, on this agreement, alleging after mutual promises that the defendant promised "that B should and might quietly use, occupy, possess, and enjoy the said premises during the said term for which A had so agreed to let them," that this claim was not made out, as the law would not imply from an agreement to let subject to conditions, in the absence of shewing what they were, an absolute contract for quiet enjoyment, and that it was not incumbent on the defendant to shew what they were.

Held, also, that, at all events, the implied contract for quiet enjoyment, if indeed it could at all be implied from a mere agreement to let, was confined to the interest of A; and that, in order to enable B to recover, he ought to shew the continuance of A's interest. *Messent v. Reynolds*, 15 Law J. Rep. (N.S.) C.P. 226; 3 Com. B. Rep. 194.

(C) OF THE RENT.

(a) At what Period payable.

Premises were demised from A to B from the 25th of March 1844, for a twelvemonth certain, and from thence until determined by a six months' notice from B expiring at any quarter of a year, at the rent of 120*l.*, per annum:—Held, that the rent was payable yearly, and that A could not recover in use and occupation for the quarter ending the 25th of December 1845. *Collett v. Curling*, 16 Law J. Rep. (N.S.) Q.B. 390; 10 Q.B. Rep. 785.

(b) Payment to Ground Landlord.

A plaintiff in replevin may, in bar to an avowry for rent, plead a compulsory payment to the ground landlord or other incumbrancer having claims paramount to those of the immediate landlord making the distress. Under such a state of facts the proper form of plea is *riens in arriere*, concluding to the country. A plea setting out the facts specially and concluding with a verification,—Held, to be bad on special demurrer. *Jones v. Morris*, 18 Law J. Rep. (N.S.) Exch. 477; 3 Com. B. Rep. 742.

In the year 1840, A being the lessee of a warehouse and cellar, under a demise from B, and being also the lessee under C of property comprising *inter alia* a vault, D became tenant from year to year to A of the warehouse and cellar and vault, under an annual rent of 185*l.*, made up of 140*l.* for the warehouse and cellar, and 45*l.* for the vault. On the 27th of October 1845 A became bankrupt, 92*l.* 10*s.* being at that time due as rent from D to A. The assignees upon being appointed elected to take the property held under B; and on the 26th of February 1846, elected not to take the property held under C. At Christmas 1845 rent to the amount of 114*l.* 7*s.* 6*d.* became due from A to C, for which amount, on the 19th of February 1846, C distrained upon the goods in the vault held by D, who, to relieve himself from this distress, paid that sum to C. An action having been subsequently brought by the assignees of A against D, to recover the above sum of 92*l.* 10*s.*, and also 35*l.*, being one quarter's rent of the warehouse and cellar, due at Christmas 1845,—Held that D was not entitled in such action to avail himself of the payment of 114*l.* 7*s.* 6*d.* made by him to C. *Graham v. Alisopp*, 18 Law J. Rep. (N.S.) Exch. 85; 3 Exch. Rep. 186.

(c) When Payment of, Evidence of Title.

A receipt of rent from the tenant by an actual agent of a lessor, although not known to be such by the tenant at the time of payment, is evidence for the jury of the lessor's title to the premises.

Replevin. Plea in bar, *non tenuit*. W and B being entitled to certain premises as trustees of C, conveyed their estate to W and N, who conveyed it to the defendants. The plaintiff paid rent to H during the time that he was agent both for W and B and W and N, and received from him receipts in the following form:—"Received for the trustees (not naming them) of C," &c. The plaintiff was ignorant of the conveyance of the legal estate to W and N, and of H being their agent. The defendants proved the conveyance from W and N to themselves, but not the conveyance from W and B to W and N:—Held, that the payment of rent to the agent of

W and N, although he was not known to be such, was evidence of the defendants' title to the premises. *Hitchings v. Thompson*, 19 Law J. Rep. (N.S.) Exch. 146; 5 Exch. Rep. 50.

(d) *Penal Rent.*

A demised premises to B for a term of years, "yielding and paying to A the yearly rent of 100*l.*, and also yielding and paying to A on the days of payment of the said yearly rent, over and above the same rent, a further yearly rent or sum according to the rate of 20*l.* the acre of grazing land which should be broken up into tillage by B during the term, and also yielding and paying to A on the days of payment of the said yearly rent first named, over and above the same rent, "according to the rate of 20*l.* the acre" of any closes which B. should underlet, or from which he should take a third crop of corn without seeding it down, and also yielding and paying to A on the days of payment of the first-mentioned rent, over and above the same rent, the further yearly rent or sum of 20*l.* the acre of land which should be mowed for hay, &c., without being manured once at least in every three years. The said several eventual and contingent rents, if any such should become due, to be additional to the first-mentioned rent, and to be paid and payable half-yearly by equal portions. The first payment to be made on the day of payment of the first-mentioned rent which should first or next happen after such eventual or contingent rent should have been incurred, and to continue payable thenceforth during all the residue of the term thereby created." B in one year took a third crop of corn without seeding down:—Held, that B was liable to the penal rent of 20*l.* per acre during the residue of the term though the branch of the covenant imposing such penalty did not contain the terms "further yearly rent" which were contained in the other branches of such covenant. *Bowers v. Nizon*, 18 Law J. Rep. (N.S.) Q.B. 35; 12 Q.B. Rep. 558.

(D) LANDLORD'S REMEDIES.

(a) *Distress.*

(1) *At Common Law.*

A distress cannot be made at common law after the tenancy has been determined by notice to quit, though the rent may have become due before such determination.

And an avowry for such rent must therefore be framed so as to bring the case within the 8 Ann. c. 14. *Williams v. Steven*, 15 Law J. Rep. (N.S.) Q.B. 321; 9 Q.B. Rep. 14.

(2) *Notice of.*

A parol notice of distress is insufficient, under the statute 2 Will. & M. sess. 1. st. 5. s. 2. *Wilson v. Nightingale*, 15 Law J. Rep. (N.S.) Q.B. 309; 8 Q.B. Rep. 1034.

A notice of distress for rent in arrear stated that the party giving the notice had "distrained the goods, chattels and things mentioned in the inventory hereunder written." In the inventory referred to one article was named, and then followed the words "and any other goods and effects that may be found in and about the said premises," &c.:—Held, in an action for a wrongful sale, that such notice, though

very loose, could not be considered insufficient, as it appeared that all the goods upon the premises were intended to be, and were distrained upon.

Upon the trial of an action against several defendants, where the only plea pleaded is not guilty, it is in the discretion of the Judge at the end of the plaintiff's cases to direct a verdict of acquittal in favour of one of the defendants against whom there is no evidence. *Wakeman v. Lindsey*, 19 Law J. Rep. (N.S.) Q.B. 166.

(3) *What may be distrained.*

Where the sheriff seizes goods in execution, and assigns to the execution creditor, having notice that a year's rent is due to the landlord, though he may be liable to an action at the suit of the landlord, yet such landlord cannot distrain for his year's rent while the goods are in the possession of the sheriff or his assignee.

Trespass *qu. cl. fr.* of plaintiff. Plea, entry to seize growing crops under a distress for rent. Replication, a previous seizure under a *fi. fa.*, at the suit of the plaintiff against the tenant of the *locus in quo*, and an assignment to the plaintiff by the sheriff under it. Rejoinder, that the seizure was made after notice to the sheriff and to the plaintiff that a year's rent was due to the landlord, and that neither the plaintiff nor the sheriff paid such year's rent, wherefore the landlord (the defendant) distrained:—Held, that the rejoinder was bad.

Held, also, that the replication was good, and was no departure from the declaration, which stated the closes to be the closes of the plaintiff, for although the replication shewed a tenant from whom the rent was due at the time of the execution, yet such possession was consistent with the possession of the plaintiff at the time of the trespass. *Wharton v. Naylor*, 17 Law J. Rep. (N.S.) Q.B. 278; 12 Q.B. Rep. 678.

Though growing crops seized under a *fi. fa.* are protected from distress at common law, yet if the execution creditor by reason of his claiming some things distrainable at common law is driven to rely on the statute 56 Geo. 3. c. 50, he is bound to bring himself in his pleading within the provisions of that statute. And therefore, in an action of trover for pigs, swine, wheat, straw, and other goods, &c., the defendant (the landlord of a farm) justified under a distress for rent, and the plaintiff, in his replication, set out a *fi. fa.* on a judgment recovered against M C (the tenant), and an assignment to him (the plaintiff) by the sheriff of all the crops, under an agreement by which the plaintiff agreed to use and expend the produce on the farm according to the custom of the country, and alleged that the wheat, straw, &c. seized was the produce of the crops, and that the pigs and swine were kept to consume the straw and produce under the provisions of the statute and the agreement:—Held ill, for not shewing that there was no covenant or written agreement between the landlord and tenant within the 3rd section.

Secondly, the plaintiff's agreement, as set out in the replication, being that he would not sell or dispose of or carry off from the farm any straw, &c., except such as M C had a right to sell or dispose of in case the execution had not issued,—Held, that the replication which did not negative that the

straw, &c. was straw which M C had a right to dispose of, was, for this reason, also ill.

Thirdly, the plea having stated the possession of M C, the replication as to the residue of the goods, &c., stated that M C at the time when, &c. was in possession of part only, and not of the whole of the said farm, and the said residue was not on the said farm in the possession of M C,—Held ill, as being either an argumentative denial of M C's possession, and of the cattle, &c. being on the farm, or an informal new assignment. *Hutt v. Morrell*, 16 Law J. Rep. (N.s.) Q.B. 240.

To a declaration in replevin, for taking the cattle, goods, and chattels of the plaintiff, the defendant made cognizance as bailiff of W M, and justified the taking for rent due to W M, from the occupier J T (W M's tenant). Plea in bar, that the premises in which the cattle, goods, and chattels were taken, were occupied by J T as tenant, at a yearly rent; that, at the time of the making of the distress, J T was a "common public livery stable-keeper," and was used in his trade "as such," from time to time, to take in, to feed, to keep, and to clean all other persons' horses and carriages who placed the same with him; that it was necessary for the carrying on such trade that horses and carriages should be kept and taken care of on the premises and that the cattle, goods, and chattels distrained were placed and remained on the premises to be managed and dealt with by J T in his said trade, as defendant well knew, &c.:—Held, that horses and carriages standing at livery may be distrained for rent.

Semble—If articles are sent to remain at a place, they are distrainable; if sent for a particular purpose, and the remaining at the place be an incident necessary for the completion of such purpose, they are not. *Parsons v. Gingell*; *Lewis v. Gingell*, 16 Law J. Rep. (N.s.) C.P. 227; 4 Com. B. Rep. 545.

(4) *Fraudulent Removal of Goods.*

A commitment, under the statute 11 Geo. 2. c. 19. s. 4, for the fraudulent removal of goods, omitted to state a complaint in writing by the landlord, his bailiff, agent, or servant. The order of adjudication stated the defendant to have been duly charged in writing before the magistrate. The Court held the commitment to be bad. *Ex parte Fuller*, 13 Law J. Rep. (N.s.) M.C. 142.

In trespass for entering the plaintiff's dwelling-house, the defendant pleaded, that at the said time when, &c., S held certain premises, situate at, &c., as tenant thereof to the defendant, under a certain demise thereof, made on &c., by the defendant to S, for the term of, &c., from thence next ensuing, upon which a yearly rent of 60*l.* was reserved by quarterly payments on &c.; that half a year's rent was owing from S to the defendant, and that after the said rent became due, and while it was unpaid, S fraudulently removed certain goods from the demised premises to prevent the defendant distraining, and in concert with the plaintiff deposited the said goods in the said dwelling-house of the plaintiff, in which, &c., and justified entering the plaintiff's house within thirty days after the removal, for the purpose of seizing the said goods as a distress, there being no sufficient distress upon the demised premises, under 11 Geo. 2. c. 19. s. 1:

—On special demurrer, it was held that the plea contained a sufficient statement of the defendant's right to distrain. *Angell v. Harrison*, 17 Law J. Rep. (N.s.) Q.B. 25.

(5) *Retention of Goods.*

Trespass for seizing and taking away goods. Plea, that the defendant had demised a house to the plaintiff; that rent was in arrear; that the plaintiff fraudulently removed the goods to prevent a distress, and that no sufficient distress being left, the defendant seized the goods in question. The plaintiff new assigned, that after the defendant had seized the goods, as in the plea mentioned, and after the plaintiff had paid the defendant the arrears of rent and costs of distress, and after the defendant had received the same in full satisfaction and discharge, and after the defendant ought to have restored the goods distrained, the defendant retained possession of the goods, and afterwards sold and disposed of them:—On special demurrer, held, that the new assignment did not sufficiently allege an act of trespass; that as the new assignment did not state that the acceptance of the rent took place before the impounding of the goods, it must be considered to have taken place afterwards; and that where a landlord after a lawful distress and impounding accepts the rent in arrear and costs of distress, he is not liable as a trespasser for retaining possession of the goods distrained, and selling and disposing of them. *West v. Nibbs*, 17 Law J. Rep. (N.s.) C.P. 150; 4 Com. B. Rep. 172.

(6) *Tender of Rent.*

A bailiff acting under a warrant of distress for arrears of rent, has an implied authority to receive the amount of the rent and costs, if tendered by the tenant; and such authority cannot be limited by a previous express instruction, given on behalf of the landlord to the bailiff, not to receive the rent, but to refer the tenant to the landlord's attorney. *Hatch v. Hale*, 19 Law J. Rep. (N.s.) Q.B. 289; 15 Q.B. Rep. 10.

(7) *Time to replevy.*

The five days allowed to a tenant or owner of goods by the statute 2 Will. & M. sess. 1. c. 5. s. 2. to replevy a distress for rent, are to be reckoned exclusively both of the day of distress and the day of sale. *Robinson v. Waddington*, 18 Law J. Rep. (N.s.) Q.B. 250.

(8) *For Penalty under a Demise.*

Replevin. Avowry, that A held land as tenant to B under a demise, subject to certain rents, provisions, conditions and stipulations, *inter alia*, that H should not during the continuance of the tenancy sell any hay off the premises, under the penalty of 2*s.* 6*d.* for each yard of the hay so sold, to be recovered by distress as for rent in arrear. Averment of the sale of 800 yards of hay by A, contrary to the said stipulation, by reason whereof a sum of money at 2*s.* 6*d.* per yard became due to B; non-payment thereof; and a distress for the same. Plea, *non tenuit*. Verdict for the defendant and judgment under the statute 17 Car. 2. c. 7. The Court of Queen's Bench, on error, affirmed this judgment (16 Law J. Rep. (N.s.) Q.B. 25; s.c. 11

Q.B. Rep. 949). On error, brought upon the judgment of the Court of Queen's Bench,—Held, by the Court of Exchequer Chamber, that the sum distrained for not being a rent service, the judgment under the statute 17 Car. 2. c. 7. was erroneous, although after verdict the avowry might have sustained a judgment for the defendant at common law.

Held, also, that under these circumstances this Court had no power to give judgment for the defendant *pro retorno habendo* at common law, but could simply reverse the judgment of the Court below. *Pollitt v. Forrest*, 17 Law J. Rep. (N.S.) Q.B. 291; 11 Q.B. Rep. 962.

(b) Re-entry.

Where the lease provided that, on non-payment of a half-year's rent, the landlord might enter on the premises for the same until it should be fully satisfied,—Held, that the 4 Geo. 2. c. 28. did not operate to dispense with the formal demand of rent. *Doe d. Darke v. Bouditch*, 15 Law J. Rep. (N.S.) Q.B. 266; 8 Q.B. Rep. 973.

The statute 1 Geo. 4. c. 87. s. 1, enabling landlords to recover possession of premises unlawfully held over by tenants, does not apply to the case of a subsisting lease, a condition of which has been broken, and a right of re-entry has accrued. *Doe d. Cundey v. Sharpley*, 15 Law J. Rep. (N.S.) Exch. 341; 15 Mee. & W. 558.

Where land is demised subject to a condition for re-entry on default in payment of the rent, the right of re-entry does not accrue until the rent has been duly demanded. *Hill v. Kempshall*, 7 Com. B. Rep. 975.

Goods sufficient to countervail arrears of rent are not "to be found" on the demised premises, so as to avoid the operation of the statute 4 Geo. 2. c. 28. s. 2, unless they are so visibly there that a broker going to distrain would, using reasonable diligence, find them, so as to be able to distrain them. *Doe d. Haverson v. Franks*, 2 Car. & K. 678.

(c) Restitution of deserted Premises.

The appeal allowed by the statute 11 Geo. 2. c. 19. s. 17, against an order of magistrates giving possession to a landlord, under section 16, is to the Judges of Assize, as individuals.

Held, therefore, that an indictment alleging that the Judges of Assize had made an order for restitution of the premises to the tenant, was not supported by production of an order, made upon an appeal to A B and C D (the Judges), "and others their fellows, Justices," and signed by the deputy clerk of assize only.

Semble, such an order should be signed by the Judges who made it.

Semble, also, that it is not necessary, on such indictment, to prove the proceedings before the magistrates preliminary to the restitution, and that it is sufficient to put in the record made up by them, in which, after reciting the complaint and other proceeding, they declare that they put the complainant into possession. *Regina v. Sewell*, 15 Law J. Rep. (N.S.) Q.B. 49; 8 Q.B. Rep. 161.

(d) Use and Occupation.

[See (A) Of the Tenancy, (d) *Holding over*.]

(E) LANDLORD'S LIABILITIES.

(a) Wrongful Distress.

A principal is not liable in trespass for the wrongful acts of his agent, though he receives benefit from them, unless at the time of the receipt he has notice of the illegality.

Where a broker, under a warrant from the landlord authorizing him to distrain the goods and chattels of the tenant, seized a fixture, which was afterwards sold, and the proceeds paid to the landlord,—Held, that the receipt of the proceeds did not make the landlord a trespasser, it not being shewn that he was aware of the illegal seizure. *Freeman v. Rosher*, 18 Law J. Rep. (N.S.) Q.B. 340.

The declaration in an action on the case against two defendants, complained that they wrongfully and injuriously distrained upon the plaintiff's goods for more rent than was due, and also that they afterwards wrongfully sold the same for the alleged rent and the expenses of the distress. The defendants pleaded payment into court of 1s., and no damages ultra. The jury found for the plaintiff, damages 40l. There was no evidence given at the trial to connect one of the defendants with the acts complained of:—Held, that no such evidence was necessary, as by the payment into court the defendants admitted a joint wrong, not only in respect of the alleged distress, but also of the subsequent sale, which was to be considered not merely as matter of aggravation, but as an alleged substantive wrong.

Held, also, that case was a proper form of action, and that it was not necessary to allege in the declaration that the wrongs complained of had been done maliciously. *Leyland v. Tancred*, 19 Law J. Rep. (N.S.) Q.B. 313.

In case for selling goods distrained for rent, without complying with the provisions of the statute 2 Will. & M. sess. 1. c. 5, the damages are, the value of the goods distrained, less the amount of rent due. *Whitworth v. Maden*, 2 Car. & K. 517.

A was seised in fee of nine acres of land charged with legacies, for which there was a power of distraining. A let the land to B, and the legatees assigned their legacies to C, who gave notice to B to pay the rent to him:—Held, that B was not justified in so doing upon a notice only, although he would have been under the threat of a distress. *Whitmore v. Walker*, 2 Car. & K. 615.

(b) To double Value under 2 W. & M. c. 5. s. 4.

In case upon the 2 W. & M. c. 5. s. 4. for double value, for distraining, no rent being due, the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods. *Masters v. Harris*, 1 Com. B. Rep. 715.

(F) TENANT'S RIGHTS AND LIABILITIES.

A debtor assigned by bill of sale all the household goods and furniture, horses, cows, &c. and all the hay, corn, and grain, as well in stock and in the barn and granary as now standing, growing, and being upon the farm, &c., and all carts, waggons, &c., "and also all the tenant right and interest yet to come and unexpired" of the debtor, in trust, to sell and pay the debt and the residue to the debtor:—Held, that away-going crops sown after the execution of the bill of sale passed under it as a tenant

right yet to come. *Petch v. Tutin*, 15 Law J. Rep. (n.s.) Exch. 280; 15 Mee. & W. 110.

A tenant who has agreed to keep and deliver up premises in good repair at the end of his term, is bound to put and keep them in good repair with reference to the class to which they belong. It is not sufficient for him to keep them in as good condition as he found them. *Payne v. Haine*, 16 Law J. Rep. (n.s.) Exch. 130; 16 Mee. & W. 541.

Where tenant for years agrees to keep the premises in repair during the tenancy, and, before the expiration of the term, an action is brought against him for breach of this agreement, the plaintiff is entitled to recover nominal damages only. *Marriott v. Cotton*, 2 Car. & K. 553.

(G) NOTICE TO QUIT.

[*Bessell v. Landsberg*, 5 Law J. Dig. 376; 7 Q.B. Rep. 638.] [*Doe d. Clarke v. Smarridge*, 5 Law J. Dig. 376; 7 Q.B. Rep. 957.]

A notice to quit, given by an agent, in the names of W and B, and also several other parties, is valid as a notice from W and B only. *Doe d. Bailey v. Foster*, 15 Law J. Rep. (n.s.) C.P. 263; 3 Com. B. Rep. 215.

Where a tenant is entitled to six months' notice to quit, a notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear on the face of it that it was given six months before the period therein specified for quitting. *Doe d. Gorst v. Timothy*, 2 Car. & K. 351.

(H) ASSIGNEE OF REVERSION.

The statute 32 Hen. 8. c. 34. applies only to cases of demise by deed, and an assignee of the reversion cannot maintain assumpsit on a contract to repair made with the assignor.

Where a lease contains an express contract on the part of the tenant to repair, there can be no implied contract to repair arising from the relation of landlord and tenant.

A and B being entitled to copyhold premises in certain shares, B demised the whole to defendant, in his own name, by lease in writing (not under seal), for one year, at a rent payable half-yearly; and B thereby agreed for himself, his heirs, &c. and assigns with defendant that he should peaceably hold the demised premises. Before the first half-year's rent fell due, B surrendered his interest in the premises to A, of which the defendant had notice, and afterwards paid that rent to an agent employed by A and B. In assumpsit, for use and occupation, brought by A to recover the last half-year's rent,—Held, that the occupation of defendant having become in point of law an occupation by the permission of A, as soon as his interest accrued, the action was maintainable by virtue of the 11 Geo. 2. c. 19. s. 14.

Admitted copies of the court roll of the manor, by which the premises purported to have been surrendered, were held sufficient evidence of their being copyhold. *Standen v. Christmas*, 16 Law J. Rep. (n.s.) Q.B. 265; 10 Q.B. Rep. 135.

The defendant entered into possession of certain premises as tenant under a written agreement, for a term of years, made on the 28th of March 1845, between the plaintiff and T of the one part, and the

defendant of the other part, and which agreement was prevented from operating as a lease by the 7 & 8 Vict. c. 76. The agreement stipulated that the defendant would put and keep the premises in good repair and condition. On the 16th of June 1847, T assigned all his interest in the premises to the plaintiff, of which the defendant had notice, and afterwards paid the rent to the plaintiff alone:—Held, that a tenancy from year to year, upon the terms of the written agreement with the plaintiff and T, was to be presumed; that after the assignment by T a new substituted agreement with the plaintiff, upon the same terms as those contained in the original agreement, might be implied; and that the plaintiff might sue alone for a breach of such implied agreement by the defendant in not repairing the premises.

The repealing statute, 8 & 9 Vict. c. 106, does not apply to agreements made before October 1845, and which by the 7 & 8 Vict. c. 76 are prevented from operating as leases. *Arden v. Sullivan*, 19 Law J. Rep. (n.s.) Q.B. 268.

LANDS CLAUSES CONSOLIDATION ACT.

[See COMPANY—INJUNCTION, Special.]

- (A) PURCHASE BY AGREEMENT [See SPECIFIC PERFORMANCE.]
- (B) COMPULSORY POWERS OF PURCHASE.
 - (a) *When they may be exercised.*
 - (b) *What is an Exercise of.*
 - (c) *Taking part of House, Manufactory, &c.*
 - (d) *Lands in Mortgage.*
- (C) NOTICE TO TAKE LANDS.
- (D) ASSESSMENT OF COMPENSATION.
 - (a) *By Arbitration.*
 - (1) *Appointment of Umpire.* [See (2).]
 - (2) *Form and Requisites of the Award.*
 - (3) *Costs of Arbitration.*
 - (b) *By a Jury.*
 - (1) *Warrant to summon Jury.*
 - (2) *Before what Jury Compensation may be assessed.*
 - (c) *For what Compensation may be assessed.*
 - (1) *Severance.*
 - (2) *Lands injuriously affected.*
 - (3) *Ferry.*
 - (4) *Injury to Trade.*
 - (d) *Costs of the Inquiry.*
 - (e) *Inquisition, Waiver of Objection to.*
- (E) ENTRY ON LANDS.
 - (a) *In general.*
 - (b) *Under Section 85. before Compensation assessed.*
 - (c) *Willful Entry.*
- (F) APPLICATION OF COMPENSATION.
 - (a) *In Discharge of Incumbrances.*
 - (b) *Purchase of other Lands.*
 - (c) *Where Land is in Lease.*
 - (d) *Payment of small Sums to Parties.*
 - (e) *Investment of Compensation.*
 - (1) *Generally.*
 - (2) *Petition for and Practice.*

- (f) *Payment of Deposit out of Court.*
- (g) *Deposit where Title not made out.*
- (h) *Costs of Deposit and Investment of Compensation.*

(G) CONVEYANCE OF COPYHOLD LANDS.

(A) PURCHASE BY AGREEMENT.

[See SPECIFIC PERFORMANCE.]

(B) COMPULSORY POWERS OF PURCHASE.

(a) *When they may be exercised.*

The S W Railway Company, who were empowered to construct their railway in a line which crossed the L Railway, included in their deposited plans and book of reference certain land on part of which the L Railway was actually constructed, and gave a notice to the L Railway Company that they required to purchase the whole of such land for the purposes of constructing their railway. There was no power in any of the acts to cross on a level, or for the S W Railway Company to purchase, or for the L Railway to sell that portion of the land on which the latter railway was constructed:—Held, that a mandamus requiring the S W Railway Company to take proceedings to assess compensation for the purchase of the land on which the L Railway was constructed could not be supported. *R. v. South Wales Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 272.

Where the power of fully completing a railway according to the intention of the legislature depends on the voluntary consent of individuals having property on the line, such consent should be obtained by the company before they proceed in the undertaking.

Quere, whether where it is evident that a line of railway cannot be fully completed, the company can compulsory take any part of the property along the line. *Gray v. Liverpool and Bury Rail. Co.*, 9 Beav. 391.

The time within which a railway company was authorized to take lands expired on the 4th of August 1848. Long before this period, they gave notice to a landowner to treat, and afterwards delivered to the plaintiff, to whom the lands had been in the mean time devised, a bond, and paid the estimated value of the lands comprised in the notice into the Bank under the Lands Clauses Consolidation Act, 1845, s. 80. Under an amended act, the powers of which extended beyond 1848, the company were authorized to take the land included in the notice; and, on the 3rd of August 1848, they gave a notice to the plaintiff, that in pursuance of the powers of both those acts, they intended to take the lands. After the 4th of August 1848, but without taking any further steps under the acts, the company entered upon the land. On a motion for an injunction, the Court declined to interfere, on the ground that, although the company might not be then entitled to take possession under their compulsory powers, they were able, by some proceeding under the second act, to obtain the land; and the motion was ordered to stand over with liberty to the plaintiff to bring an action. *Williams v. South Wales Rail. Co.*, 3 De Gex & S. 354.

(b) *What is an Exercise of.*

Where a railway company has power to take a certain quantity of land, that power is not exhausted by their taking, in the first instance, a smaller quantity, if they afterwards find that the quantity comprised in their first purchase is not sufficient for their works. *Stamps v. Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 431; 7 Hare, 251.

A railway company, who were by their act empowered to take, among other lands, a close of the plaintiff, gave him notice of their intention to take part; and more than a year afterwards gave him notice of their intention to take the remainder. The part first taken was for the railway and the remainder for a station, both of which they were empowered by their act to make:—Held, that their power as to the plaintiff's close was not exhausted by the first notice. *Simpson v. Lancaster and Carlisle Rail. Co.*, 15 Sim. 580.

Where a company had compulsory power to purchase land for the purposes of their railway and other works, and the whole of a piece of land was numbered on the railway plans, the company were entitled to purchase the whole of it, where they required it for the purpose of making an additional station and other works connected with their railway, although a part would have been sufficient merely for the line of railway, and although the plans merely shewed the line of railway, and did not shew any intention of constructing other works there. *Cotter v. Midland Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 235; 2 Ph. 453.

By the Whitehaven Railway Act it was provided, that the powers of the company for the compulsory purchase or taking of lands should not be exercised after the expiration of three years from the passing of the act. This period expired on the 4th of July. The company having given the plaintiff notice that they would take a portion of his land under the compulsory powers, a jury was summoned according to the provisions of the act, and assembled on the 3rd of July, but did not terminate their sittings or make their award till the 6th of July. Upon an application that the company might be restrained from paying the money in the manner directed by the act, and from proceeding to take possession of the land, the Court granted an injunction until the opinion of a court of law should be obtained whether the compulsory powers had or had not determined. *Brocklebank v. Whitehaven Junction Railway Co.*, 16 Law J. Rep. (N.S.) Chanc. 471; 15 Sim. 632.

(c) *Taking Part of a House, Manufactory, &c.*

By section 18. of the Lands Clauses Consolidation Act, when the promoters of an undertaking require to purchase any lands, they shall give notice to the parties interested therein, and every such notice shall state the particulars of the lands required, and that the promoters are willing to treat for the purchase thereof. By section 92. no party shall be required to sell to the promoters of an undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell the whole thereof:—Held, that this latter section is not obligatory on the promoters,

though it protects an owner of a building, &c. from being compelled to sell a part of it only.

Therefore, when a company have given a notice requiring part of a manufactory, a mandamus directing them to summon a jury to assess compensation for the whole cannot be sustained.

Where a mandamus requires the company to take the whole manufactory, the prosecutors cannot have the writ for a part only. *Regina v. London and South-Western Rail. Co.*, 17 Law J. Rep. (N.S.) Q.B. 326; 13 Q.B. Rep. 775.

Landowners, by an original bill, sought to restrain a railway company from entering in and taking eight out of ten pieces of land required by their notice. Having obtained an injunction, they filed a supplemental bill, alleging that the ten pieces formed part of a "manufactory" within section 92. of the Lands Clauses Consolidation Act, and praying for an injunction to restrain the company from taking possession or assessing the value of the ten pieces without taking the whole manufactory. The Court granted an injunction to that effect, putting the landowners under terms to concur, upon the request of the company, in speedily taking the opinion of a court of law, whether the pieces, notice to take which was given were parts of a manufactory within section 92. But the Lord Chancellor, on appeal, held that the landowners were not entitled to the last injunction. *Barker v. North Staffordshire Rail. Co.*, 2 De Gex & S. 55; 5 Rail. Cas. 412.

(d) *Lands in Mortgage.*

A railway company having notice that certain lands required for the purposes of the railway were mortgaged, and that the mortgage money could not be paid off until March 1851, paid the purchase-money into court, upon a valuation, to the credit of the mortgagor, and entered upon the lands without any communication to or negotiation with the mortgagees.—Held, that the company not having provided for the expenses of re-investment or for the costs of the mortgagees, or any compensation for the difference of interest, had wrongfully taken possession of the lands, and an injunction was granted to restrain them from prosecuting the works of the railway upon the lands mortgaged. *Ranken v. East and West India Docks and Birmingham Junction Rail. Co.*, 19 Law J. Rep. (N.S.) Chanc. 153; 12 Beav. 298.

(C) NOTICE TO TAKE LANDS.

Conclusiveness and Effect of.

A party who has received notice from a railway company of their intention in exercise of the powers of the Lands Clauses Consolidation Act to purchase his lands, may sustain a bill for specific performance of the agreement thereby created; and the Court will enforce it by ordering the company to take the proceedings prescribed by the statute for ascertaining the amount of purchase money and compensation. *Walker v. Eastern Counties Rail. Co.*, 6 Hare, 594.

A railway company having given the plaintiff notice that they should require twenty perches of his land, subsequently gave a notice that they should

only require one perch, and also gave a notice withdrawing the former notice.—Held, that the first notice was binding; and that, without the consent of the plaintiff, another valid notice could not have been given. *Tawney v. Lynn and Ely Rail. Co.*, 16 Law J. Rep. (N.S.) Chanc. 282.

Where a railway company gives notice of their intention to form their railway under a person's land by means of a tunnel, and to treat with him for the amount of compensation, they are not thereby precluded from afterwards giving notice of their intention to take, or from taking the surface of the same land where they find that the making of the tunnel is impracticable or dangerous to the buildings on the surface. *Stamps v. Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 431; 7 Hare, 251.

On the 9th of November 1847, the railway company sent notice to the plaintiffs that certain portions of their premises were required for the purposes of the railway; and on the 30th of November the plaintiffs sent in particulars of their claim. After a fruitless negotiation between the parties, the company on the 30th of June 1848, gave the plaintiffs formal notice of their intention to enter and take possession, and the plaintiffs not consenting to such entry, the company under the 85th section of the Lands Clauses Consolidation Act, procured a valuation of the premises, and paid the amount into the Bank, and gave the bond as required by the act, and entered into possession on the 20th of July 1848. The plaintiffs then abandoned their claim of the 30th of November, 1847 and required the company to take the necessary steps for summoning a jury to assess compensation. The company refusing to summon a jury, on the 2nd of April 1849 the plaintiffs filed their bill, praying a declaration that the company were bound to complete the purchase according to the notice of the 9th of November 1847, and that the company might be ordered to take all proper proceedings under the act to settle the amount of compensation. A demurrer by the company for want of equity was allowed, on the ground that the company having taken possession under the 85th section, the plaintiffs ought to have sent in particulars of their claim, which claim would have become an absolute right in case the company did not agree, or did not proceed within twenty-one days to summon a jury. *Adams v. London and Blackwall Rail. Co.*, 19 Law Rep. (N.S.) Chanc. 557; 2 Mac. & G. 118; 2 Hall & Tw. 285; reversing s. c. 18 Law J. Rep. (N.S.) Chanc. 356.

(D) ASSESSMENT OF COMPENSATION.

(a) *By Arbitration.*

(1) *Appointment of Umpire.*

[See (2) *Form and Requisites of the Award.*]

(2) *Form and Requisites of the Award.*

Where a claim for compensation is referred to arbitration under the Lands Clauses Consolidation Act, the award need not assess the price of the land taken and the damage separately.

The arbitrators awarded a sum for the fee simple in possession of the claimant's land, and also for

the immediate possession thereof:—Held, unobjectionable, though it appeared that there was an existing lease of part of the land, the claimant having used the same terms in his notice of claim.

The Court will not entertain an objection that the award is contrary to the evidence.

Where two arbitrators have been appointed by the parties, the appointment of an umpire by the Board of Trade more than twenty-one days after the appointment of the last arbitrator is valid.

The three months within which the umpire is bound to make his award are to be calculated from the time when the duty devolves upon him. *In re East and West India Docks and Birmingham Junction Rail. Co. and Bradshaw*, 17 Law J. Rep. (N.S.) Q.B. 362; 12 Q.B. Rep. 562.

The Lands Clauses Consolidation Act, 8 Vict. c. 18. enacts, section 23, with respect to lands required to be taken for the purposes of the undertaking, that if the party claiming compensation desires to have the same settled by arbitration, and gives a notice in writing thereof to the promoters, stating therein the nature of his interest and the amount of compensation claimed, the same shall be so settled. Section 25. enacts, that in questions of disputed arbitration, unless both parties concur in the appointment of a single arbitrator, may each appoint an arbitrator, and such appointment shall be deemed a submission to arbitration on the part of the party by whom the same shall be made. The North Staffordshire Railway Company requiring certain lands for the purposes of their railway, gave notice thereof to T L, R H, and R H, the parties interested therein, and received from them a notice which stated that they had and claimed an estate and interest in certain copyhold lands and hereditaments, situated in, &c. and required to be taken by the company, and that they claimed compensation for the said lands and hereditaments to the amount of 3,344*l.* 17*s.* 6*d.*, that they desired to have the same compensation settled by arbitration, and appointed T H one of the arbitrators. Another arbitrator having been appointed by the company, and an umpire nominated by the arbitrators, a claim for compensation was made by one T W, who alleged that he had a leasehold interest in the said lands. The umpire awarded that the sum of 1,861*l.* 2*s.* 6*d.* should be paid by the company to T L, R H and R H as such trustees for the purchase of the fee simple in possession, free from all incumbrances of and in the said copyhold lands, &c. required to be taken by the company, but omitted to adjudicate upon T W's interest. The company took possession of the land in question.

A motion to set aside the award having been made on the ground that the umpire had not apportioned the sums to be paid to T L, R H, and R H for their limited interest in the land, and the sum to be paid to T W for his interest,—The Court refused to set aside the award.

But held,—that the award was insufficient on the ground of the arbitrators not having found the value of the interest of T L, R H and R H, and awarded a distinct compensation on that account.

But, *quære*, whether it was not binding on the parties by reason of their conduct.

Semble, that the notice of T L, R H and R H,

which constituted the submission, was not conformable to the statute, and therefore that the award could not be enforced by attachment. *In re North Staffordshire Rail. Co. and Landon*, 17 Law J. Rep. (N.S.) Exch. 350; 2 Exch. Rep. 235.

The North Staffordshire Railway Company having, under the Lands Clauses Consolidation Act, 8 Vict. c. 18, given to C W and R W, landowners, notice to treat for the taking of certain portions of their land, the latter thereupon served a notice upon the company, stating themselves to be owners and lessees of the land in question; that their interests were more particularly described in a schedule of claims served therewith; that they claimed 2,280*l.* 8*s.* as compensation for the purchase-money and for damage arising from the execution of the railway works (claiming in the schedule in respect of the value of the land and for compensation for severance and damage); that if the amount were not paid, they required the matter to be settled by arbitration, and desired the company to appoint an arbitrator on their behalf. The company then served C W and R W with a similar notice, appointing an arbitrator to whom was to be referred the amount of compensation to be paid by the company for the purchase of the lands, or of the interests of C W and R W, or of any other person, which C W and R W were enabled to sell. By the 8 Vict. c. 18. s. 25, these notices respectively constituted a submission by each party to arbitration. At the hearing before the umpire, C W and R W gave evidence of the value of certain small pieces of land, which being severed by the works of the company, C W and R W contended the latter were bound to purchase. This evidence was objected to by the company, but received by the umpire. The umpire awarded that the sum of 1,444*l.* should be paid by the company to C W for the purchase of the fee simple, the copyhold and leasehold interest, and that the further sum of 732*l.* should be paid to C W and R W as compensation for the damage sustained by the execution of the works and of the severing or otherwise injuriously affecting of the said lands.

The company having applied to set aside this award, on the ground, amongst others, that the umpire had exceeded his authority in awarding one gross sum for the land required by the company, and the land required by C W and R W to be taken by the company, inasmuch as the company had not agreed to submit to arbitration the purchase of the last-mentioned land,—Held, that the award was bad, and could not be enforced, as nothing had been submitted but the value of the land required by the company; but the Court refused to set the award aside.

Whether it could be sustained by reference to the conduct of the parties, *quære*. *In re North Staffordshire Rail. Co. and Wood*, 17 Law J. Rep. (N.S.) Exch. 354; 2 Exch. Rep. 244.

By deed of reference between L and a railway company, it was referred to an arbitrator to determine what sum of money was the value of certain land required by the company, and should be paid by the company for the purchase of it, and it was agreed that the purchase-money should be paid to L within three days from the date of the award, and that thereupon L should execute a valid conveyance of the land, subject nevertheless to the pay-

ment of the amount into Chancery, under the provisions of the Lands Clauses Consolidation Act. There was also a provision that the company should pay the costs of the conveyance and arbitration, according to the provisions of section 82. of the above-named statute. The award found the price, and directed the company to pay it to L within the three days from the date of the award, and that thereupon L should execute a conveyance. The award then directed the company to pay the costs of the conveyance pursuant to the above-named act, and also to pay the costs of the reference and award. On a rule nisi being obtained on the part of L, calling upon the company to pay him the purchase-money awarded, the company objected that the rule could not issue, as the submission made it optional on the company to pay it to L or into Chancery; that consequently the direction in the award to pay it to L was an excess of authority; that the payment of the money was to be concurrent with the execution of the conveyance, and that thereupon L was not entitled to demand the money without having executed the conveyance or shewn a readiness to do so; that he was not entitled to the whole purchase-money, but only to damages for breach of the contract, and that there had been no demand made for the costs awarded. The Court, notwithstanding these objections, made the rule absolute. *Lindsay v. Direct London and Portsmouth Rail. Co.*, 19 Law J. Rep. (n.s.) Q.B. 417; 1 L. M. & P. 529.

Where arbitrators have been named to fix the amount of compensation to be paid by a railway company for land, and the arbitrators have appointed an umpire, the three months allowed by the 23rd section of the Lands Clauses Consolidation Act, for the arbitrators, or their umpire, to make the award, will not be computed from the appointment of the arbitrators, but the umpire will be entitled to that time, independently of the time allowed to the arbitrators to make their award. *Skerratt v. North Staffordshire Rail. Co.*, 17 Law J. Rep. (n.s.) Chanc. 161; 2 Ph. 475.

(3) Costs of Arbitration.

Under the 8 & 9 Vict. c. 18, s. 34. (the Lands Clauses Consolidation Act) the costs incident to the arbitration must be ascertained by the arbitrators, and included in their award, and cannot be enforced under a subsequent certificate granted by such arbitrators.

Even if such subsequent certificate were the right mode of proceeding, the amount could not be enforced by a rule under the 1 & 2 Vict. c. 110. s. 18, as the liability is only conditional upon the amount of the offer made by the company. *Quick v. London and North-Western Rail. Co.*, 18 Law J. Rep. (n.s.) Q.B. 89; 5 Dowl. & L. P.C. 685.

Under the 8 & 9 Vict. c. 18, s. 34. (the Lands Clauses Consolidation Act) the costs incident to the arbitration are to be ascertained and settled subsequently to the time of the award, and by the person or persons making the award; overruling *Quick v. London and North-Western Rail. Co.*, 18 Law J. Rep. (n.s.) Q.B. 89.

Such a settlement of the costs need not be within three months of the matters being referred to the person or persons by whom the award is made.

An averment that the umpire was called upon to

settle and determine the costs, and that he did by an instrument in writing, &c. duly settle and ascertain the same, &c. sufficiently shews that he did it in the performance of his duty under the 34th section of the statute. *Gould v. Staffordshire Waterworks Co.*, 19 Law J. Rep. (n.s.) Exch. 281; 5 Exch. Rep. 214.

(b) By a Jury.

(1) Warrant to summon Jury.

Where arbitration proceedings, under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to settle compensation for land required by a railway company, had gone off, owing to a disagreement about the appointment of an umpire, and the time allowed to the Board of Trade for making such appointment had passed, and the party claiming compensation had given notice to the company requiring them to issue their warrant for a jury to assess the amount of compensation, and further, that in case of neglect he would apply for a mandamus to compel them,—Held, that the claimant was entitled, under the provisions of the act, to have his claim of compensation then settled by a jury; and that, after a refusal, a mandamus lay to compel the company to issue their warrant for that purpose.

Held, also, that in such a case it was enough to shew a refusal on the part of the company, and that no particular form or service of notice upon them was necessary under the act. *In re South Yorkshire, Doncaster and Goole Rail. Co., ex parte Senior*, 18 Law J. Rep. (n.s.) Q.B. 333.

The Lands Clauses Consolidation Act (8 Vict. c. 18, s. 123.) provides, that "the powers of the promoters of the undertaking for the compulsory purchase or taking of lands for the purposes of the special act shall not be exercised after the expiration of the prescribed period." Where within the prescribed period the promoters of a railway company gave notice to a landowner that they required to purchase his land, and the landowner gave notice to the company of the amount of his claim, and demanded that the amount of compensation should be settled by a jury, but the company neglected to take any further steps towards completing the purchase until after the expiration of the prescribed period, at which time the claimant applied for a mandamus to compel the company to issue their warrant,—Held, that the mandamus might issue, as the limitation in the statute does not apply where the proceeding for completing the purchase originates with the landowner under such circumstances.

Quare—as to the effect of the 11 & 12 Vict. c. 3, upon the 8 Vict. c. 18, s. 123, in respect of the powers of compulsory purchase or taking of land. *Regina v. Birmingham and Oxford Junction Rail. Co.*, 19 Law J. Rep. (n.s.) Q.B. 453.

Section 38. of the Lands Clauses Consolidation Act (8 Vict. c. 18.) applies only to cases where the promoters of an undertaking are about to take or injuriously affect land in the possession of the claimant, and in such case they are bound to give the claimant ten days' notice of their intention to cause a jury to be summoned to assess compensation, but such notice is not required where the promoters have already taken possession of or injuriously affected land, but for which no compensation

has been made. Such a case is regulated by section 68; and if the claimant desires the question to be settled by a jury, and states the amount which he claims, the promoters are bound to pay the whole amount so claimed, or to issue their warrant for summoning a jury within twenty-one days. *Railstone v. York, Newcastle and Berwick Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 464.

(2) *Before what Jury Compensation may be assessed.*

A claimed compensation under the Lands Clauses Consolidation Act for injury done by a railway company to land held by him in fee in the county of the city of L. The injury complained of was occasioned by the company in the county of L cutting off the communication with a ferry across a stream which separated the city of L from the county of L. The ferry was claimed as appurtenant to the lands of A in the city of L:—Held, that as the land injuriously affected lay wholly in the city of L a jury of the city had jurisdiction to award compensation. *In re Cooling and the Great Northern Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 25.

(c) *For what Compensation may be assessed.*

(1) *Severance.*

The line of a proposed railway crossed at a level an occupation way leading from the residence of R to the high road. R claimed compensation for land to be purchased from him by the railway company, for damage by severance of the lands taken from other lands belonging to him, and for injuriously affecting such other lands by reason of the execution of the act. A jury having been impanelled under the Lands Clauses Consolidation Act, 8 Vict. c. 18, to assess the amount of compensation to be paid to him by the company, R claimed to have included the expense of erecting a bridge to connect the two portions of the occupation way. This was resisted by the company, as not being a matter cognizable by the jury. The jury ultimately gave in a written verdict, whereby they found a gross sum for the purchase of the lands required by the company, a sum to be paid for severance estimated at a certain number of years' purchase, and a third sum expressed to be for "severance owing to the crossing, and the expense incurred thereby." There was some evidence to shew that this last sum was that which a bridge would cost:—Held, that as to this portion of the verdict there was an excess of jurisdiction, the enforcing the construction of such a communication being confided to two Justices by the 8 Vict. c. 20. s. 69. (Railways Clauses Consolidation Act), and that, consequently, a *certiorari* would lie as to the whole. *In re South Wales Rail. Co. v. Richards*, 18 Law J. Rep. (N.S.) Q.B. 310.

(2) *Lands injuriously affected.*

A railway company, in prosecuting their works within the powers of their act, carried their line across a street by a solid embankment, by means of which the access from one part of the street to the other was totally interrupted. The owner of houses, &c. in this street, which were situate 126 feet from the boundary line of the railway, served the company with a notice, under the 68th section of the Lands Clauses Consolidation Act 1845, of a claim for compensation, on the ground of his premises

being injuriously affected by the works of the company, and requiring them to summon a jury to settle the compensation in case they declined to pay the amount claimed. On a bill filed by the company against the claimant, denying his right to compensation, the Court granted an injunction to restrain the defendant from proceeding upon his notice, or taking any other steps to recover the amount claimed by him; but gave him liberty to bring an action against the company, and directing that the company in such action should admit the notice of claim within the terms of the 68th section, and that the company had not taken proceedings to summon a jury within the time prescribed by that section; and that either party should be at liberty to apply after trial, the parties undertaking to use the judgment as the Court should direct. *London and North-Western Rail. Co. v. Smith*, 19 Law J. Rep. (N.S.) Chanc. 193; 1 Mac. & G. 216; 1 Hall & Tw. 364.

(3) *Ferry.*

The land held by A had been in 1844 leased and afterwards conveyed to him by the corporation of L. Neither the lease nor the conveyance expressly mentioned the ferry, but purported to pass the land "with the profits and commodities thereto belonging." The lessees of the land always as far as living memory went used the ferry and took toll. The landing-places were not shewn to belong either to the corporation of L or to A:—Held, first, that the ferry, if attached to the land of A, was a private right in respect of which compensation might be assessed; and, secondly, that under the circumstances a jury might infer that the ferry passed to A by the conveyance of the land with its profits and commodities. *In re Cooling and the Great Northern Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 25.

(4) *Injury to Trade.*

The Hull Dock Act, 7 & 8 Vict. c. ciii. s. 117, provides, that if the dock company cannot agree with any party for the purchase of lands, a jury shall be summoned, who shall deliver their verdict for the sum of money to be paid for the purchase of the lands required, and also the sum of money to be paid for the injury done to the lands of such party by the severance of such lands from the lands required, and also the sum of money to be paid by way of compensation for the damage occasioned to any such lands by the execution of the works, whether damage sustained before the inquiry, or for future damage, either temporary or permanent: the sums of money to be paid for the injury done by severance, or by way of compensation for any such damage as aforesaid, to be assessed separately from the value of the lands. A jury, summoned, assessed the compensation as follows:—400*l.* for the purchase of J's interest in his brewhouse (the lands required); 300*l.* as a compensation for the damage which J will sustain by reason of his having to give up his premises as a brewer until he can obtain suitable premises in which to carry on his business:—Held, that the latter part of the finding of the jury was warranted by the authority given them to award the sum to be paid by way of compensation for the damage occasioned to any lands by the execution of the works. *Regina v. Jubb v. Hull*

Dock Co., 15 Law J. Rep. (N.S.) Q.B. 403; 9 Q.B. Rep. 413.

(d) *Costs of the Inquiry.*

The taxation of costs of an assessment of compensation by a jury under the 8 & 9 Vict. c. 18. ss. 51, 52, is final, and cannot be reviewed by the Court.

The promoters of an undertaking gave notice of their intention to summon a jury under section 38. of the 8 & 9 Vict. c. 18. to assess compensation, and offered, pursuant to the 4th section, such sum as they considered sufficient. Subsequent to the notice of the execution of the warrant, a much larger offer was made by the company and refused. The jury found the claimant to be entitled to the sum last offered:—*Seemle, per Erle, J.*, that this was not a sum previously offered within the meaning of the 51st section, so as to deprive the claimant of his right to costs. *Ross v. York, Newcastle and Berwick Rail. Co.*, 18 Law J. Rep. (N.S.) Q.B. 199; 5 Dowl. & L. P.C. 695.

When a jury, summoned by a railway company under the Lands Clauses Consolidation Act, to assess compensation, give the same amount to the landowner as the company had previously offered, the company are not entitled under ss. 51, 52. of the above-mentioned act to call upon the landowner to defray any portion of their costs for counsel, attornies, or witnesses, as being costs of taking the inquiry. *Bray v. South-Eastern Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 11.

By the Blackwall Railway Act, 6 & 7 Will. 4. c. cxiii. s. 27, it is provided that where a jury shall give a verdict for the same, or a greater sum than shall have been offered by the company, for the purchase of lands to be taken for the purposes of the act, or as compensation for any damage arising in consequence of the power thereby granted, the costs of such inquiry shall be defrayed by the company, and such costs, &c. shall be settled and determined by the sheriff, &c.; and in case they are not paid within ten days after demand, a power of distress is given to recover them. By section 37, the costs of deducing, &c. such title as the company may require to any lands purchased or taken by the company for the purposes of the act are to be borne by the company, who are to pay the same before entering into possession, or in case of dispute are to obtain an order as hereinafter mentioned, and to deposit the amount claimed by the party whose lands are taken. By section 38, if the company and the said parties cannot agree as to the amount of such costs, the same shall be ascertained by the Court of Exchequer, who may order them to be referred to a Master of that court for taxation; and such order shall be served on the said parties, who shall be at liberty to proceed under the same; and the said Court may, after taxation, order the amount at which the costs are taxed to be paid to the persons aforesaid. On a rule for a mandamus to the above company, commanding them to pay the costs of an assessment of compensation for damage, and the costs of title to lands purchased by the railway company, in consequence of a notice by the owner that they were damaged by the proximity to the railway, such costs not having been settled by the sheriff, &c., or taxed in the Court of Exchequer,—Held, that a mandamus could not issue, at all events, until after the costs

had been ascertained and attempted to be levied in the mode pointed out by the statute. *Regina v. London and Blackwall Rail. Co.*, 15 Law J. Rep. (N.S.) Q.B. 42; 3 Dowl. & L. P.C. 399.

(e) *Inquisition, Waiver of Objection to.*

The direction in respect of the interest of the sheriff, in the 39th section of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), is introduced for the protection of the party against whom the interest would operate, and he may, therefore, waive the protection if he so elects.

A railway company having issued their warrant to the sheriff to summon a jury to assess compensation, under the 8 & 9 Vict. c. 18. s. 39, the under-sheriff before whom the inquisition was to be taken informed the party whose land was to be assessed, that he, the under-sheriff, was a shareholder in the railway company:—Held, that as the party did not object, but proceeded with the inquisition before the under-sheriff, he must be taken to have waived any objection arising from the interest of the under-sheriff under the statute. *Ex parte Baddeley*, 5 Dowl. & L. P.C. 575.

(E) ENTRY ON LANDS.

(a) *In general.*

Railway company ordered to make compensation before entering on land to make a tunnel. *Ramsden v. Manchester, &c. Rail. Co.*, 1 Exch. Rep. 723.

(b) *Under Section 85. before Compensation assessed.*

A declaration in case stated that, before and at the time of the grievance, a certain messuage was in the possession and occupation of one J C H, as tenant thereof to the plaintiff, the reversion thereof then and still belonging to the plaintiff; and it then charged the defendant with pulling down the said messuage. The defendant pleaded, secondly, that the said messuage was not in the possession or occupation of the said J C H, as tenant thereof to the plaintiff, nor did the reversion thereof belong to the plaintiff, *modo et formâ*. It appeared that the plaintiff was the lessee of an unexpired term in the messuage in question, which, at the time of the act complained of, was let by her to and occupied by J C H, an under-tenant. In 1846, the railway company requiring the messuage, and being unable to agree with the plaintiff, proceeded under the 85th section of the Lands Clauses Act, and having agreed with the under-tenant and all the other parties interested, in March 1847 entered upon the messuage, pulled it down, and sold the materials. The present action was brought subsequently to March 1847:—Held, that this issue was properly found for the plaintiff, as, at the time of the grievance, the messuage was in the possession and occupation of J C H within the meaning of that issue.

The defendant pleaded, fourthly, justifying the pulling down the messuage, as servant of the South-Western Railway Company, and alleged that a bond had been given by the company to the plaintiff, conditioned for payment to the plaintiff, or for deposit in the Bank of England, under the provisions of the Lands Clauses Consolidation Act, of the purchase-money, and compensation for the plaintiff's interest in the messuage. This was traversed in the replication. The 85th section of the Lands

Clauses Consolidation Act, 8 Vict. c. 18, requires in cases like the present a bond to be given by the company to the party interested in the lands to be taken "conditioned for payment to such party, or for deposit in the Bank, for the benefit of the parties interested in such lands, as the case may require, under the provisions herein contained, of all such purchase-money or compensation." The condition of the bond given by the company was, that the defendant "shall pay to the said E. H. (the plaintiff), her heirs, executors, administrators, or assigns, or shall deposit in the Bank of England, or otherwise, for the benefit of the parties interested in, &c., as the case may require, under the provisions contained in the Lands Clauses Consolidation Act, 1845, all such purchase-money and compensation-money," &c. :—Held, that the bond was not in conformity with the act of parliament, by reason of the introduction of the words "or otherwise."

Quære—Whether the words "her heirs, executors, administrators, or assigns," also prevented the bond from amounting to a compliance with the act.

Held, secondly, that the measure of damages was the amount by which the estate was diminished in value by the wrongful act of the defendant. *Hosking v. Phillips*, 18 Law J. Rep. (N.S.) Exch. 1; 3 Exch. Rep. 168.

The Great Northern Railway Company entered upon a piece of land required for the purposes of their railway, under the 85th section of the Lands Clauses Consolidation Act. A motion was made on behalf of the owners of the land for an injunction on the following terms: first, that the operations of the company would greatly alter the appearance of the ground; secondly, that the owners had been induced by the company to let the time when a mandamus might have been obtained for summoning a jury before the long vacation, expire; thirdly, that the surveyor appointed under the 85th section had been previously in the employment of the company, and, in that character, had valued the land; fourthly, that the sureties named in the bond were the solicitors to the company, and, in that character, were liable to pay very large sums of money in respect of similar bonds; fifthly, that the sureties were named by the company *ex parte*, and without any communication with, or reference to, the plaintiffs:—Held, that none of these reasons afforded sufficient ground for granting the injunction.

In this case the owners of the land were entitled to it as tenants in common, and they had throughout acted together by one solicitor, and were all plaintiffs in the suit. The condition in the bond was, that "if the company should on demand pay to the plaintiffs," jointly, &c.:—Held, that the bond was irregular in respect of making the money payable to the plaintiffs jointly.

Semble—that the introduction of the words "on demand" rendered the bond irregular.

Semble—that the suit was irregular from the owners of the land being joined together as plaintiffs in the suit.

A plaintiff is not entitled to move *ex parte* after having served the defendant with a subpoena. *Langham v. Great Northern Rail. Co.*, 16 Law J. Rep. (N.S.) Chanc. 438; 1 De Gex & S. 486.

A railway company took possession of land under the 85th section of the Lands Clauses Consolida-

tion Act, and gave a bond conditioned to be void if they should "on demand" pay to the plaintiff, or should "on demand" deposit in the Bank of England, the amount of the purchase-money:—Held that the condition of the bond was not in accordance with the directions of the act; and the company were restrained from taking the land until they had given a bond in conformity with the provisions of the act. *Poynder v. Great Northern Rail. Co.*, 16 Law J. Rep. (N.S.) Chanc. 444; 2 Ph. 330; 16 Sim. 3.

A notice given by a railway company, under section 32, of the Lands Clauses Consolidation Act, of their intention to take lands should state for which of the purposes mentioned in that section the land is meant to be used; it is not sufficient to say that the company intend to enter on the land for those purposes, or some of them. *Ibid.* 16 Sim. 3.

A railway company gave notice of their intention to take ten pieces of land, authorized to be taken by their special act, according to section 18. of the Lands Clauses Consolidation Act. They afterwards entered upon eight of such pieces only and had them valued, and deposited the amount of the valuation in the Bank, and gave security by bond under their corporate seal, but without sureties under section 85. Held, first, that they could not enter upon or give security for less than all the lands comprised in the notice; secondly, that two sureties are required as well where the bond is given by a corporation as by an individual.

Semble—that the several bond of the company and joint bond of the Justices is insufficient.

A company seeking to avail themselves of section 85, must shew clearly and satisfactorily that they have complied with its provisions, and the landowner must have the benefit of any doubt which may exist. *Barker v. North Staffordshire Rail. Co.*, 2 De Gex & S. 55; 5 Rail. Ca. 412.

In 1846 a railway company served upon the plaintiff, a lessee for years, the usual notice that they required a certain part of his garden for the purposes of their railway. The plaintiff then sent in his claim for compensation, and no further steps were taken until August 1848, when the company under the 85th section of the Lands Clauses Consolidation Act, having procured a valuation of the plaintiff's interest *in invitum*, and paid the amount into the Bank, and executed a bond for the like sum, entered into possession of the land. The sum paid in and the bond given were afterwards held not to be a compliance with the 85th section, and the company then paid the whole amount of the plaintiff's claim into the Bank, and executed to him a bond for the like sum:—Held, that the laches of the company in not following up their notice of 1846, did not preclude them from taking advantage of the 85th section.

Where a railway company have taken possession under the 85th section, when, in consequence of unintentional error, they were not entitled so to do, the Court will authorize their continuing in possession upon afterwards complying with the requisitions of the statute.

Where a railway company treat with a claimant as the party interested in the land, it is sufficient that the bond to be given under the 85th section secures payment of the compensation money to

"the claimant, his executors," &c., without referring to "the parties interested in the premises." *Willey v. South-Eastern Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 201; 1 Mac. & G. 58; 1 Hall & Tw. 56.

Where a railway company proceeds under the 85th section of the Lands Clauses Consolidation Act, it is sufficient that the proceedings are approved of by two Justices, and the company is not required to give notice to the owner of the land which is sought to be affected by those proceedings. *Bridges v. Wilts, Somerset and Weymouth Rail. Co.*, 16 Law J. Rep. (N.S.) Chanc. 335.

The proceedings under section 85. of the Lands Clauses Consolidation Act are not necessarily invalid because the award was signed on a day subsequent to the day on which the money was paid into court and the bond given. *Stamps v. Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 7 Hare, 256.

Money paid into the Bank by a railway company under section 85. of the Lands Clauses Consolidation Act, ordered to be repaid to them under section 87. without any deduction for costs payable by them to the landowner. *Re London and Southampton Railway Extension Act*, 16 Sim. 165.

(c) Wilful Entry.

An act of parliament, the 7 & 8 Vict. c. lx., enabled a railway company to take lands for the purposes of the railway, compensation in the absence of any agreement to be awarded by a jury; and, on refusal to accept compensation, or on failure to make out title, the company were empowered to pay the money into the Bank of England, to the credit of the party. Then, by the 158th section, the company were prohibited entering on lands, except by consent, until payment of the compensation to the party or deposit thereof in the Bank of England; and the 159th section enacted that if the company wilfully entered upon and took possession of lands, without such consent, or without having made such payment or deposit as aforesaid, they should be liable to certain specified penalties; and that if the company should, after conviction in such penalty, or after notice from the party in possession of such lands, continue in unlawful possession of any such lands, the company should be liable to forfeit the sum of 25*l.* for every day they so remained in possession: proviso, that the company should not be liable to the penalties aforesaid, if they should "*bonâ fide* and without collusion, have paid or deposited the compensation agreed or awarded to be paid in respect of the said lands, to any person whom the company may have reasonably believed to be entitled thereto, although such person may not have been legally entitled thereto":—Held, first, that the word "*wilfully*," in the first part of the 159th section did not extend over that part of the clause which imposed a penalty for continuing in unlawful possession after notice; secondly, that the company having, *bonâ fide*, and without collusion, though without having complied with the requisites of the statute, paid the money awarded by a jury into the Bank of England, to the credit of the plaintiff, were protected from penalties by the proviso to the 159th section, although they had taken and continued in unlawful possession of his

land after notice. *Hutchinson v. Manchester, Bury and Rossendale Rail. Co.*, 15 Law J. Rep. (N.S.) Exch. 293; 15 Mee. & W. 314.

(F) APPLICATION OF COMPENSATION.

(a) In Discharge of Incumbrances.

All the lands of a municipal corporation are held "upon the same or the like uses, trusts, or purposes," within the 8 & 9 Vict. c. 18. s. 69, so that money paid for the compulsory purchase of one part may be applied in redemption of an incumbrance upon another part of the lands of the same corporation. *Ex parte Corporation of Cambridge*, 6 Hare, 30.

(b) Purchase of other Lands.

The Court of Chancery will not allow money paid into the Bank of England by a railway company, in respect of land purchased from a tenant for life, to be laid out on mortgage security. *Ex parte Franklin, in re Great Northern Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 166; 1 De Gex & S. 528.

Upon petition that a sum of 1,200*l.*, paid by a railway company, for the purchase of land, might be applied in part payment of 2,800*l.* for another estate, which estate was to be mortgaged as a security for the remainder of the purchase-money, the Court refused the petition, on the ground that the trustees of the fund were not authorized in laying out the money in the purchase of an equity of redemption. The petitioner subsequently proposed to make up the necessary amount for the purchase out of his own pocket, and prayed that the estate might be conveyed without a reference. The Court refused to make the order without a reference to the Master to approve of the title. *Ex parte Craven, in re Chellenham and Great Western Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 215.

Semble—that the 69th section of the Lands Clauses Consolidation Act does not authorize the investment of the purchase-money of a freehold estate in copyhold property.

But, upon the report of the Master that such an investment is fit and proper, and for the benefit of the persons interested, the Court will, in certain cases, sanction such an investment. *In re Cann's Estate*, 19 Law J. Rep. (N.S.) Chanc. 376.

(c) Where Land is in lease.

The owner of a freehold estate which was in the occupation of a yearly tenant, contracted to sell it to a corporate body for a sum of money, which was paid into court. The tenant received due notice from the owner to quit at the end of six months, but he remained in possession without the consent either of the vendor or of the purchaser:—Held, that he was not entitled to any portion of the purchase-money as compensation for his interest in the estate. *Ex parte Nadin*, 17 Law J. Rep. (N.S.) Chanc. 421.

A dean and chapter and their lessee together sold land to a railway company for 1,760*l.*, which sum was paid into the Bank, under the Lands Clauses Consolidation Act, 1845, section 69. The Court refused, on the petition of the lessee, to apportion the purchase-money between him and the dean and chapter. *Ex parte Ward, in re Midland Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 249; 2 De Gex & S. 4.

(d) Payment of small Sums to Parties.

Upon the purchase of a piece of land by a railway company belonging to the rectory of Bredicot, for 200*l.*, a new purchase was found for 179*l.* 10*s.* The petition asked that the surplus, 20*l.* 10*s.*, might be paid to the rector in liquidation of extra costs beyond those allowed by the act: but this part of the prayer was refused. *Ex parte Rector of Bredicot, in re Birmingham and Gloucester Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 414.

A railway company took some land which had been settled on A for life, with remainder to his issue, and the purchase-money was paid into court. An agreement for investing this sum, with the exception of 30*l.*, in the purchase of other land, was approved by the Master. On a petition for carrying out the agreement, it was ordered that the 30*l.* should be paid to A, he undertaking to lay it out in lasting improvements. *Ex parte Barrett*, 19 Law J. Rep. (N.S.) Chanc. 415.

*(e) Investment of Compensation.**(1) Generally.*

A railway company took some land which had been demised by the Dean and Chapter of G, for twenty-one years, to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the Dean and Chapter, and this purchase-money was ordered to be invested in consols:—Held, that the dividends to accrue on this stock until the expiration of the term were not payable to the Dean and Chapter, but ought to be accumulated. *Ex parte Dean and Chapter of Gloucester*, 19 Law J. Rep. (N.S.) Chanc. 400.

(2) Petition for and Practice.

Where a ~~tenant for life~~ of lands sold by him, under a railway act, to the company, presents a petition for the investment of the purchase-money and payment of the dividends, the usual affidavit that he believes his title to be good, and that he is not aware of any other claims, will not be dispensed with, although the petitioner is aged and infirm, and although the company may have contracted with him, accepted his title, and consented to the prayer of the petition. *Ex parte Hollick, in re Ely, Brandon and Peterborough Rail. Act*, 16 Law J. Rep. (N.S.) Chanc. 71.

Certain glebe lands belonging to the rectory of Kirkby Overblow having been taken by a railway company, and the money paid into court, a petition was presented by the rector for investment of the money:—Held, that it was not necessary to serve the company with notice of the petition. *In re Leeds and Thirsk Rail. Co.*, 19 Law J. Rep. (N.S.) Chanc. 329.

(f) Payment of Deposit out of Court.

The owner of certain land required by a railway company, on being served with the usual notice, stated his desire to have the amount to be paid to him for compensation and damages settled by arbitration under the provisions of the Lands Clauses Consolidation Act, 1845. Arbitrators were accordingly appointed by the landowner and the company,

and these arbitrators not being able to agree upon an umpire, an umpire was ultimately appointed by the Commissioners of Railways. In the mean time, the company having paid into the Bank the amount claimed by the landowner, and having given the bond required in such cases by the act, entered upon the land. The arbitrators not having made their award in time, the questions of compensation and damage came before the umpire, who made his award, giving the landowner a much less sum than that claimed by him from the company. The landowner having refused to deliver an abstract of title or to take any steps for conveying the land, the company proceeded under the provisions of the act applicable to such a case, and paid into the Bank the sum awarded by the umpire. They then presented a petition for payment out to them of the sum paid in by them before taking possession of the land. The landowner in the mean time had taken proceedings at law to set aside the award on various grounds, but without success, and was, at the time when the petition was presented, prosecuting an action against the company to recover the amount originally claimed by him. Under these circumstances, the landowner opposed the petition of the company; but the Lord Chancellor made the order prayed, holding that the landowner was not entitled to avail himself of the security provided by the act in the deposit of the money, and at the same time to repudiate the proceeding, the benefit of the result of which it was the object of the act thus to secure to him. *In re Wilts, Somerset and Weymouth Rail. Act, in re Fooks*, 2 Mac. & G. 357.

(g) Deposit where Title not made out.

A railway company were empowered by their act to agree with the owners of lands, which they were authorized to take for the railway, for the purchase of their interest. Proviso, that, in case of difference as to the value of the lands, or the compensation to be made for them, or if, from absence, the owner should be prevented from treating, or if he should fail to disclose his title to the lands, &c. the amount of compensation was to be settled by a jury. It was also provided, that if the owner of lands, on tender of the purchase-money or compensation agreed for, or awarded to be paid, should refuse to accept it, or if he should fail to make out a title to the lands in respect whereof such purchase-money or compensation should be payable, to the satisfaction of the company, or if he should be gone out of the kingdom, or could not be found, or should refuse to convey, it should be lawful for the company to deposit the purchase-money or compensation in the Bank of England, in the name of the Accountant General, and thereupon all interest in such lands should vest absolutely in the company:—Held, that this latter clause was *prospective*, and applied to the period *after* the purchase-money was agreed on, or the compensation settled by the jury; and therefore that the company were not justified, immediately after the finding by the jury, in paying the amount assessed by them into the Court of Chancery, and in taking possession of the land; but that they ought first to call upon the owner to make out a title, even although he had failed to disclose his title *before* the jury made their assessment. *Doe d. Hutchinson v. Manchester, Bury and Rossendale Rail. Co.*,

15 Law J. Rep. (N.S.) Exch. 208; 14 Mee. & W. 687.

(h) *Costs of Deposit and Investment of Compensation.*

[See COSTS, IN EQUITY.]

Upon the construction of a railway act the Court declined to make any order as to the costs of an application by vendors to have payment out of court of part of the purchase-money, and investment of the remainder. *Ex parte Molyneux, in re Liverpool and Manchester Railway Act*, 2 Coll. C.C. 273.

Upon petition for the investment in the funds of a sum of money paid for the purchase of lands under the Birmingham Railway Act, the Court refused to order the company to pay the costs. *Ex parte Worcester College, Oxford, in re London and North-Western Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 193.

The purchase-money of lands purchased by the Midland Counties Railway Company, under their act, from a tenant in tail, was paid into the Bank. The tenant in tail barred the entail of the money, and presented a petition for the payment of it:—Held, that he was not entitled to the costs of the petition. *Ex parte Thoroton, in re Midland Counties Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 167.

Upon the purchase of land by a railway company, it was held, that the company were not liable under their act for the costs incurred by the application of the purchase-money in paying off an incumbrance upon the land. *Ex parte Earl of Hardwicke, in re Eastern Counties Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 422.

What amounts to a wilful refusal to receive money within the 80th section. *In re Windsor, Staines and South-Western Rail. Act*, 12 Beav. 522.

An act of parliament authorized a corporation to take lands for public purposes, and empowered the Court to order the costs, &c. of re-investing the compensation money to be paid by the corporation:—Held, that several applications for investment of portions of the money were not necessarily so vexatious as to prevent the costs of all being given. *In re Merchant Tailors Co.*, 10 Beav. 485.

A railway company having acquired certain lands of the petitioner, the matter was referred to arbitration. After the award, the petitioner applied to the Queen's Bench to set the award aside, whereupon the company refused to allow him the usual costs incident to the investigation of title and preparation of conveyances, contending he had brought himself within the exception contained in the 80th section of the Lands Clauses Consolidation Act:—Held, that the objection raised by the petitioner was not capricious or unsubstantial, and that he was entitled to his costs. *Ex parte Bradshaw, in re East and West India Docks, &c. Rail. Co.*, 17 Law J. Rep. (N.S.) Chanc. 454; 16 Sim. 174.

Where devisees in trust of a testator whose estate is in the course of administration in a suit, sell to a railway company under the Lands Clauses Consolidation Act, 1845, the company pays the cost of a petition for transferring the purchase-money from the account of the railway act to that of the suit. *Dinning v. Henderson*, 2 De Gex & S. 485.

Land belonging partly to infants having been taken by a company, the money was paid into court. The persons entitled to the fund having attained their majority petitioned for payment of the money to

them:—Held, that the company must pay the costs of the petition. *Ex parte Slater's Devisees, in re North Midland Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 431.

A sum of money was paid into court upon the purchase of certain land by a railway company, whose act provided for the costs of obtaining the money out of court. That railway was incorporated with a second railway, and the act of the first railway was repealed. The act of the second railway did not provide for the costs. The second railway was then amalgamated with a third railway, and both the previous acts were repealed; but it was provided, that where any money had been, or should be, paid into court by either of such dissolved companies, upon the purchase of lands, such monies should be held and disposed of pursuant to the act under which the same had been paid, and the provisions in such act relating to the money so paid should remain in full force:—Held, that the costs of obtaining the money out of court should be paid by the third railway company. *Ex parte Chetewode, in re Chester and Crewe Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 418.

The costs occasioned by a reference to the Master as to the propriety of a sale of part of a lunatic's estate to a railway company, ordered to be paid by the company under the 80th section of the Lands Clauses Act, 1845. *In re Taylor*, 1 Mac. & G. 211; 1 Hall. & Tw. 432.

A purchased Greenacre for 1,000*l.* in lieu of Blackacre, which a railway company had taken from him, and for which they had paid 644*l.* into court. The company were ordered to pay A the same costs as he would have been entitled to under section 80. of the Lands Clauses Act if Greenacre had cost 644*l.* only. *Re Sheffield and Lincolnshire Rail. Co., ex parte Hodge*, 16 Sim. 159.

Under the 6 & 7 Will. 4. c. 79. the Trinity House purchased the Skerries Lighthouse, and the petitioner, an infant, was interested in one-third of the purchase-money, namely 141,660*l.* The 28th clause of the act empowered the Court to order the costs of re-investing the purchase-money in land to be paid by the corporation. Upon appeal, the costs of a fourth purchase were ordered to be paid by the corporation, the proceedings not being vexatious. *Jones v. Lewis*, 19 Law J. Rep. (N.S.) Chanc. 539; 2 Mac. & G. 163; 2 Hall & Tw. 406.

A railway company purchased certain land, which was devised to the petitioner for life, and then to his children. The tenant for life had mortgaged his life estate, and the mortgagees were made parties to the conveyance to the company. The purchase-money was paid into court. The tenant for life now presented a petition for its investment. The mortgagees were served, and asked for their costs:—Held, that such costs must be paid by the mortgagor, and not by the railway company. *In re Lancashire and Yorkshire Rail. Co., ex parte Smith's Estate*, 19 Law J. Rep. (N.S.) Chanc. 56.

Upon petition for the investment of money paid in under a railway act, it was objected that the petition was made unnecessarily long by the introduction of certain clauses in the railway acts, which, being public acts, were sufficiently known to the Court, and that the costs of such petition ought not to be allowed:—Held, that the introduction of the

railway clauses was not unnecessary, and the petitioner was entitled to the costs. *In re Lilley's Devises*, 19 Law J. Rep. (N.S.) Chanc. 329; 17 Sim. 110.

R C obtained an agreement for a lease of some warehouses and premises, which was deposited with his solicitor, who subsequently agreed to advance 300*l.* to R C for the repairs of the premises, upon his signing a memorandum charging them with that amount, and with all further advances not exceeding 500*l.* The premises were afterwards taken by the corporation of London, by virtue of an act of parliament for making public improvements, and in consequence of questions between R C and his solicitor respecting the amount due upon the security, and also in consequence of notice of a judgment debt due by R C, the purchase-money was paid into court, and upon a petition by R C asking for an account, and that 500*l.* might be set apart to answer what should be found due from him to his solicitor, and that the surplus, after payment of the judgment debt, might be paid to R C.—Held, that the amount of debt between R C and his solicitor must be ascertained by the Master, that the corporation need not attend, but that it must pay the costs of this petition, but not of the affidavits made relating to the claims of the parties. *Ex parte Collins*, 19 Law J. Rep. (N.S.) Chanc. 244.

(G) CONVEYANCE OF COPYHOLD LANDS.

A steward of a manor entitled by the custom on the conveyance of the manor lands to one fee for the surrender and another for the admittance to such lands, is entitled under the 95th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, to a fee upon the surrender, but not upon the admittance to such lands. *Cooper v. Norfolk Rail. Co.*, 18 Law J. Rep. (N.S.) Exch. 176.

LAND-TAX.

[See LUNATIC.]

Where tenant for life has redeemed the land-tax under the 42 Geo. 3. c. 116, the reversioner may on coming into possession compel the representatives of such tenant for life to accept the consideration paid for such redemption, together with the arrears of interest, so as to render the land no longer chargeable with the yearly payment of interest.

Therefore, where defendants in replevin avowed as devisees of a tenant for life in respect of the yearly sum payable as interest on the redemption money, and the plaintiff pleaded in bar that he held a moiety of the remainder in fee as tenant in common, and being desirous of freeing the lands from that charge, had, before the distress, tendered to the defendants the redemption money and interest, which they had refused,—Held, that the plea in bar was good. *Cousens v. Harris*, 17 Law J. Rep. (N.S.) Q.B. 273; 12 Q.B. Rep. 726.

The last reversionary grant, by the rector and lord of the manor of Bredon, of certain copyhold premises, comprised in it, in one aggregate holding and at one aggregate undivided rent, three ancient tenements, originally held of the manor, under distinct grants at distinct rents. The same rector

afterwards sold and conveyed the reversionary fee in those premises, under the powers in the Land-Tax Redemption Act, to redeem a portion of the land-tax on the living, and the sale was confirmed by the Land-Tax Commissioners under that act. In ejectment by a subsequent rector, to recover the premises, held, that the title of the defendant, who claimed under the parliamentary sale and conveyance, could not be impeached, on the ground that the sale was the sale of a reversion expectant on a void grant. *Doe d. Strickland v. Woodward*, 17 Law J. Rep. (N.S.) Exch. 1; 1 Exch. Rep. 273.

The Court of Exchequer cannot order the Commissioners of Land-Tax to cause the proportion charged upon a division to be equally assessed. *In re Holborn Land-Tax Assessment*, 5 Exch. Rep. 548.

The land-tax is a "parliamentary tax," within the meaning of an agreement to pay rent "and all taxes parliamentary and parochial." *Manning v. Lunn*, 2 Car. & K. 13.

The guardians of A, an infant, who was tenant in tail in possession of an estate, contracted for the redemption of the land-tax, under the powers of the 38 Geo. 3. c. 60, and made all the transfers of stock, agreed to be made, before 1804. In 1804, A attained his majority, and suffered a recovery. In 1805, A, by indentures of lease and release, executed in consideration of his then intended marriage, conveyed the estate with its rights, members, and appurtenances, &c. (using the usual general words) to certain uses, and entered into the usual covenants for title. The land-tax was not noticed in these deeds. After the execution of these deeds, and during A's life, the said charge in lieu of land-tax was kept separate from the rents of the estate:—Held, that this charge did not pass by the settlement, and that it had not been merged in the estate during A's life. *Blundell v. Stanley*, 18 Law J. Rep. (N.S.) Chanc. 300.

LARCENY.

[See RECEIVING STOLEN GOODS.]

- (A) WHAT CONSTITUTES THE OFFENCE OF LARCENY.
 - (a) *Appropriation in Hope of Reward.*
 - (b) *Post-Letters.*
 - (c) *Cases of finding.*
 - (d) *Appropriation after lawful Possession.*
 - (e) *Determination of Bailment.*
 - (f) *Other Cases.*
- (B) BY SERVANTS.
 - (a) *Possession of, when Possession of Master.*
 - (b) *Animus furandi.*
 - (c) *Lucri Causâ.*
 - (d) *Other Cases.*
- (C) STEALING FROM THE PERSON.
- (D) INDICTMENT.
 - (a) *Averment of Thing stolen.*
 - (b) *Property, In whom laid.*
 - (c) *Election.*
- (E) TRIAL, PRACTICE AT.

The law relative to larceny amended by the 12 Vict. c. 11; 27 Law J. Stat. 11.

The summary jurisdiction in cases of larceny further extended by the 13 & 14 Vict. c. 37; 28 Law J. Stat. 66.

(A) WHAT CONSTITUTES THE OFFENCE OF LARCENY.

(a) *Appropriation in Hope of Reward.*

Upon an indictment for stealing a watch, the jury returned the following verdict:—"We find the prisoner not guilty of stealing the watch, but guilty of keeping it in the hope of reward from the time he first had the watch." The Court of Quarter Sessions directed a verdict of guilty to be entered:—Held, that upon this finding a verdict of not guilty should have been entered. *Regina v. York*, 18 Law J. Rep. (N.S.) M.C. 38; 1 Den. C.C. 335; 2 Car. & K. 841.

(b) *Post-Letters.*

In an indictment under the 7 Will. 4. & 1 Vict. c. 36, against a person employed under the Post Office, the prisoner was charged in one count with stealing, and in another count with secreting letters. The jury found that the prisoner, having committed a mistake in the sorting of the letters in question, secreted them in the water-closet, in order to avoid the supposed penalty attached to such mistake:—Held, that this amounted to a verdict of guilty on both counts. *Regina v. Wynn*, 18 Law J. Rep. (N.S.) M.C. 51; 1 Den. C.C. 365; 2 Car. & K. 859.

S, post-mistress of G, received from A a letter unsealed, but addressed to B, and with it 1*l.* for a Post-office order, 3*d.* for the poundage on the order, 1*d.* for the postage, and 1*d.* for the person who got the order. S gave the letter, unsealed, and the money to the prisoner, who was the letter carrier from G to L, telling him to get the order at L, and inclose it in the letter, and post the letter at L. The prisoner destroyed the letter, never procured the order, and kept the money:—Held, that he was indictable under section 26. of the statute 7 Will. 4. & 1 Vict. c. 36, for stealing, embezzling, and destroying a post-letter, he being at the time in the employ of the Post Office. *Regina v. Bickerstaff*, 2 Car. & K. 761.

Any letter posted in the ordinary way, whatever be its address or object, is a post-letter, within the statute 1 Vict. c. 36. ss. 26, 47, and the stealing such letter is punishable accordingly. *Regina v. Young*, 1 Den. C.C. 194; 2 Car. & K. 466.

(c) *Cases of finding.*

If a man finds goods that are actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. Nor is it larceny if, after having so taken them, he obtains knowledge of the ownership, and then appropriates them to his own use; but if he takes goods so lost, or supposed to be lost, reasonably believing at the time of taking that the owner can be found, it is larceny.

The prisoner was indicted for stealing a bank note. It appeared that he had picked it up in the road, and that he meant to appropriate it to his own use, but he had not then any means of ascertaining

the owner, or any reason to believe that the owner knew where to find it. He afterwards was informed who the owner was, but, notwithstanding, he changed it and appropriated the money. The jury found that he had reason to believe it to be the prosecutor's property before he changed it:—Held, that he was not guilty of larceny. *Regina v. Thurburn*, 18 Law J. Rep. (N.S.) M.C. 140; 1 Den. C.C. 387; 2 Car. & K. 831.

(d) *Appropriation after lawful Possession.*

A watch-maker, who had received a watch to repair, without any intention of stealing it at the time he received it, but who subsequently appropriated it to his own use, was held not guilty of larceny. *Regina v. Thristle*, 19 Law J. Rep. (N.S.) M.C. 66; 1 Den. C.C. 502; 2 Car. & K. 842.

A letter carrier between A and B is entrusted at A with two directed envelopes, each containing a 5*l.* note, to deliver at B. He delivers the envelopes at B, having previously taken out the two notes. Verdict, guilty, but that he had no intention of stealing the notes when given to him at A:—Held, no larceny. *Regina v. Glass*, 1 Den. C.C. 215; 2 Car. & K. 395.

A servant, who receives goods from his master on the master's account, and wrongfully appropriates them, is not guilty of embezzlement, but of larceny. *Regina v. Hawkins*, 1 Den. C.C. 584.

Prisoner, a drover, was employed by A and B, pig-jobbers at N, to take some pigs by railway, and deliver them to C at L, and bring back to A and B such price as C should give for them. No instructions were given to the prisoner as to what he was to do with them, if C refused to buy them. No bargain was made between A and B and the prisoner as to his remuneration for the job; but the custom of the trade was to pay for such jobs by the day; nor was anything said as to the prisoner's right to take cattle from any other person at the same time; but by the custom of the trade he would have had such right. On his arrival at L, C was from home, and his wife refused to take the pigs; the prisoner thereupon sold the pigs to another person in the market, and absconded with the purchase-money:—Held, not guilty of larceny, as at the time of receiving the pigs from the owners he was not their servant; but by the receipt became a bailee, and at that time had no intention of stealing. *Regina v. Hay*, 1 Den. C.C. 602; 2 Car. & K. 983.

(e) *Determination of Bailment.*

A having become the bailee of B's mare, took her to a livery-stable, and paid B a balance due to him, after deducting certain expenses, and B ordered the stable-keeper not to let A have the mare again; and on A asking to be allowed to ride the mare to a certain place, twice told him never to put a finger near her more. A made no claim of lien or property in the mare, but at a later period on the same day obtained her, by a false story, from the ostler at the livery-stables, and sold her:—Held, that there was evidence to go to the jury, that after the bailment was ended, a change of possession had taken place, after she had been left at the stables, and that the stable-keeper had become B's agent; and that A was rightly convicted of larceny. *Regina*

v. *Steer*, 18 Law J. Rep. (N.S.) M.C. 30; 1 Den. C.C. 349; 2 Car. & K. 988.

(f) *Other Cases.*

A went to B's shop, and said he had come from C for some hams, &c., and at the same time produced a note in the following terms: "Have the goodness to give the bearer ten good thick sides of bacon, and four good showy hams at the lowest price. I shall be in town on Thursday next, and will call and pay you. Yours, &c., C." B thereupon delivered the hams to A. The note was forged, and A had no such authority from C:—Held, that A was not guilty of larceny. *Regina v. Adams*, 1 Den. C.C. 38.

A assists the wife of B to take B's goods, which were afterwards used by them in common without the consent of B:—Held, evidence to warrant a conviction against A of larceny. *Regina v. Thompson*, 1 Den. C.C. 549.

A, assisted by B, had done work for the father of C, and C told A and B that if they would bring a stamped receipt they should be paid. B bought a stamp with the money of A, and they together went to C, and the blank stamp was given to C to write a receipt on it. C did so; and as the stamp lay on C's desk, A signed the receipt and B witnessed it, but neither of them ever had the stamp in his possession after the receipt was written on it. C, under pretence of fetching his father's cheque-book, took away the receipt, and would not pay the money it was given for:—Held, not a larceny of the stamp. *Regina v. Frampton*, 2 Car. & K. 47.

(B) BY SERVANTS.

(a) *Possession of, when Possession of Master.*

The prisoner was a shareholder and a salaried clerk in an unincorporated partnership called "The Globe Insurance Company." By its constitution the directors had the appointment and dismissal of the servants, and fixed the duties which they had to perform. The directors had the ultimate charge and custody of the documents of the company. By the course of business between the company and its bankers the pass-book and the paid cheques were returned weekly to the directors. It was one of the prisoner's duties to receive the pass-book and cheques from the company's messenger, and to preserve the cheques for the use of the company. On the 14th of February the prisoner paid in to his own account at his bankers' a cheque purporting to be drawn by the company on their bankers. The cheque was cashed, and the amount entered in the company's pass-book to their debit, and the cheque and pass-book were, on the following day, delivered to the messenger, and by him delivered to the prisoner in the usual way. On the 4th of March search was made for the cheque among the vouchers of the company in the prisoner's keeping, and it could not be found there, and never was found, for the prisoner had fraudulently abstracted or destroyed it. On examination of the pass-book, it was discovered that the entry of the amount of the cheque had been erased. There was no evidence to shew that the cheque was drawn by any one on behalf of the company, or that it was written on paper stolen from the company:—Held, that the prisoner

was properly convicted of stealing the cheque, on an indictment for stealing a piece of paper the property of the directors, his masters; since the facts shewed that he was a servant of the directors who had the custody of and a special property in the vouchers of the company: that the cheque had reached its ultimate destination when it came into the prisoner's keeping, which being on account of his masters made his possession theirs, wherefore his afterwards feloniously appropriating it was an act of larceny, not of embezzlement: and that his interest as a shareholder gave him no property in the paper. *Regina v. Watts*, 19 Law J. Rep. (N.S.) M.C. 192; 2 Den. C.C. 14.

(b) *Animus furandi.*

To constitute larceny there must be a taking with intent to deprive the owner of the entire dominion over the property.

A person, employed in a tannery to dress skins of leather, clandestinely got access to the warehouse where the dressed skins were kept, and removed from it, but not off the premises, some skins dressed by other workmen. The practice was for the dressed skins to be delivered to the foreman, and each workman was paid for the skins thus delivered as for his own work. Upon an indictment for larceny of the skins so removed, the jury found that the prisoner did not intend to remove the skins from the tannery and dispose of them elsewhere, but that his intention in taking them was to deliver them to the foreman, and to get paid for them as if for his own work, and in this way he intended the skins to be restored to the possession of his masters:—Held, that this did not amount to larceny. *Regina v. Holloway*, 18 Law J. Rep. (N.S.) M.C. 60; 1 Den. C.C. 370; 2 Car. & K. 942.

The servant of a tallow-chandler removed portions of fat, belonging to his master, from one part of the premises to another, and put it into a pair of scales used by the master for weighing the fat offered by other persons for sale. The jury found that the removal was for the purpose of selling it to his master, and appropriating the proceeds to his own use:—Held, that this was larceny. *Regina v. Hall*, 18 Law J. Rep. (N.S.) M.C. 62; 1 Den. C.C. 381; 2 Car. & K. 947.

(c) *Lucri Causa.*

A, a servant of B, applied for at the post-office and received all the letters addressed to B. She delivered them all to B except one, which she burned. Her motive for destroying it was the hope of suppressing inquiries respecting her character:—Held, a larceny: and that supposing *lucri causa* to be a necessary ingredient therein (which the Court did not admit) there was a sufficient *lucrum* proved. *Regina v. Jones*, 1 Den. C.C. 188; 2 Car. & K. 236.

Prisoners were charged with stealing their master's oats. It was proved that they took them wrongfully to give to their master's horses, without any end of gain to themselves:—Held a larceny. *Regina v. Privett*, 1 Den. C.C. 193; 2 Car. & K. 114.

(d) *Other Cases.*

Where a servant received money from his master in order to pay the wages of certain work-people

therewith, and in the book in which the account of the monies so paid was kept by the servant, entries were found charging the master with more money than the servant had actually disbursed, but there was no proof that he had ever delivered this account to his master:—Held, that this did not amount to larceny in the servant. *Regina v. Butler*, 2 Car. & K. 340.

(C) STEALING FROM THE PERSON.

A asked B what o'clock it was, and B took out his watch to tell him, holding his watch loosely in both his hands. A caught hold of the ribbon and key attached to the watch, and snatched it from B, and made off with it:—Held, no robbery, but a stealing from the person. *Regina v. Walls*, 2 Car. & K. 214.

(D) INDICTMENT.

(a) *Averment of Thing stolen.*

An indictment for larceny which alleged that the prisoner stole "one ham of the value of 10s. of the goods and chattels of A B," is good, as the Court will presume that a ham is an article which is a subject of larceny. *Regina v. Gallears*, 19 Law J. Rep. (N.S.) M.C. 13; 1 Den. C.C. 501; 2 Car. & K. 981.

The prisoner was indicted for stealing sovereigns and half-sovereigns:—Held, (*Erle, J. dissentiente*,) that if the jury found that he stole either sovereigns or half-sovereigns, but that they could not say which, they ought to acquit him. *Regina v. Bond*, 19 Law J. Rep. (N.S.) M.C. 138; 1 Den. C.C. 517.

Prisoner was charged in one count of the indictment with stealing a cheque for 13*l.* 9*s.* 7*d.*; in another count for stealing a piece of paper value 1*d.*:—Held, that supposing the cheque to have been a void cheque (as being contrary to the provisions of the statute 55 Geo. 3. c. 184), it would still sustain the charge laid in the second count. *Regina v. Perry*, 1 Den. C.C. 69.

(b) *Property, In whom laid.*

Prisoners were indicted for sacrilegiously breaking into a church and stealing a box and money:—Held, first, that the box (under the circumstances) was not affixed to the "freehold," but was constructively in the possession of the vicar and churchwardens. Secondly, that the property was rightly laid in the vicar and others, in their individual names. *Regina v. Wortley*, 1 Den. C.C. 162; 2 Car. & K. 283.

(c) *Election.*

Where a prisoner was indicted in one count for stealing from the mine of one H J G coal, the property of the said H J G, and, in the same count, for stealing from the mines of thirty other proprietors coal, the property of each of such other proprietors, and it appeared that all the coal so alleged to have been stolen had been raised at one shaft, —Held, first, that the prosecutor could not be called upon to elect on which charge he would go to the jury; secondly, that, although for the sake of convenience in trying the prisoner the Judge might direct the jury to confine their attention to one particular charge, yet that the prosecutor was entitled to give evidence in support of all the

charges laid in the indictment; thirdly, that proof of such charges might be relied on in order to shew a felonious intent. *Regina v. Bleasdale*, 2 Car. & K. 765.

(E) TRIAL, PRACTICE AT.

Where a prisoner charged with larceny has given two different accounts of the way in which he became possessed of the stolen property, it is not incumbent on the prosecutor to call as witnesses persons whom, in one of the statements, he says could prove his innocence, with a view of disproving that statement; but it may be prudent in the prosecutor to have these persons in attendance at the trial, though he does not call them, to avoid the effect of the observations by the prisoner or his counsel, that these persons could prove the prisoner's innocence, but that he has not the means of procuring their attendance. *Regina v. Dibley*, 2 Car. & K. 818.

LEASE.

[See INCLOSURE—LANDLORD AND TENANT—STAMP—VENDOR AND PURCHASER.]

- (A) LEASE OR AGREEMENT.
- (B) VALIDITY OF.
- (C) BY ESTOPPEL.
- (D) COVENANTS.
- (E) RENEWAL OF.
- (F) SURRENDER.
- (G) FORFEITURE.

Relief against defects in leases made under leasing powers granted by the 12 & 13 Vict. c. 26; 27 Law J. Stat. 31.

The 12 & 13 Vict. c. 26. as to defects in leases made under leasing powers amended by the 13 Vict. c. 17; 28 Law J. Stat. 20.

(A) LEASE OR AGREEMENT.

"Proposals for letting the M Farm, at H, in the county of S; quantity 130 acres, term twelve years, determinable at the end of eight years, provided notice be given by either landlord or tenant at the end of the first four years. Rent 172*l.*" (with stipulation as to the mode of cultivation) and subjoined to them the following:—"June 3, 1835.—Agreed to the above rent, provided the house, cottages and buildings are put in good and tenantable repair, on a plan to be mutually determined upon, and finally settled within a month from the above date." Signed by the parties:—Held, not to be a present lease, but at most a conditional agreement for a future tenancy. *Doe d. Wood v. Clark*, 14 Law J. Rep. (N.S.) Q.B. 233; 7 Q.B. Rep. 211.

Certain copyhold property having been devised to the poor of the parish of W, upon certain trusts, P was admitted tenant in trust; and subsequently, a memorandum between G, agent for the churchwardens of the parish, of the one part, and F, of the other part, was entered into, by which G agreed, provided a licence could be obtained from the lord, and upon F putting the premises into repair, that the churchwardens should grant, or procure to be granted, a lease for twenty-one years, at a certain

rent, to contain the usual covenants, and until such lease should be executed, the rent should be recoverable by distress, in the same manner as if the lease had been executed:—Held, that this was not a lease, but an agreement merely.

W and B were churchwardens at the time of this agreement, and A was let into possession under it by G:—Held, that he was estopped from disputing the title of W and B. *Doe d. Bailey v. Foster*, 15 Law J. Rep. (n.s.) C.P. 263; 3 Com. B. Rep. 215.

Agreement entered into on the 28th of October 1843, between M, D, and T, and signed by them, that whereas M held and rented under D a messuage situate, &c., at the rent of 25*l.* per year, payable quarterly, and that whereas M had agreed with T to underlet the messuage from Monday next, at and after the rent of 20*l.* per year, until the 24th day of June next, at which time the said D agrees to exonerate the said M from his tenancy, on his paying all rent up to the said 24th of June, and to accept the said T as tenant from that period, at, &c. Now, therefore, the said M agrees to let, and the said T agrees to take the said messuage, &c. (and to do certain repairs), and the said T agrees to take of the said D the said messuage, from the said 24th day of June next, at, &c. and the said D agrees to release and exonerate the said M from his tenancy on and from the said 24th of June next, on his paying up all rent due to that time:—Held, that this instrument amounted to a lease, as regarded both T and D.

After T had been let into possession by M, and before the expiration of his tenancy to M, he contracted with D for the purchase of the messuage:—Held, that such contract did not affect the above lease, and that after the 24th of June T became a yearly tenant to D. *Tarte v. Darby*, 15 Law J. Rep. (n.s.) Exch. 326; 15 Mee. & W. 601.

The 4th section of the 7 & 8 Vict. c. 76. (repealed by the 8 & 9 Vict. c. 106.) enacted, that no lease in writing of any freehold, copyhold, or leasehold land should be valid, unless the same should be made by deed; but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease. A memorandum of agreement, dated the 3rd of July 1845, and made while that section was in force, whereby M agreed to let, and B agreed to take, certain premises from the 7th day of that month, for the monthly rent of 36*s.*, to be paid every four weeks, was held to take effect as an agreement to execute a lease, and to be admissible in evidence without a stamp.

Semble—that but for the operation of that section this memorandum would have been properly construed as a lease requiring a 1*l.* 1*s.* stamp under the 55 Geo. 3. c. 184. *Burton v. Reeve*, 16 Law J. Rep. (n.s.) Exch. 85; 16 Mee. & W. 307.

(B) VALIDITY OF.

Husband and wife, by a post-nuptial settlement, conveyed part of the wife's estates to a trustee to the use of the husband for life, remainder to their eldest son for life, &c., with an ultimate remainder in fee to the husband, and a power to him to lease "for any time or term of years or lives, and with or without covenants for renewal; and in case of

the determination of all or any of the aforesaid lease or leases, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines as he should think fit." The husband was also empowered to raise, by sale or mortgage, any sum or sums of money not exceeding in the whole 20,000*l.*, or to charge the premises therewith, for such uses as he should appoint, and to charge to any amount for younger children. The husband and wife afterwards executed three leases of parts of the estates comprised in the settlement for terms of 999 years, upon which fines were taken. One of the leases contained a clause permitting the lessee to graff and burn the surface, and also a clause of surrender; and another contained clauses making the lessee punishable for waste, and permitting him to cut timber, and to graff and burn the surface, and in this lease was included part of the wife's estates not comprised in the settlement. The latter lease, and another of prior date, were made subject to existing freehold leases. None of the leases were referred to in the power. The fines received on the making of these and other leases amounted to 10,208*l.*, and the husband subsequently raised 10,500*l.* by mortgage of the estates subject to the leases:—Held, that all the leases were valid at law, as being authorized by the power in the settlement; and consequently there was no ground of equity to impeach them.

Regard is to be had to the objects of the settlement, where the power is of doubtful construction; but no such consideration is to controul powers expressed in clear terms, according to their ordinary acceptation. *Sheehy v. Lord Muskerry*, 1 H.L. Cas. 576.

(C) BY ESTOPPEL.

By an indenture in 1742, the Broderers Company demised a certain farm for 100 years, with a covenant for perpetual renewal. On the 25th of August 1827, the party in whom that term vested assigned the residue to one Hogarth. On the 28th of August 1827, Hogarth assigned the residue of the term to mortgagees, with a proviso for redemption on repayment of 5,000*l.* within twelve months. In May 1828, a lease of the premises in question was executed by Hogarth and the plaintiff for twenty-one years, under which the plaintiff entered into possession, and paid rent to Hogarth up to the year 1835, and afterwards to the defendant. On the 12th of January 1836, by an indenture made between the mortgagees, Hogarth, the defendant, and the Broderers Company, the mortgagees and Hogarth surrendered, released, &c. to the company the premises in question for the residue of the term, together with all covenants, &c., to the intent that the residue of the term might be merged in the reversion, and the covenant for renewal be extinguished. On the 13th of January 1836, the Broderers Company demised the premises to Hogarth for 100 years; and, by an indenture of the 4th of February 1836, the unexpired residue of the term became vested in the defendant. An action of covenant having been brought against the defendant as assignee of Hogarth, for a breach of covenant in not endeavouring to destroy the rabbits on the farm,—Held, on a special case stating the above facts, first, that Hogarth did demise to the plaintiff, as the

lease by him was good by way of estoppel; secondly, that the reversion became vested in the defendant, as it was good by way of estoppel. *Sturgeon v. Wingfield*, 15 Law J. Rep. (N.S.) Exch. 212; 15 Mee. & W. 224.

(D) COVENANTS.

A lease of premises for a term of years was granted to K, L, and C. Some time afterwards L granted a lease of the residue of the said term, wanting one day, to the defendants, by whom the lease was duly executed, and rent was paid to L. Both leases contained covenants to repair, insure, &c., and a proviso for re-entry for breach of either of them, but a performance of the covenant to insure in the lease to the defendants would not necessarily have included a performance of the corresponding covenant in the original lease. The premises being out of repair and uninsured, the original lessor entered for a forfeiture. In an action of covenant by L, as reversioner, against the defendants for a breach of their covenants to repair and insure, and for damages sustained by his loss of the term, &c.—Held, first, that the execution of the lease and payment of rent to L by the defendants were evidence that L was solely entitled to the reversion upon the determination of the lease granted to the defendants:—Held, that L (a sub-lessor) could not recover against the defendants (sub-lessees) the value of the term granted by the original lease, which he had lost by the defendant's breach of covenants. *Logan v. Hall*, 16 Law J. Rep. (N.S.) C.P. 252; 4 Com. B. Rep. 598.

Under a power to make leases for years, determinable on lives, of premises usually so leased, reserving the usual rents and heriots, and so as there should be contained usual and reasonable covenants, a lease was granted, in 1831, of a tenement, called C, "together with so much of the water from the shuts in D's ground as R M has been accustomed to have, and at the same time for the purpose of working a mill, and also the use of the water descending from the head weir, reserving to the occupiers of the meadows watered by the said course running from the head weir through Little Moor Meadow, and thence by a trough into T Meadow, the right to enter and cleanse the said watercourse, and to take the water for watering the meadows, having the right thereto as heretofore accustomed." This lease contained a covenant to do suit and service at the courts of the manor of W, but no covenant to pay fines, &c. In what was taken as the pattern lease, executed in 1749, there was a demise of C, with all waters, watercourses, &c., excepting to the lessor a watercourse flowing from the head weir, through Little Moor Meadow, and from thence by a trough into another meadow, for watering the same and other lands of the lessor; and there was a covenant to pay fines, &c., as well as to do suit and service. It appeared that from a date prior to 1749, there had been no courts baron or customary courts held for the manor, and no evidence was given of the existence of any freehold or copyhold tenants:—Held, that the covenant to pay fines, &c. was not a usual or reasonable covenant the omission of which avoided the lease.

Held, also, that the lease of 1831 did not demise more than had been formerly leased, the effect of the

pattern lease being to pass the channel of the watercourse, reserving only the water itself.

Held, also, that it was properly left to the jury to say what quantity of water R M was accustomed to have to turn the mill, in order to see whether it was in excess of what was formerly granted. *Doe d. Earl of Egremont v. Williams*, 17 Law J. Rep. (N.S.) Q.B. 154; 11 Q.B. Rep. 688.

Where a lease is executed on a certain day, *habendum* from a previous day, the tenant who has entered between the two days is not liable on the covenant to repair for breaches committed during the interval. The operation of the *habendum* is *prospective* merely. *Shaw v. Kay*, 17 Law J. Rep. (N.S.) Exch. 17; 1 Exch. Rep. 412.

A lease was in the following terms:—S C covenants with E J that the said S C will during the continuance of the term, at his own costs and charges, in all things well and sufficiently repair and glaze the windows of the messuage, and also the hedges, ditches, mounds, and fences of and belonging to the premises, and all fixtures, additions and improvements thereto, during the said term, in and by and with all and all manner of needful and necessary reparations, cleansings, and amendments when and as often as occasion shall require, *the said farm-house and buildings being previously put and kept in repair by the said E J*:—Held, that these latter words raised an absolute covenant on the part of E J to put the farm-house and buildings in repair.

By another clause in the lease it was agreed between the parties that E J should within eighteen months from the date of the lease, erect and build a new shed and stalls for feeding cattle, &c.; "the whole of which is agreed to be left to the superintendence of the said S C and the son of E J." The declaration stated, as a breach thereof, that although eighteen months from the date, &c. had elapsed, the defendant did not nor would within that period, or at any other time, erect and build a new shed and stalls for feeding cattle, &c.:—Held, on motion in arrest of judgment, that the breach was well assigned, the provision that the work should be left to the superintendence of J C and the son of E J not being a condition precedent to or concurrent with the covenant by E J to build and erect the shed, &c. *Connock or Cannock v. Jones*, 18 Law J. Rep. (N.S.) Exch. 204; 3 Exch. Rep. 233.

A agreed to let, and B to take, a piece of land, with liberty to build thereon such warehouses, glass-houses, kilns, houses for workmen, and other erections, necessary for carrying on the business of a glass-manufactory, as he should think fit, for sixty-one years, at a certain rent; and B agreed to pay the rent, to build in a substantial manner, and not to use the premises for any other purpose than a glass manufactory during the term. A lease and counterpart to be executed in conformity with the agreement, in which should be inserted all usual covenants:—Held, that this agreement did not warrant the insertion in the lease of an affirmative covenant by the lessee, that he *would* carry on the business of a glass-manufactory on the demised premises during the term. *Doe d. Marquis of Bute v. Guest*, 15 Mee. & W. 160.

A lease for years contained a proviso for re-entry, in case the lessee "should at any time during the term commit any act of bankruptcy, whereupon a commis-

sion or fiat in bankruptcy should issue against him, and under which he should be duly found and declared a bankrupt." The lessee, being a trader, committed an act of bankruptcy, on which a fiat issued against him, and he was by the Commissioner found and declared a bankrupt; but the petitioning creditor's debt on which the fiat was founded was proved by A and B, as partners, whereas it was due to A, B and C, as partners:—Held, by *Pollock, C.B. and Platt, B., Parke, B. dissentiente*, that the lessee was not duly found and declared a bankrupt, within the meaning of the proviso. *Doe d. Lloyd v. Ingleby*, 15 Mee. & W. 465.

An action on a covenant to repair in a lease cannot be sustained where the lessor never executes the lease, although the lessee occupies for the whole term in the intended lease. *Pitman v. Woodbury*, 3 Exch. Rep. 4.

By an agreement between A and B it was agreed that B should hold premises until Michaelmas 1845, at which time A was to grant him a lease for a term containing a covenant by B "to insure and keep insured the premises at all times during the term." Owing to disputes in Chancery the lease was not executed until the 12th of January 1847, but was by the Court of Chancery ordered to bear date on and to take effect from Michaelmas 1845. B left the premises uninsured until the 18th of February 1847. Ejectment having been brought by A against B for a forfeiture, the defendant gave no evidence in explanation of his delay to insure:—Held, that under the circumstances of the case the Judge ought to have directed the jury as a matter of law that the plaintiff was entitled to a verdict. *Doe d. Darlington v. Ulph*, 18 Law J. Rep. (N.S.) Q.B. 106; 13 Q.B. Rep. 204.

A lessee bound by a covenant to repair under penalty of forfeiture, must do so within a reasonable time after the premises are out of repair; and the acceptance of rent by the lessor does not operate as an extension of such time if, when such rent became due, the reasonable time has not expired. *Doe d. Baker v. Jones*, 19 Law J. Rep. (N.S.) Exch. 405; 5 Exch. Rep. 498.

(E) RENEWAL OF.

In ejectment, to prove the grant of a new lease a witness was called, who deposed to a conversation which took place fourteen or fifteen years back, with the owner of the property in dispute, under whom the lessor of the plaintiff claimed, in which conversation such owner admitted the premises had been released, without stating the term, or lives, rent, or any other particulars:—Held, that such evidence could not be made available as proof of a new lease having been granted. *Doe d. Lord v. Crago*, 17 Law J. Rep. (N.S.) C.P. 263; 6 Com. B. Rep. 90.

Lessees of way-leaves under a lease granted by a copyhold tenant in fee of the land, entered into a negotiation for a new lease with the tenant for life under the lessor's will, which gave the tenant for life power of leasing, and a new lease was accordingly granted. The original lease contained a clause usual, if not universal, in such leases, giving the lessee the option of determining the lease on notice. The correspondence respecting the new lease was silent as to such a clause, but the proposed lease

was alluded to as a renewal of the former:—Held, first, that the lessees were not bound to accept a lease without such a clause; and, secondly, that the tenant for life had no power to grant such a lease, and that the reversioner, though able to fulfil the agreement, was not entitled to a specific performance of it.

Quære—Whether in executory agreements there is a presumption in favour of the insertion in the executed contract of all such stipulations as are customarily inserted in such contracts. *Ricketts v. Bell*, 1 De Gex & S. 355.

On a devise of successive interests in leases for lives or years where the testator directs that the leases are from time to time to be renewed without more, the fines and expenses of renewal are to be borne by the tenant for life and remainderman, or parties successively entitled, in proportion to their actual enjoyment of the estate, and not in proportion to an extent of enjoyment to be determined speculatively, or by a calculation of probabilities.

If the testator provides a specific fund for renewals, or directs that the fines shall be raised or borne by the parties in a certain manner, such direction supersedes the general rule; but if trustees having power to direct the mode in which fines shall be raised do not exercise the power, the Court will pursue the general rule.

Quære—If the trustees might so act as to throw the burthen on the parties differently from the general rule.

Quære—Whether there is any difference where parties take successive interests under a will, and where they take them under deeds of settlement. *Jones v. Jones*, 5 Hare, 440.

(F) SURRENDER.

B, tenant for life, with a power of leasing, made in April 1788 a lease to A for ninety-nine years, determinable on three lives, of a portion of premises already demised to A by two several leases of 1760 and 1784. The lease of April 1788 purported to be granted "for and in consideration of the surrendering up to B" of the leases of 1760 and 1784; "and in order to effectuate an agreement entered into between A and one C for the sale to C of the residue of the premises, which residue the lease recited was intended to be demised by B to C, by indenture of lease bearing even date therewith." The lease to A, of April 1788, was not a good execution of the power. The lease of 1784 was a good execution of the power. The lease of 1760 had determined. The residue of the premises, mentioned in the lease to A of April 1788, was demised to C, by indenture of that date, by a valid subsisting lease:—Held, that the acceptance by A of the lease of April 1788 did not, as to the premises thereby demised to A, operate as an absolute surrender in law of the lease of 1784, and that, on ejectment being brought by the remainderman after the death of the tenant for life, the lease of 1784 must be considered as a subsisting lease. *Doe d. Biddulph v. Poole*, 17 Law J. Rep. (N.S.) Q.B. 143; 11 Q.B. Rep. 713.

In 1755, a tenant for life, under a power of leasing, demised lands to the defendant for ninety-nine years, determinable on lives. In 1812, the tenant for life under the same power granted a

further lease in reversion of the same lands to the defendant for ninety-nine years on additional lives. The lease purported to be made "in consideration of the surrendering up into the hands of the lessor by the lessee" of the lease of 1755, "which surrender is hereby made and accepted accordingly." The lease of 1812 was not a valid execution of the power:—Held, that as it did not pass an interest according to the contract, it did not operate as a surrender of the lease of 1755, and one of the lives named in that lease being still *in esse*, ejectment would not lie. *Doe d. Earl of Egremont v. Courtney*, 17 Law J. Rep. (N.S.) Q.B. 151; 11 Q.B. Rep. 702.

(G) FORFEITURE.

A lessee was to incur a forfeiture if he did not do certain repairs "to the satisfaction of the surveyor" of the lessor. He did the repairs, but the lessor's surveyor was not satisfied:—Held, in ejectment for the forfeiture, that if the jury thought the surveyor ought to have been satisfied, that would be sufficient, and there would be no forfeiture incurred. *Doe d. Baker v. Jones*, 2 Car. & K. 743.

LEAVE AND LICENCE.

[See LICENCE—PLEADING.]

LEGACY.

[See MONEY HAD AND RECEIVED.]

- (A) CONSTRUCTION OF.
 - (a) *In general.*
 - (b) *Gift by Implication.*
- (B) WHO TAKE AS LEGATEES.
 - (a) *Generally.*
 - (b) *Description of Legatee.*
 - (c) *Gift to a Class.*
 - (1) *When and how ascertained.*
 - (2) *Distribution per Capita or per Stirpes.*
 - (3) *Next-of-Kin.*
 - (4) *Legal Representatives.*
 - (5) *Issue.*
- (C) WHAT PROPERTY PASSES.
 - (a) *Generally.*
 - (b) *Dividends.*
- (D) WHAT INTEREST VESTS.
 - (a) *Absolute.*
 - (b) *For Life.*
 - (c) *Joint Tenancy.*
 - (d) *Tenancy in common.*
 - (e) *Trust or Beneficial.*
 - (f) *Separate Use.*
- (E) ON WHAT PROPERTY CHARGEABLE.
- (F) VESTED OR CONTINGENT.
 - (a) *In general.*
 - (b) *Period of vesting.*
- (G) SPECIFIC AND DEMONSTRATIVE.
- (H) CUMULATIVE OR SUBSTITUTIONAL.
- (I) CONDITIONAL.
- (J) SURVIVORSHIP.
- (K) PAYMENT OF.
- (L) INVESTMENT.

- (M) ABATEMENT.
- (N) ADEMPMENT AND SATISFACTION.
- (O) REMISSION OF DEBT.
- (P) VOID.
- (Q) REVOKED.
- (R) LAPSED.
- (S) PRIORITY AND CONTRIBUTION.
- (T) RESIDUE.
- (U) INTEREST ON.
- (V) ANNUITY.
- (W) RECOVERY OF LEGACY.
- (X) RIGHTS AND LIABILITIES OF THE LEGATEE.
- (Y) LEGACY DUTY.

(A) CONSTRUCTION OF.

(a) *In general.*

A testator bequeathed thirty G W Railway shares to A, and other thirty shares to B, and declared that the legacies should not be deemed specific so as to be capable of ademption. At his death he was entitled to fifty G W Railway shares originally subscribed for, and seventy purchased shares. The G W Railway Act was passed during his lifetime. All the calls had not been paid on the shares at the time of his death. After his death, the G W Railway Company passed a resolution, declaring that the proprietors of shares should be entitled to two new quarter shares in respect of each whole share:—Held, first, that the legatees were entitled to the income of the shares from the death of the testator; secondly, that the legatees were entitled to a proportional number of new quarter shares; thirdly, that (as between the legatees and the testator's estate) the legatees were bound to pay the calls on the new quarter shares; fourthly, that the legatees also were bound to pay the future calls on the purchased shares; fifthly, that the legatees, and not the executors, had the right of determining out of which class their shares were to come.

Whether the testator's estate was liable to pay the future calls on the shares originally subscribed for—*quære*. *Jaques v. Chambers*, 15 Law J. Rep. (N.S.) Chanc. 225; 2 Coll. C.C. 435.

Testator bequeathed to G two sums of stock, and in case of his death in the testator's lifetime without issue, the two sums were to be equally divided among the testator's nieces thereafter named, under the same conditions and restrictions as were thereafter mentioned respecting the several bequests thereafter mentioned to them respectively given. He then gave 12,000*l.* stock to trustees, upon trust to pay the dividends (in thirds) to his three nieces, A, B, and C, for their lives, and after their respective deaths to transfer the capital (in thirds) to the children of the nieces; with limitations over, in the nature of cross-remainders, in the event of any of the nieces dying without leaving children; with an ultimate limitation in the event of all the nieces dying without leaving children, in favour of the residuary legatee, a stranger. G died, without issue, in the testator's lifetime. The nieces had children:—Held, that the children took the same interests in the stock given to G as they did in the 12,000*l.* consols. *Ross v. Ross*, 2 Coll. C.C. 269.

Real and personal estate was given to trustees, upon trust to pay the income to the testator's wife for

her life, and within or at the expiration of ten years from the death of the survivor of himself and his wife to sell and convert the same into money, and out of the income to pay annuities to several persons and classes of persons for the said term of ten years, with pecuniary legacies to the same persons and classes, and also to other persons at the expiration of that time, and annuities to other persons for the lives of the annuitants, and specific legacies to others. The residue was then given to all and every the several legatees before named, rateably and in proportion to the amount of their several legacies. The wife survived the testator:—Held, that the "legatees before named" meant the legatees taking benefits out of the fund which fell in at the wife's death, and the "legacies," such legacies as remained unsatisfied at the end of the ten years.

That annuitants for life not having other legacies were legatees of shares in the residue, and that those who died during the ten years took vested interests in their annuities and legacies.

That specific legatees were entitled to share in the residue according to the value of their legacies.

* That a class described as "the children of B," but not otherwise named, came within the description of "legatees before named."

That the testator's widow did not take under the residuary gift. *Bromley v. Wright*, 7 Hare, 334.

A testator directed his trustees to pay an annuity to his brother, until he should attempt to charge it, or some other person should claim it, and then to apply it for his support and maintenance. The annuitant having become insolvent,—Held, that his assignees were entitled to the annuity. *Young-husband v. Gisborne*, 15 Law J. Rep. (N.S.) Chanc. 355.

A testator bequeathed leaseholds to his son Charles, and if he died without issue, that they should be considered part of his residuary estate, and divided among the children of his three daughters, Isabella, Matilda, and Mary, as thereafter mentioned; and he gave the residue of his estate to trustees in trust for his son and three daughters, or such of them as should be living at the death of his wife, equally during their lives; and directed that after their deaths the whole of the residue should be divided among all the children of his said son and daughters in equal shares; and in case any of his said son and daughters died without leaving issue, the share of him, &c. so dying should be divided among the survivors and their issue, in like equal shares, &c. Isabella died in the lifetime of the widow, leaving children. Mary died after the widow, leaving children. Charles died without issue. Matilda was still living, and had children:—Held, that Isabella's and Mary's children each took a fourth of the residue; that Matilda was entitled to another fourth for her life, with remainder to her children; and that Charles's fourth was divisible into three parts, each part to go as the other fourths of the residue. *Hawkins v. Hamerton*, 16 Sim. 410.

A testatrix, after leaving ten guineas to the person who should, at her death, be the eldest son of her daughter, by her then husband, and stating that she gave him no more because he would have a handsome provision from the estate of his grandfather and his father, who was still living, bequeathed one moiety of her residuary estate to her daughter's

children, except the eldest son, in equal shares, to be divided when the youngest should attain twenty-one:—Held, that one of the daughter's younger children, who became the eldest son, was excluded, although he did not become the eldest son till after the death of the testatrix, and took no provision under the will of his grandfather, and very little under the will of his father. *Livesey v. Livesey*, 15 Law J. Rep. (N.S.) Chanc. 357; 13 Sim. 33.

A testator directed a fund to be set apart to answer an annuity, which he directed to be paid to his widow. After her death, he directed the fund to form part of his residuary estate, which he bequeathed to all his children equally, with a proviso that if any child should die, either in his lifetime or after his decease, and before the part or share bequeathed to such child should become a vested interest, without leaving issue, then such share should go to the survivors; but in case any child should die leaving issue, then such issue should take their parent's share:—Held, that the second branch of the proviso must be read in connexion with the first, and that in both, the death contemplated was a death before the share vested in possession. *King v. Cullen*, 2 De Gex & S. 252.

Meaning of "money" in a will. *Glendeney v. Glendeney*, 9 Beav. 324.

Testator gave the interest of his residuary estate to his mother for life, and afterwards one-half of the interest to his brother, and one-half to his sister. On the death of his sister, the capital was to go to her children, if any, and if not, to his brother. On the death of the brother, the capital was to go to his children. The sister died without children:—Held, that the brother's children took no interest in her moiety. *Tatnall v. Tatnall*, 10 Beav. 509.

Bequest in trust for A for life, if he should not marry H B, and after such forfeiture should have taken place, and after the decease of A, in trust for the widow of A (except as aforesaid) and A's children, by any other woman than H B. A married H B:—Held, that A was still entitled to the income. *W— v. B—*, 11 Beav. 621.

A testator bequeathed a sum of money to his trustees, who were to pay the dividends to his brother, until his niece should attain the age of twenty-one, or should previously marry with the consent of her father, such interest to be applied by his brother in the maintenance and education of the niece, and when she should attain twenty-one, or marry with such consent, upon trust, to transfer the capital to her. The niece married under age, without consent:—Held, that the dividends between the time of her marriage and her attaining twenty-one were to be paid to the niece. *In re Camac*, 17 Law J. Rep. (N.S.) Chanc. 418.

Upon the construction of a will and codicil,—Held, that a substituted executor was not entitled to a legacy given to the original executor for his trouble in the execution of it. *Finch v. Secker*, 1 De Gex & S. 34.

A testator directed trustees to pay an annuity to his nephew for life, without anticipation, &c., or until bankruptcy or insolvency; and in case of bankruptcy or insolvency to pay the same to his wife for the personal support of herself and him and his children, during the life of him and her and the survivor, with power, in case of alienation, &c. by

them or either of them, to the trustees to withhold payment of the annuity, or to apply it towards the support of their children. The nephew took the benefit of the Insolvent Debtors Act in the lifetime of his first wife, living at the testator's decease, and afterwards married a second wife:—Held, that the second wife took no interest in the annuity, and that upon the death of his first wife, their children became entitled in equal shares to the annuity during his life, and that upon his decease the fund upon which it was secured fell into the residue of the testator's estate. *Boreham v. Bignall*, 19 Law J. Rep. (N.S.) Chanc. 461 ; 8 Hare, 181.

A testator bequeathed one-seventh of the residue of his estate to each of his seven children, for his or her life ; and declared that after the death of any of his children the capital of the share or shares of such child or children should be divided among his, her, or their children ; and if any of his children should die without issue living at his or her death, the interest and capital of such child should be divided equally amongst the survivors or survivor of his said children then living, and the children or issue of such of them as should be then dead, at such times and in such manner as was thereinbefore directed concerning the original shares. A, one of the testator's children, died without issue, and then B, another child, died without issue:—Held, that B's accrued share went over to the other children and the grand children of the testator. *Goodman v. Goodman*, 17 Law J. Rep. (N.S.) Chanc. 103 ; 1 De Gex & S. 695.

A testator gave all his personal estate to trustees, upon trust, to pay an annuity to his wife for her life, and to pay the remainder of the interest equally between his nephews and nieces and his sister E W, in equal shares ; but that the share of the said interest should be paid to E W during her life, and, after her decease, to go to her children ; and he directed that, after the death of his wife and sister, the principal monies should be divided between his nephews and nieces equally. At the death of the testator E W was living ; but no other sister, and no brother, of the testator. E W had three children, and there were five other nephews and nieces:—Held, that all the nephews and nieces were equally entitled to the property, with the qualification that the shares of the children of E W, during her life, belonged to her. *Blakelock v. Sharpe*, 17 Law J. Rep. (N.S.) Chanc. 453 ; 2 De Gex & S. 484.

A testator bequeathed to trustees 800*l.* upon trust to invest, and pay the income equally among his four daughters, A, B, C, and D, for their lives, to their separate use ; and in case of the decease of any or either of them leaving issue of her or their body or bodies, then he bequeathed one-fourth of the said principal sum to be equally divided amongst such issue, and if but one, to such one only ; and in default of issue, then the share of her or them so dying he bequeathed unto the survivors of them equally, and if but one, to such one only. By a subsequent clause in his will, the testator directed that in case any or either of his children, to whom or to whose benefit any legacy or bequest was given by his will should die, before such legacy or bequest should have become vested in her or them, leaving lawful issue, then such legacy or bequest should descend to and become the property of

such issue. A died before the testator, but after the date of the will, leaving issue, and B survived the testator and died without issue:—Held, that, by the effect of the subsequent clause in the will, the issue of A were entitled to participate with C and D, the surviving children in the one-fourth share given over in the event of the death of B without issue. *Willets v. Willets*, 17 Law J. Rep. (N.S.) Chanc. 457 ; 7 Hare, 38.

(b) Gift by Implication.

A testator, by will, gave to A a legacy of 500*l.* By the first codicil to his will the testator bequeathed a further legacy of 500*l.* to A, which the testator declared to be in addition to the like sum bequeathed to him by the will. By a second codicil the testator bequeathed to A 500*l.* in addition to the 1,500*l.* which he had before bequeathed to A:—Held, that A was by implication entitled to a legacy of 2,000*l.* *Jordan v. Fortescue*, 16 Law J. Rep. (N.S.) Chanc. 332 ; 10 Beav. 259.

A testator bequeathed 100*l.* each to the two children of his nephews, A and B. A had three children and B two children all living at the date of the will, and at the testator's death:—Held, that the five children were entitled to 100*l.* a piece. *Morrison v. Martin*, 5 Hare, 507.

An estate was mortgaged to A, who sub-mortgaged to B. A devised the estate to C, and bequeathed to B, through his executors, 1,000*l.* to clear the estate in part. B, after the testator's death, foreclosed the estate:—Held, that C was entitled to the 1,000*l.* *Lockhart v. Hardy*, 9 Beav. 379. And to interest thereon at 3*l.* per cent. 10 Beav. 292.

Gift of life estate by implication. *Hudleston v. Gouldsbury*, 10 Beav. 547.

A testator bequeathed a sum of money to his wife's nephew for life, and if he should die in the testator's lifetime, without issue, then he gave the same to other parties. The nephew died in the lifetime of the testator, leaving issue:—Held, that such issue was not entitled, by implication, to the legacy. *Cooper v. Pitcher*, 16 Law J. Rep. (N.S.) Chanc. 24.

[See (B) Who take as Legatees, (c) Gift to a Class (1), and (D) What Interest vests, (b).]

(B) WHO TAKE AS LEGATEES.

(a) Generally.

A testator gave and devised all his estate in the funds of England, and all his freehold, copyhold, and leasehold property to A for life, and then to his first and other sons in tail male, remainder to B, with the same limitations to his children, and in default of such issue "to his own right heirs for ever." The testator also gave his trustees a power to lay out his personal estate in the purchase of freeholds to be settled to the same uses:—Held, that the testator's personal estate would go to his heir-at-law, and not to his next-of-kin. *De Beauvoir v. De Beauvoir*, 15 Law J. Rep. (N.S.) Chanc. 305 ; 15 Sim. 163.

Upon the construction of a will,—Held, that executors were entitled as against the Crown claiming in default of next-of-kin, to the surplus proceeds of leaseholds bequeathed to be sold for payment of debts and legacies.

Executors having legacies under the will,—Held, not precluded from taking property undisposed of by the will to their own use, the legacies being unequal in amount. *Russell v. Clowes*, 2 Coll. C.C. 648.

A testatrix, by her will, bequeathed all interest of money arising from money in the hands of A B, unto her daughter, C D, for her natural life, and afterwards to devolve in succession upon her (testatrix's) remaining children. On the death of C D, the next eldest child in priority of birth, who had attained twenty-one, was held entitled to the interest of the fund for life. *Young v. Shepherd*, 16 Law J. Rep. (N.S.) Chanc. 247; 10 Beav. 207.

(b) Description of Legatee.

Testator gave 5,000*l.* after the decease of his niece, to be divided among his next-of-kin of the surname of Crump, who should be living at the death of his said niece:—Held, that the wife of A, who was next-of-kin of the testator, and whose maiden name was Crump, but who had married before the death of the niece, was entitled. *Carpenter v. Bott*, 16 Law J. Rep. (N.S.) Chanc. 433; 15 Sim. 606.

A testator gave to four persons, whom he described as "children of J and A E," legacies of 500*l.* each. A E was a daughter of a brother of the testator. The gift of these legacies was followed by this clause, "I direct my executors to pay by and out of my personal estate, the sum of 500*l.* a piece to each child that may be born to either of the children of either of my brothers lawfully begotten:—Held, that under this clause the four children of J and A E had not any claim to a second legacy of 500*l.* *Early v. Benbow*, 15 Law J. Rep. (N.S.) Chanc. 169; 2 Coll. C.C. 342.

A testator who was a farmer by his will gave a legacy in these terms: "to W R, one of my farming men." At the date of the testator's will, and at the time of his death, he had two persons in his service named W R—one of them was a farming man, and the other was employed both in the house and in the farm:—Held, (upon some evidence that the testator intended to benefit the latter), that the latter and not the former was entitled to the legacy. *Reynolds v. Whelan*, 16 Law J. Rep. (N.S.) Chanc. 434.

The Earl of A by his will gave to each person as servant in his domestic establishment at the time of his death a year's wages. The Earl of A lived at E Castle. Adjoining to the castle was a garden, inclosed by a wall, which was cultivated under the direction of O as head gardener. O lived in a garden-house situated in the garden, the domestic work of which was performed by the Earl's servants who came there from the castle:—Held, that O was entitled to a legacy under the above clause.

In this case the garden-house had been pulled down shortly before the Earl's death, and a new house was in the course of erection at his death; and, during this period, O lived at some distance from the castle. It was, however, the intention of the Earl that, on the completion of the new house, O should remove to it:—Held, that O's absence was only of a temporary and provisional nature and did not interfere with his right to the legacy.

In this case the circumstance that O was hired

at weekly wages (the hiring not being a yearly one) did not interfere with his right to the legacy. *Ogle v. Morgan*, 19 Law J. Rep. (N.S.) Chanc. 531.

(c) Gift to a Class.

[See (F) Vested or Contingent.]

(1) When and how ascertained.

A testator directed his trustees to set apart a sufficient sum out of his estate to produce 600*l.* per annum, which was to be paid to his daughter during her life, and after her decease to her children; and if at her death she should not have any child, or if none of her children should attain the age of twenty-four years, the trust monies were to be sold, and certain legacies paid out of the proceeds; and the testator bequeathed the rest of the trust monies to and among his heirs-at-law in equal shares:—Held, that the death of the testator was the time for ascertaining the parties who were to take; and that the testator's daughter being then his sole next-of-kin, and also his heiress-at-law, was in one of those characters entitled to the fund; but whether as heiress or as next-of-kin, *quære*. *Ware v. Rowland*, 16 Law J. Rep. (N.S.) Chanc. 427; 15 Sim. 587; affirmed, 17 Law J. Rep. (N.S.) Chanc. 147.

A testator bequeathed the residue of his estate in trust for his wife for her life, and after her decease to distribute the same, in equal shares and proportions, between and amongst each and every of his brothers and sisters, and such of their children as should be then living, the parents and children to be classed together, and to share in equal proportions:—Held, that the residuary fund was distributable in equal shares *per capita* amongst such only of the brothers and sisters of the testator and their children as were living at the death of the testator's widow, who survived the testator. *Turner v. Hudson*, 16 Law J. Rep. (N.S.) Chanc. 180; 10 Beav. 222.

Gift, by will, to A for life, and after her death for her surviving brothers and sisters. Some of A's brothers and sisters had died before the testator, and some died after the death of the testator, in the lifetime of A:—Held, that the brothers and sisters living at the death of A were alone entitled. *Davies v. Thorns*, 18 Law J. Rep. (N.S.) Chanc. 212; 3 De Gex & S. 347.

A testator willed that certain property should be vested in a manner most secure and least liable to fluctuation, and that 3,000*l.* should be at the will of his wife at her death, but the residue he willed she should distribute to his relations, and he made his wife residuary legatee:—Held, that the distribution to the relations took place at the wife's death, and that on the whole bequest the wife took a life estate. *Hudleston v. Gouldsbury*, 10 Beav. 547.

A testator, by his will, bequeathed his residuary estate to trustees upon trust for A, but with the proviso that if A died without having attained the age of twenty-one, and without leaving lawful issue him surviving, then that the trustees should pay the money arising from his estate unto and equally among B, the children of C, and the children of D, and the issue of such of them as should die leaving lawful issue, such issue taking their parent's share. A died under twenty-one, and without having been married. B was the first of

the residuary legatees who attained twenty-one. C had children living at the death of the testator, and born afterwards:—Held, that the children of C born between the death of the testator and B's attaining twenty-one, were entitled to share in the bequest. *Robley v. Ridings*, 16 Law J. Rep. (N.S.) Chanc. 345.

A residuary bequest to testator's brother for life, and after his death to his wife, and at her death to go to such of testator's relations as survived them, —Held, to give the whole to the only one of testator's brothers who survived the tenants for life, to the exclusion of the children and representatives of brothers of the testator who survived him, but died in the lifetime of the second tenant for life. *Bishop v. Cappell*, 1 De Gex & S. 411.

A bequest for the benefit of unbeneficed curates whose annual incomes do not exceed 35*l*. and to such as shall be recommended in a particular manner,—Held, to comprise two separate classes of legatees. *Pennington v. Buckley*, 6 Hare, 453.

A testator gave specific legacies and the residue of his personal estate to his children *nominatim*, payable to them at twenty-one or on marriage. He also gave the residue of his real estate, subject to the payment of an annuity to his wife and other trusts, between all his said children (not naming them) share and share alike; and directed in case any of his children by his second wife should die without issue before he or she should attain twenty-one, that the interest of each in his, the testator's, last-mentioned real and personal estate, together with the thereinbefore-mentioned legacies bequeathed to them respectively, should go between his said second wife and such of his children by her as should be living, &c.:—Held, that one of the said legatees, who was an illegitimate daughter of the testator by his second wife, was entitled to share with their legitimate children in the residue of the testator's property. *Evans v. Davies*, 18 Law J. Rep. (N.S.) Chanc. 180; 7 Hare, 498.

(2) *Distribution per Capita or per Stirpes.*

Upon a bequest of 2,000*l*. to be equally divided amongst testator's next-of-kin both maternal and paternal, the fund is divisible between the two classes *per capita*, and not *per stirpes*. *Dugdale v. Dugdale*, 11 Beav. 402.

A testator, by his will, gave a fund to trustees on trust, to pay the proceeds of it to A for life; and after the death of A, to pay the principal money unto and equally amongst all and every the children of A and B, which should be living at the death of A, and the lawful issue of such of them as should be then dead, share and share alike:—Held, that this was a gift to the children and issue of A and B *per capita*, and not *per stirpes*. *Abbey v. Howe*, 16 Law J. Rep. (N.S.) Chanc. 437; 1 De Gex & S. 470.

A bequest to testator's wife of the use and usage of all his effects for her life, and at her death bequest of the same to four nieces by name, to be by them equally divided, share and share alike, and at their deaths to go equally share and share alike to their children,—Held, to give the respective children their parent's share only. *Arrow v. Melish*, 1 De Gex & S. 355.

Upon an appointment of stock "unto and among

my said brother and my sisters and my nephews and nieces living at the decease of my wife, in equal shares,"—Held, that the qualification of living at the death of the wife attached only to the nephews and nieces, and that the legatees took *per capita*. *Baker v. Baker*, 6 Hare, 269.

Bequest of a fund to be divided among the children of A, the children of B, the children of C, the children of D, and to E, if he should then be living, and, if not, E's share to be divided into four parts, and paid to the children of A, B, C, and D "in manner aforesaid":—Held, that the fund was divisible among the children *per stirpes* and not *per capita*. *Nettleton v. Stephenson*, 18 Law J. Rep. (N.S.) Chanc. 191.

(3) *Next-of-Kin.*

S D M, by his will, dated in 1832, gave to trustees all his real and personal estate which he might be entitled to at his death, upon trust, after the second marriage of his wife, to apply the income for the benefit of his children, and if more than sufficient for their maintenance, &c., to invest the surplus to accumulate at interest till they attained twenty-one years of age, and on their attaining twenty-one, upon trust to convey the testator's real and personal estate equally between such children; and if either of them should die before attaining twenty-one years leaving issue, then the share of him or her so dying should go to such issue, but if there should be only one such child, then unto such only child, his heirs, executors, or administrators for ever; and if all his, the testator's, present or future children or child should happen to die without leaving issue, then upon trust to release the said real estate to the testator's heir-at-law, and to assign his personal estate unto and equally between his next-of-kin, according to the Statute of Distributions. Mrs. B, the testator's widow, married the defendant, J B B, in 1838. The testator had two children living at his death, a son and a daughter; the son died on the 8th of July 1841, in the ninth year of his age, and the daughter died on the 9th of July 1841, in the thirteenth year of her age. In pursuance of a reference made by the Court in January 1843, the Master reported that the two children of the testator were his next-of-kin at his death, and that the defendants, J G M and E M, the brother and sister of the testator, would have been his next-of-kin if he had died without issue, and that they were such next-of-kin at the death of the testator's last surviving child:—Held, that the legal personal representative of the two deceased children was entitled to the personality in their right. *Seifferth v. Badham*, 15 Law J. Rep. (N.S.) Chanc. 345; 9 Beav. 370. See *Lasbury v. Newport*, 9 Beav. 376.

A testatrix, under a power, charged estates with a sum of money, and directed it to be paid to such of her mother's relations as her husband should by will appoint, and for want of such appointment then to her mother's relations according to the Statute of Distributions. The husband survived, but did not appoint the fund to any relation of his wife's mother:—Held, that the next-of-kin of the mother living at the death of the husband were entitled to the fund in default of a valid appointment by the husband. *Davidson v. Proctor*, 19 Law J. Rep. (N.S.) Chanc. 395.

A testator directed the dividends of stock to be paid to his wife for life, and after her death the capital to be transferred to such persons in such shares at such times and in such manner as might be expressed in any codicil to his will; and in default of such direction or appointment the same to be transferred to such persons as would under the Statutes of Distributions have been entitled to his personal estate in case he had died intestate. The testator died without making any appointment by codicil, leaving his wife surviving him. The wife afterwards died:—Held, that the fund belonged to those who at the testator's, and not at the widow's, death would have been entitled to his personal estate in case he had died intestate, and that, consequently, the widow was entitled to a distributive share.

But, *semble*, there was no joint tenancy between the widow and the next-of-kin of the testator living at his death, and, therefore, that the widow having survived those next-of-kin did not take the whole by survivorship. *Jenkins v. Gower*, 2 Coll. C.C. 537.

(4) Legal Representatives.

A testator gave a sum of money to his daughter for life, and after her decease to three persons, share and share alike; and in the event of the death of all or any of the three legatees, in the lifetime of the daughter, he gave the shares of those so dying to their legal personal representatives. Two of the legatees died in her lifetime:—Held, that their executors, and not their next-of-kin, were entitled to two-thirds of the fund. *Hinchliffe v. Westwood*, 17 Law J. Rep. (N.S.) Chanc. 167; 2 De Gex & S. 216.

A testator gave his residuary estate to his son for life, with remainder to his children, and upon the decease of his son, if he should die without issue, he directed that one-fourth should be paid to his nephew, if he should then be living; and if not, then to his legal representative or representatives. The nephew died before the tenant for life, who died without issue:—Held, that the next-of-kin of the nephew were entitled to his share of the estate. *Walker v. Camden*, 17 Law J. Rep. (N.S.) Chanc. 488; 16 Sim. 329.

(5) Issue.

Bequest to testator's brother and sisters A, B, and C for their several lives, share and share alike, and after the decease of either of them, then as to the share or shares of either of them so dying, he bequeathed the same to the issue of the body or bodies of him, her, or them so dying begotten, or to be begotten, by their present husbands, share and share alike for ever. Assuming that A, B, and C took life estates only,—Held, that "issue" included grandchildren and remoter descendants. *Evans v. Jones*, 2 Coll. C.C. 516.

(C) WHAT PROPERTY PASSES.

(a) Generally.

[*King v. Wright*, 5 Law J. Dig. 393; 14 Sim. 400.]

Canal shares will not pass under a bequest of "property vested in bonds or securities." *Hudleston v. Gouldsbury*, 10 Beav. 547.

A testator bequeathed all his property in the Austrian and Russian funds, and that vested in a Swedish mortgage security. He had at the date of his will several sums invested on different Swedish mortgages:—Held, that the bequest was not void for

uncertainty, and that all the sums invested in Swedish mortgages passed. *Richards v. Patteson*, 15 Sim. 501.

A testator gave to trustees all his leasehold estates, and the residue of his monies, chattels, funds, railroad shares, securities for money and other personal estate and effects, on trust, to convert into money all such parts as should not consist of government securities, stocks, funds, or railroad shares, and apply the monies arising therefrom for the benefit of his wife and children, and after the death of his wife if there should be no children, the testator directed his real estate to be sold, and the money arising therefrom, and also the money arising from his residuary personal estate and effects, to be held upon certain trusts mentioned in his will:—Held, that the railroad shares passed in the gift over after the death of the widow. *Surtees v. Hopkinson*, 18 Law J. Rep. (N.S.) Chanc. 188.

A testator made the following bequest:—"To my wife I give all my interest in my house at Laven-der Hill, the furniture, books, pictures, wines," &c. Between the date of the will and his death the testator removed to another house, where he died:—Held, that the widow was entitled to the furniture, books, pictures, wines, and articles of a similar description, which were in the testator's house when he died. *Norris v. Norris*, 15 Law J. Rep. (N.S.) Chanc. 420; 2 Coll. C.C. 719.

Under a devise of a house in Camden Place and "all therein" to M for life; "at her death I give and bequeath the house, &c. to my nephew T and his heirs," after the death of M, T is entitled to all the chattels which were in the house at the testator's death except consumable articles. *Twining v. Powell*, 2 Coll. C.C. 262.

A bequest of all the property which a testator might die possessed of, held, from expressions in a codicil, to pass only part. *Attorney General v. Wiltshire*, 16 Sim. 36.

(b) Dividends.

A testator bequeathed all the dividends or interest of all his money in the funds, and of all other his personal property, to A for life. The testator was at his death entitled to some dividends on stock which had accrued due during his life, but had not been received by him:—Held, that such dividends did not pass under the words "dividends of money in the funds," but formed part of his general personal estate. *Shore v. Weekly*, 18 Law J. Rep. (N.S.) Chanc. 403.

A testator bequeathed all the shares he possessed in a railway, and all his right, title, and interest therein and thereto. Calls had been paid by the shareholders on each of the shares, at the date of the will and death of the testator, and the testator had also, by virtue of a power to that effect, contained in the act of parliament establishing the railway company, made payments in advance on each of his shares, and received interest from the railway company thereon:—Held, that the anticipated payments and the interest payable by the railway company in respect of the anticipated payments passed to the legatees with the shares. *Tanner v. Tanner*, 17 Law J. Rep. (N.S.) Chanc. 115; 11 Beav. 69.

A testator bequeathed to A all and singular his

ready money, money in the funds, furniture, &c., and all other his property in and about his house, except securities for money. He then gave the rest and residue of his estate on the trusts therein mentioned. The testator at his death was entitled to dividends on stock in the 3l. per cent. reduced annuities, and the 3l. 10s. per cent. annuities belonging to him, which had accrued due during his life, but had not been received by him:—Held, that such dividends did not pass under the words “ready money” or “money in the funds.” *May v. Grave*, 18 Law J. Rep. (N.S.) Chanc. 401.

(D) WHAT INTEREST VESTS.

(a) Absolute.

[See *Lassence v. Tierney*, 2 Hall & Tw. 115; 1 Mac. & G. 551, tit. ‘Will, Construction of.’]

Bequest to testator’s daughter for life, and on her death to testator’s son and his children. The son had no child at his father’s death, but had children living at the death of the daughter:—Held, that his children were neither joint tenants with him, nor entitled in remainder after his death, but that the fund belonged to him absolutely. *Scott v. Scott*, 14 Law J. Rep. (N.S.) Chanc. 439; 15 Sim. 47. [5 Law J. Dig. Add. 835.]

A testatrix gave 1,000l. to her nephew to bring up and maintain her natural son Frederick; she then gave the residue of her property for the benefit of her four children, including Frederick:—Held, that the nephew took the 1,000l. absolutely. *Ward v. Biddles*, 16 Law J. Rep. (N.S.) Chanc. 455.

A bequest of 8,000l. to testatrix’s daughter, a married lady, towards purchasing a country residence, —Held, to be an absolute bequest. *Knox v. Lord Hotham*, 15 Sim. 82.

A testator bequeathed the interest of all monies invested in loan societies, as well as all other property, to his wife for life. He then directed all his debts to be got in and invested in government securities for the benefit of his wife for her life, and after her decease he gave various legacies to his grandchildren; and as to the remaining part of his estate he directed the same to be put out at interest for the benefit of his wife during her life, and all monies were to be kept in the Bank of England. The testator afterwards directed that all monies belonging to him in the friendly societies when received should belong to his wife for her own use absolutely:—Held, that the last clause in the will must controul the first, and that the testator’s wife was entitled to the money in the friendly societies absolutely, and not merely for life.

Held, also, that the trustees were not bound to convert the money in the societies immediately for the purpose of investment in government securities. *Marks v. Solomon*, 18 Law J. Rep. (N.S.) Chanc. 234.

Bequest to A, and in the event of her death without children to her heirs, the nearest relations of her grand-aunt A. A took the absolute interest. *Yearwood v. Yearwood*, 9 Beav. 276.

A testator gave fourteen Phoenix shares in trust to pay the produce of ten to his daughters for life, and afterwards to his son, and afterwards to his son’s “children;” and he gave the other four to his son for life, and afterwards to his “children;” and in default of “such issue” of his son to his daughters,

and their “issue,” share and share alike, such issue not to take more than their deceased parent’s share. The son died without issue:—Held, that the daughters took absolute interests, and that their children took only by substitution for their parents, and not by way of limitation or succession.

He also gave ten Pelican shares to his son, his heirs, executors, administrators and assigns, for ever, he paying the profits of eight to the testator’s daughters, for life, and after their decease the daughters’ shares were to return to the son and “his issue,” and in default of such issue over to the daughters and their issue:—Held, that subject to the life interest of the daughters, the son was absolutely entitled to the shares. *Hedges v. Harpur*, 9 Beav. 479.

Testator bequeathed his residue to his three sons, in trust to be divided between his three sons and his daughter, and he directed his daughter’s share to be kept in the hands of his sons for her “or” her children’s sole use, free from the controul of her husband. The daughter survived:—Held, that she took absolutely. *Whitcher v. Penley*, 9 Beav. 477.

Under a bequest to “my son William or his children,”—Held, that the son who survived was absolutely entitled, and that the children could only take by substitution in case of the death of their parent. *Penley v. Penley*, 12 Beav. 547.

A testator gave a fund to A absolutely, but directed that the interest only should be paid to her for her separate use for life, and that after her death the property should go to her children, and in the event of her not intermarrying nor having children, the property to be at her disposal by will or otherwise. A, being a widow, sixty-four years of age, and never having had any children, filed a bill for the transfer of the fund:—Held, that she was entitled to it. *Mackenzie v. King*, 17 Law J. Rep. (N.S.) Chanc. 448.

A testatrix directed her trustees to pay and apply the sum of 800l. in and upon the education of her grandson, who was an infant:—Held, that this was an absolute legacy, vested immediately, upon which interest was payable from a year after the death of the testatrix. *Noel v. Jones*, 17 Law J. Rep. (N.S.) Chanc. 470; 16 Sim. 309.

A testator bequeathed to his grand-daughter the interest arising out of 1,500l. consols, during her life, and at her decease to descend to her heirs male or female, by paying to her uncle 10l. per annum, during his life, but the said 1,500l. stock to be by no means sold whatsoever, except on failure of issue, and then to descend to the testator’s son and his heirs for ever:—Held, that this was an absolute bequest of the 1,500l. stock to the testator’s grand-daughter. *Ousby v. Harvey*, 17 Law J. Rep. (N.S.) Chanc. 160.

A testator bequeathed to trustees two sums of stock, standing in his name, upon trust, to pay the dividends to his four brothers and his two sisters in equal proportions for their several and respective lives; and from and after their several and respective deceases, upon trust, to pay the same dividends unto and amongst the present or any eldest future sons or son only for the time being, of the testator’s said brothers, born or to be born, and the survivors or survivor of them, for their life or lives, equally upon their attaining twenty-one; and if but one son

only of his said brothers should be living at the time of the testator's decease, then the whole to such only son during his life; and from and after the decease of such eldest sons or son, for the time being, and the survivors or survivor of them, as the case might be, upon further trust to pay such dividends amongst the lawful eldest male issue, for the time being, of their, and each and every of their bodies or body *ad infinitum*, for ever, without in any manner disposing of any part of the said capital sums of stock:—Held, that the four eldest sons of the testator's four brothers, living at the time of the testator's death, took absolute vested interests in the said sums of stock, as tenants in common, in remainder, expectant upon the decease of the testator's said brothers and sisters. *Harvey v. Towell*, 17 Law J. Rep. (N.S.) Chanc. 217; 7 Hare, 231.

The Earl of A, by his will, reciting that he was seised of an inalienable estate tail, settled by act of parliament, and also of divers purchased estates, which it was his intention to give to his eldest son to descend with the title, devised all his said purchased estates to trustees, to the use of his eldest son for life, with remainder to the use of such person or persons as might be entitled upon such son's decease to the family settled estates, in such order and course successively, and for such estates, and subject to such powers, &c., as were expressed in the acts settling the family estates. The testator then bequeathed to his said son, all his gold and silver plate, pictures, &c., to be held as heir-looms, and directed his executors to make an inventory of the same. By a codicil the testator declared, that in addition to the articles and things by his will made heir-looms, certain other specified chattels should be considered and taken to be heir-looms, and he thereby gave and bequeathed them to his executors as heir-looms in his family, and directed his executors to make an inventory of the same:—Held, that the bequest of the specified chattels was direct, and that they vested absolutely in the first taker. *Rowland v. Morgan*, 17 Law J. Rep. (N.S.) Chanc. 339; 5 Hare, 563; affirmed, 18 Law J. Rep. (N.S.) Chanc. 78.

Bequest to A and B of a fund upon trust to invest on security, and to apply the interest on the principal for the benefit of C, in such way as A and B should think fit, during the life of C, and so that A and B should have the entire power over the fund, to dispose of the principal and interest, or any part thereof, or to withhold the same as they should think fit, without being accountable to C or any other person; and on the death of C, in case the said sum or any part thereof should be undisposed of, to stand possessed thereof on the trusts therein mentioned. A and B paid the income to C during their lives, and died leaving C surviving:—Held, that C was absolutely entitled to the capital. *Gude v. Worthington*, 18 Law J. Rep. (N.S.) Chanc. 303.

A testator gave to his daughter the sum of 15,000*l.*, to be kept in trust by his executors till she should attain the age of twenty-one, or marry with consent, whichever might first happen, when this sum was to be settled on his said daughter; but failing her attaining twenty-one or having issue by such marriage, then the money to devolve upon others. The

daughter attained the age of twenty-one, without having been married:—Held, that she was entitled to the legacy absolutely without any settlement being made. *Arnold v. Arnold*, 18 Law J. Rep. (N.S.) Chanc. 90; 16 Sim. 404.

A testator, by his will, gave 1,000*l.* to his sister for her or her children's sole use and benefit for ever. By a codicil to his will, he recited that he was desirous of making further bequests in relation to his sister and her family; and then gave, amongst other benefits, a further sum of 1,000*l.* to his trustees to pay the dividends to his sister for life, and then for her children:—Held, that the 1,000*l.* bequeathed by the will was given absolutely to the testator's sister. *Chipchase v. Simpson*, 18 Law J. Rep. (N.S.) Chanc. 145; 16 Sim. 485.

M H, by her will, gave to trustees the sum of 3,000*l.* upon trust to pay the interest thereof for the maintenance of A, and to pay him the principal when he should attain twenty-one; but directed that in case he should die before his legacy should be payable, leaving lawful issue, such issue should take their deceased parent's legacy. She then gave one moiety of the residue of her estate upon trust for W for her life, and, after the death of W, she gave this moiety to A at the time his other legacy became payable, and in case of his death without lawful issue, then the same to be equally divided between B, C and D. A survived the testatrix, attained twenty-one, and died in the lifetime of W without ever having been married:—Held, that the share of the residue had vested in him absolutely, and did not go over to B, C and D. *Woodburne v. Woodburne*, 19 Law J. Rep. (N.S.) Chanc. 88.

A testator directed his trustees, out of his estate, to pay to each of his children, as and when they shall attain twenty-five years, the sum of 3,000*l.*; and declared that it should be lawful for the trustees to apply all or any part of the income of each share of his said children for their maintenance and benefit, until he or she should attain twenty-five; and also to apply any part not exceeding 200*l.* for his or her advancement:—Held, that the legacies vested absolutely in the children at the testator's death. *Eccles v. Birkett*, 19 Law J. Rep. (N.S.) Chanc. 280.

(b) For Life.

[See (A) Construction of—(b) Gift by Implication.]

Gift in trust to be equally divided between A, B and C separate from their husbands, and for their sole use, and at their decease to be divided amongst their daughters:—Held, that each took one-third for life, with remainder as to her share to her daughters. *Willes v. Douglas*, 10 Beav. 47.

A testator gave each of his daughters 400*l.* per annum for their lives, and after their respective deceases, he gave the same to their "children" respectively, and in case any of the daughters died without issue, the annuity to cease:—Held, that the children of the daughters took for life only a proportion of the annuity. *Hedges v. Harpur*, 9 Beav. 479.

A testator gave and bequeathed all his personal estate and effects to his daughter, the same to be always considered as vested in her, upon her attain-

ing twenty-one, and to be subject to her disposition thereof; and the testator further directed that in case his daughter should happen to depart this life without attaining twenty-one, or without disposing by her will of the property bequeathed to her, then the same to be subject to the disposition by will of his wife. The testator's daughter married under twenty-one, and by articles previously to her marriage the husband covenanted to settle all the property left her by the testator upon his wife and himself for life, and then for the benefit of the children of the marriage:—Held, that the daughter took the property not absolutely but for life only, with power to dispose of it by will, and that her husband not having reduced it into possession, the articles were not binding upon the wife. *Borton v. Borton*, 18 Law J. Rep. (N.S.) Chanc. 219; 16 Sim. 552.

A testator gave his wife the interest of his money and the use of his goods for life; and at her death he gave certain legacies, and the remainder of his property to his brothers and sisters:—Held, that the wife took the residue for life. *Glendening v. Glendening*, 9 Beav. 324.

A testator bequeathed to his daughter H 1,000*l.* stock, and 70*l.* a-year during her life, which two sums he directed to be under the trust of his executors, viz., not to permit H to assign the said annuities to any one, and the interest arising from the 1,000*l.*, as it became due, to be paid to her, for her life; and at her decease the 1,000*l.* to be equally divided between her children. H died, having had no issue:—Held, that H took only a life interest in the 1,000*l.* legacy; and that the same being a restricted gift, her representatives could not take under it. *Scawen v. Watson*, 16 Law J. Rep. (N.S.) Chanc. 175; 10 Beav. 200; affirmed 16 Law J. Rep. (N.S.) Chanc. 404.

Bequest to the children of A B for life: but in case of death before marriage his share to go to the survivors. In the margin was written "What is to become of the principal? The share of the parent to be divided amongst the children, if any. *Quare*, to be put in afterwards in a proper manner." The children of A B all died unmarried:—Held, that the gift was for life only, and not an absolute gift cut down merely to admit their children. *Kay v. Winder*, 12 Beav. 610.

A testator gave property in trust for his sister, the interest to be paid to her during her life, and the principal at her death to go to the *heirs of her body*, share and share alike. The sister had five children living at testator's death:—Held, that she took for life, with remainder to her children as tenants in common. *Symers v. Jobson*, 16 Sim. 267.

A will contained a devise of realty in trust for A for life, remainder to B, his wife, for life, and after the death of the survivor to sell and divide the proceeds equally among the children whose shares were to be vested at twenty-one for sons, and twenty-one or marriage for daughters, with a proviso postponing payment in the event of shares, vesting in the lifetime of A or B. The will also contained a bequest of stock in trust to pay the dividends to A for life, and on his death to divide the principal among his children equally, the shares to vest at the same times as were before provided as to the proceeds of the realty: and there was a proviso that in the

event of there being no child of A and B, or all the children dying before twenty-one, or if daughters before twenty-one or marriage, the proceeds of the realty and the stock should be divided equally among the members of a defined class of persons who should be living at the death of the survivor of A and B, or A's child or children as the case might require:—Held, that the last of these clauses must be read distributively, and that it did not give to B by implication a life interest in the stock. *Drew v. Killick*, 1 De Gex & S. 266.

(c) Joint Tenancy.

[*Amies v. Skillern*, 5 Law J. Dig. 397; 14 Sim. 428.]

[See *Jenkins v. Gower*, 2 Coll. C.C. 537, ante, (B) (c) (3)—*Scott v. Scott*, 15 Sim. 47, ante, (D) (a).]

A legacy was bequeathed to a husband, his wife, and children. Upon a suit to determine the rights of the parties, it was held that the husband and wife were entitled to one share. Under a similar bequest in the same will the wife claimed to be entitled to a settlement out of the whole share to which the husband and wife were entitled:—Held, that the wife was not entitled to a settlement out of the whole share, as the husband was not entitled to the whole in her right; that their interest was a joint tenancy, modified so as to make their rights contingent; that it was not payable to the husband during the life of his wife, or to the wife during the life of her husband, and that the whole share ought to be carried over to the joint account of the husband and wife, and that the dividends must be paid to the husband during their joint lives; with liberty for all parties interested to apply. *Atcheson v. Atcheson*, 18 Law J. Rep. (N.S.) Chanc. 230; 11 Beav. 485.

A legacy was bequeathed to A B, his wife and children:—Held, that the parents and children took together as joint tenants, and that A B and his wife were to be reckoned as one person, and took only one share. *Gordon v. Whieldon*, 18 Law J. Rep. (N.S.) Chanc. 5; 11 Beav. 170.

(d) Tenancy in common.

[See *Symers v. Jobson*, 16 Sim. 267—ante, (b) *For Life*.]

Bequest of personal estate upon trust to assign to four persons, and to each of their respective heirs, executors, administrators and assigns:—Held to create a tenancy in common. *Gordon v. Atkinson*, 1 De Gex & S. 478.

(e) Trust or Beneficial.

A testator bequeathed to his wife for her life the use of all his property, and directed that certain specific chattels should be finally appropriated as she pleased, with a sum of 4,000*l.*; which sum, however, he recommended her to divide among certain persons:—Held, that no trust was created in favour of any of those persons as to any part of the 4,000*l.* *White v. Briggs*, 15 Law J. Rep. (N.S.) Chanc. 182; 15 Sim. 33.

A testator bequeathed copyhold and leasehold property, upon failure of prior trusts and limitations, in trust for his personal and not his real representative; and he appointed his wife sole executrix of his will and residuary legatee:—Held,

that the testator's widow was beneficially entitled to the copyhold and leasehold property, to the exclusion of the next-of-kin of the testator. *Smith v. Barneby*, 16 Law J. Rep. (N.S.) Chanc. 466; 2 Coll. C.C. 728.

A testatrix gave 1,000*l.* to her nephew to maintain and bring up her natural son F B, and she directed the interest of one-fourth of her residuo to be applied for the maintenance and education of F B during his infancy, and the capital to be paid to him on his attaining twenty-one:—Held, that the nephew was not a trustee of the 1,000*l.* for F B, but was entitled to it for his own benefit. *Biddles v. Biddles*, 16 Sim. 1.

A testator directed an annual sum of 300*l.* to be paid towards the maintenance, clothing, and education of his grandchildren during the life of their father:—Held, that this was equivalent to a gift for the benefit of the grandchildren, and that the representative of a deceased child was entitled to his share. *Lewes v. Lewes*, 17 Law J. Rep. (N.S.) Chanc. 425; 16 Sim. 266.

(f) *Separate Use.*

Bequest of 1,000*l.* stock to "a married woman" solely and entirely for her own use and benefit during her life," is a bequest to her for life to her separate use. *Inglefield v. Coghlan*, 2 Coll. C.C. 247.

(E) ON WHAT PROPERTY CHARGEABLE.

[*Darben v. Rickards*, 5 Law J. Dig. 400; 14 Sim. 537.]

[*Davies v. Ashford*, 5 Law J. Dig. 400; 15 Sim. 42.]

A testator gave freehold and leasehold estates to trustees, upon trust, to receive the rents from time to time as they became payable, and thereout to pay to his wife an annuity during her life, and after her decease upon trust to convey to other persons absolutely. The rents were inadequate to satisfy the annuity:—Held, that the annuity must abate, and that it was not charged upon the corpus of the estates. *Foster v. Smith*, 15 Law J. Rep. (N.S.) Chanc. 183; 1 Ph. 629.

A testator bequeathed pecuniary legacies, and charged his executors with the payment thereof, to whom he gave the residue of his real and personal estate to and for their own use and benefit. The personal estate being insufficient to pay the legacies, —Held, that the same were charged on the real estate. *Cross v. Kennington*, 15 Law J. Rep. (N.S.) Chanc. 167; 9 Beav. 150.

The will of a testator was in part as follows:—"All my goods and chattels to be converted into money. I bequeath the sum of 260*l.* a-year to Mrs. C C, my housekeeper, during the term of her life. And the remaining interest of my money I bequeath to R W: in the event of his demise to S W," &c.:—Held, that the annuitant had a charge in respect of her annuity on the capital of the residuary estate, and not merely on the income. *Wroughton v. Colquhoun*, 16 Law J. Rep. (N.S.) Chanc. 70; 1 De Gex & S. 36.

A testator bequeathed specific chattels charged with the payment of a pecuniary legacy and of all his just debts and funeral and testamentary expenses, and bequeathed others specific and pecuniary legacies,

but made no residuary bequest:—Held, that notwithstanding the charge, the general undisposed of residue was first applicable. *Hewitt v. Snare*, 1 De Gex & S. 333.

A testator gave 1,500*l.* to A, and charged it upon a farm L. He gave other legacies, some of which he directed to be paid by his executors, and charged his real estates with payment of his debts and in aid of his personal estate. By a codicil he confirmed all gifts, &c. made to A, and desired that all his debts, annuities and legacies should be paid in the first instance out of any money he might have in the 3*l.* per cent. consols, and he charged his farm called R with the payment of all his debts, annuities and legacies in aid of his monies in the 3*l.* per cents:—Held, that the 1,500*l.* was not charged on L exclusively, and in exoneration of the personal estate, but that the consols were to be applied first, the farm R next, the general personal estate next, and the farm L last, in payment of it. *Evans v. Evans*, 17 Sim. 102.

(F) VESTED OR CONTINGENT.

[*Nicholson v. Wilson*, 5 Law J. Dig. 406; 14 Sim. 549.]

(a) *In general.*

The testator, by his will, gave to trustees a sum of stock, upon trust, to pay the dividends to his daughter B for life, and, after her decease, to pay both principal and interest to and amongst her children, as she should by deed or will direct; but if she should leave no child living at her decease, or all should die before their ages of twenty-five years, then over. B died without having exercised the power of appointment, having had two children, one of whom died in her lifetime at the age of twenty-eight years, and the other survived her and died at the age of fifty-three years:—Held, that the respective representatives of the two children of B were entitled to the stock in moieties. *Faulkner v. Lord Wynford*, 15 Law J. Rep. (N.S.) Chanc. 8.

Testator, after directing his personal estate to be invested, gave the income of the same and of his real estate to his wife for her life, and directed that after her death his trustees should sell his real estate and "pay, distribute, and divide" the money thence arising, and the money at interest, and he gave one-third thereof unto J S "if he should be then living, but if he should be then dead, unto his legal representative or representatives if more than one, share and share alike." J S died in the lifetime of the testator's widow, leaving a widow and children:—Held, that upon the death of J S, his widow and children, as the persons who would in case of intestacy be entitled to his personal estate according to the Statute of Distributions, took vested interests in the third of the residue in equal shares as tenants in common. *Smith v. Palmer*, 7 Hare, 225.

A testator gave his real and personal estate, after paying four annuities, to A for life, and after his death he directed his personal and the produce of his real estate to be divided amongst the children of A living at the testator's death, when the youngest attained twenty-one, if the annuitants should be then dead; but if not then his trustees were either to invest it and pay and apply the residue of the

income for the maintenance of the children, or to accumulate, such accumulations to be paid after the death of the annuitants with the original shares. There was a gift over in the event of any child entitled dying before his share became payable. One of the children pre-deceased an annuitant:—Held, that the bequest was vested, and that the gift over did not take effect. *Butterworth v. Harvey*, 9 Beav. 130.

A testator gave to trustees 2,000*l.* in trust to invest and pay the income to his daughter for life, and after her death to pay and assign the trust fund to her children, as and when they should attain twenty-one years, in equal shares, to whom he gave the same accordingly, with benefit of survivorship in case any child died before his share became payable, and with a direction to apply the income of their shares for maintenance during minority:—Held, that the only child of the daughter dying under twenty-one took a vested interest. *Re Bartholomew's Trust*, 19 Law J. Rep. (N.S.) Chanc. 237; 1 Mac. & G. 354; 1 Hall & Tw. 565; 16 Sim. 585.

A testator directed his trustees, at their free will and pleasure, to sell certain portions of his property, and to pay and apply any sum not exceeding 2,000*l.* to each of his sons for setting them up in business, or for such other purpose as his wife should think proper and most beneficial for his said sons; one son died without any sum having been raised for him:—Held, that the son had a vested right in the 2,000*l.*, and his personal representative was entitled to call upon the trustees to pay the amount. *Gough v. Bult*, 17 Law J. Rep. (N.S.) Chanc. 10; 16 Sim. 45; affirmed 17 Law J. Rep. (N.S.) Chanc. 401.

(b) *Period of Vesting.*

[See (D) What Interest vests, (a) *Absolute*.]

The testator gave all his real and personal estate to trustees, upon trust, to sell and invest, and to set apart a sufficient sum to produce an annuity to his widow for her life, and that the trustees, during the life of his wife, should stand possessed of the residue of the money arising from such sales, and, after the decease of his wife, of the whole of such monies, upon trust, to pay and divide the same unto and equally between and amongst all and every his children, as and when they should respectively attain the age of twenty-one years, and to their several and respective executors, administrators, and assigns; but in regard to such of his children as had already attained the age of twenty-one years, he directed that the share or shares of such children should be paid to them respectively at the expiration of twelve months after the decease of his wife; but in the event of the decease of any or either of his said children before he, she, or they should have received or become possessed of their shares leaving issue, that the share of the child so dying should go to the children of such child on their attaining twenty-one; and on failure of issue of any of his (the testator's) sons or daughters, then that the share of such his sons or daughters should go to such of his (the testator's) children as should be then living:—Held, that the children of the testator, who had attained twenty-one at the date of the will, took vested interests in their shares,

liable to be divested in the event of their dying before the widow; but that they were entitled to receive the interest of their shares in the mean time; and that the children who had attained twenty-one since the date of the will were entitled to an immediate transfer of their shares, except as to the fund appropriated to the widow's annuity. *Rammell v. Gillow*, 15 Law J. Rep. (N.S.) Chanc. 35.

A testator gave a sum of money to trustees, upon trust, to pay the interest thereof to his daughter for life, and after her death the interest to be appropriated for the use of any of her children, until they should reach the age of twenty-one, and then the principal to be paid to the survivors, share and share alike:—Held, that the testator intended those children only to take who survived their mother, and attained twenty-one, and that the representative of a child, who attained twenty-one, but died before the mother, was excluded. *Turing v. Turing*, 15 Law J. Rep. (N.S.) Chanc. 272; 15 Sim. 139.

A testator bequeathed 1,500*l.* stock to trustees, in trust for his daughter for life, and after her decease for her children, but if she should have no children then he directed his executor to stand possessed of the fund, in trust to pay or transfer the same equally unto and between his three nephews A, B and C, and his niece, and the survivors or survivor of them, share and share alike. The nephews and niece survived the testator, and died in the lifetime of the daughter, who died without ever having had a child:—Held, that the representatives of the nephews and niece were entitled in equal shares. *Wagstaff v. Crosby*, 1 Coll. C.C. 746.

A testatrix, by her will, gave the residue of her property to her three sisters; and after her death, to be divided between her four nieces named in her will:—Held, that the gift to the nieces vested immediately upon the death of the testatrix. *Cochrane v. Wiltshire*, 16 Law J. Rep. (N.S.) Chanc. 366.

A testator gave a legacy to Anne, wife of Peter, for life, remainder to Peter for life, and after the death of both, upon trust to pay the interest for the maintenance of such children of Anne as should be living at her death, until they should respectively attain twenty-one, and when and as they should severally and respectively attain that age, upon trust to pay the legacy equally among all the children of Anne, when and as they should severally and respectively attain their said ages of twenty-one; and if any of the said children should die under twenty-one, then to such as should attain that age, share and share alike; and in case all and every the said children should die under twenty-one, then to pay the legacy to the testator's next-of-kin:—Held, that the children of Anne who attained twenty-one acquired vested interests notwithstanding they died in the lifetime of their mother. *Bradley v. Bartow*, 5 Hare, 589.

A testatrix gave an annuity of 300*l.* to her daughter, together with the interest of all she had in the stocks; and at her death she gave the stock to her children, to be equally divided between them, together with the interest, to be laid out for their use, in case their mother died before they arrived at the age of twenty-one. In case one died, the others were to have share and share alike; the sur-

vivor to have the whole; and if they all died before twenty-one, then she gave the stock to her five nieces. All the children of the daughter attained twenty-one, but four died before their mother:—Held, that all the children of the daughter, who attained twenty-one, took vested interests, although they died in the lifetime of their mother. *Bouverie v. Bouverie*, 16 Law J. Rep. (N.S.) Chanc. 411; 2 Ph. 349.

A testator directed his executors to invest his personal estate, and pay the dividends of one-third part to his daughter for life for the maintenance of herself and what issue she should have; and after her death his executors were to pay, apply, and divide one-third of the principal monies unto and amongst all and every the children of his said daughter "when and as" they respectively attained the age of twenty-six years, with benefit of survivorship among them; and in case either of such children, at the time of his daughter's decease, should be under twenty-one, then the executors were to invest the principal share of such child, and during minority apply the interest for its maintenance; they were also empowered to apply any part of such child's share for advancement:—Held, that a direction to pay to an indefinite class "when and as" they attained a certain age, did not prevent any from becoming entitled, and that the intention of the testator, to be collected from other parts of the will, was to give the children of his son and daughter immediate vested interests. *Harrison v. Grimwood*, 18 Law J. Rep. (N.S.) Chanc. 485; 12 Beav. 192.

A testator bequeathed his residuary estate to trustees, upon trust to provide a fund (which was subsequently to sink into the residue) for the payment of annuities, and then to pay the income to his children and grand-child for life; and after the decease of either of them, upon trust to pay and transfer the share of the party dying in the principal, amongst all and every the child and children of the party dying, and if but one, to such one child:—Held, that the gift to trustees, followed by trusts directing payment and transfer of the capital, gave immediate vested interests to the children of the tenants for life, living at the decease of the testator, and that the shares of two of the children who survived the testator, but died in the lifetime of the tenant for life, passed to their legal personal representatives. *Salmon v. Green*, 18 Law J. Rep. (N.S.) Chanc. 166; 11 Beav. 453.

A testator gave and bequeathed all his real and personal estate to his trustees upon trust to convey, assure and divide the same unto and amongst all his children in equal shares, as tenants in common, on their respectively attaining twenty-one; and in case of the decease of any or either of his said children without issue under that age, or before they should acquire vested interests therein, then the trustees were to convey, assure, pay and divide the shares of the children so dying to the survivors:—Held, that the testator's children, on attaining twenty-one, acquired absolute vested interests in the real and personal estate. *Wheable v. Withers*, 18 Law J. Rep. (N.S.) Chanc. 156; 16 Sim. 503.

A testator directed the dividends of two sums of stock to be equally divided between all his nephews living at his decease, and after the decease of any

of them, the capital of his share to be sold, and the proceeds to be divided amongst his children; and in default of such issue then to go and be divided amongst the children of A; and in case all A's issue should be dead, then to be divided amongst the children of B. A had four children, three of them died, and then one of the testator's nephews died without issue:—Held, that the three deceased children as well as the surviving child of A took vested and transmissible interests in the deceased nephew's share of the stock. *Cohen v. Waley*, 15 Sim. 318.

Bequest to H S for life, and after her decease, to the testator's four brothers and sister, "or such of them as should be then living," equally. And in case any of them should be then dead, then he bequeathed the deceased child's share to the children "to be paid at the time before mentioned." The brothers and sister all died in the lifetime of H S, one (A B) having had no children:—Held, that the representatives of A B were entitled to his share, and that all the children took, whether living at the death of H S or not. *Masters v. Scates*, 13 Beav. 60.

A testator bequeathed 10,000*l.* to his brother, to be paid in twenty equal half-yearly payments, but in case his brother should die before all the payments became due, then the remainder should be placed out at interest, to be paid to the children of his brother till they attained twenty-one, and then the principal to be divided amongst them. The brother died after three payments had been made, leaving five children, one of whom was supposed to be dead, not having been heard of for thirty years. Four of the children received their shares, and filed a bill praying that the remaining share might be divided amongst them. There was no evidence of the brother's marriage:—Held, that there was sufficient evidence of the legitimacy of the children, and that each was entitled, upon attaining twenty-one, to a share in the residue, but inquiries were directed as to the death of the child who had not been heard of. *Gaches v. Warner*, 16 Law J. Rep. (N.S.) Chanc. 281.

A testator gave the residue of his property in trust for his mother for life, with remainder to all the younger children of his two sisters, to be a vested interest on their attaining twenty-one. There was also a clause of survivorship upon any of the children dying under twenty-one:—Held, that those children were alone entitled who were born previously to the death of the tenant for life. *Berkeley v. Swinburne*, 17 Law J. Rep. (N.S.) Chanc. 416; 16 Sim. 275.

Bequest of personal estate to A for life, and after her death to the testator's brothers and sisters; but if any of the brothers and sisters should die before they became entitled to their shares, the shares of them so dying to go to their children. The testator left five brothers and sisters; two of whom died in the lifetime of A:—Held, that the word "entitled" had reference to the death of the testator, and not to the death of A, and that the shares had therefore vested absolutely in the brothers and sisters, and that the representatives of each of them who had died were entitled to a fifth of the fund. *Henderson v. Kennicott*, 18 Law J. Rep. (N.S.) Chanc. 40; 2 De Gex & S. 492.

(G) SPECIFIC AND DEMONSTRATIVE.

A testatrix gave to her grand-daughter all her property, except certain pecuniary legacies, but, should her grand-daughter marry, then her issue were to be her heirs, but should her grand-daughter die, and not leave any issue, then her property was directed to be divided between other persons. The testatrix concluded her will by observing, "that her property was in the Bank and India House." The testatrix's property, on her death, consisted of a sum of East India stock, and $3\frac{1}{2}\%$, per cent. Bank annuities:—Held, that the dividends of those sums were to be paid to the grand-daughter during her life, and that those sums were not to be converted. *Hubbard v. Young*, 16 Law J. Rep. (N.S.) Chanc. 182; 10 Beav. 203.

A testator, after certain specific bequests, gave to his wife all his property in the world for her life, and after her decease all his freehold and leasehold estates to his sister B and her heirs; and the interest of his funded and other property between B and S for their respective lives, with remainders over. The testator then declared that his wife should hold peaceable possession of his house, furniture, plate, linen, and glass, and all his property at East House and elsewhere for her life; and that no distribution of any part of his property should take place until after the decease of his wife, except for payment of debts, &c.:—Held, that the widow was entitled to the enjoyment in specie of certain long annuities, part of the residue of the testator's estate. *House v. Way*, 18 Law J. Rep. (N.S.) Chanc. 22.

A bequest of 5,000*l.* consols, with a direction that if the testatrix should not have sufficient stock to answer the legacy, her executors should out of her residuary estate purchase enough to make up the deficiency:—Held, to create a specific, and not merely a demonstrative legacy. *Townsend v. Martin*, 7 Hare, 471.

Upon the construction of a will legacies of stock, and of money on mortgages, bonds, &c.,—Held, to be specific. *Evans v. Jones*, 2 Coll. C.C. 516.

A testator, as to the residue of his monies, debts, stocks, funds and securities for money, and all other his personal estate and effects, gave the same and every part thereof to trustees, upon trust to permit and suffer A to receive the interest, dividends and proceeds thereof for her life, and after the death of A for other persons. The residue of the testator's estate consisted only of long annuities:—Held, that A was not entitled to enjoy the long annuities in specie, and that they ought to be sold, and the produce invested for the equal benefit of all parties interested in the residue. *James v. Gammon*, 15 Law J. Rep. (N.S.) Chanc. 217.

If a testator leaves a number of articles of the same kind to a legatee, and dies possessed of a greater number, the legatee, and not the executor, has the right of selection. *Jaques v. Chambers*, 15 Law J. Rep. (N.S.) Chanc. 225; 2 Coll. C.C. 435.

A B bound himself to pay 16,000*l.* on the death of the survivor of himself and wife on certain trusts, under which, on a contingency, the amount was to revert to himself. By his will he gave the 16,000*l.* if it reverted, to trustees on trust to pay thereout 14,000*l.* to C, and three legacies of 500*l.* each to charities, and the remaining sum of 500*l.* to the

Foundling Hospital. His wife survived him nine years, and the 16,000*l.* was invested in 25,702*l.* 3*l.* per cents. In 1848, the fund reverted and amounted to considerably more than 16,000*l.*:—Held, that the legatees were entitled to money legacies only, and not to the whole fund. *Loscombe v. Wintringham*, 12 Beav. 46.

A bequest of "all my household goods and furniture, linen, china, glass, horses, carriages, and all my other personal estate not hereinafter mentioned to be otherwise bequeathed, and also all monies in my banker's hands or in my houses, and also all monies which shall be due and owing to me," held to be residuary, and not specific; and none of the enumerated items were specifically given. *Sargent v. Roberts*, 17 Law J. Rep. (N.S.) Chanc. 117.

A testator bequeathed his personal estate in trust so far as its nature would permit for those persons to whom he had devised his real estates in strict settlement, and directed that they should under letters of attorney and powers from the trustees (which he empowered and required them to grant) receive the yearly dividends which might arise out of the public or other funds, and the yearly interest which might arise from other parts of his personal property under the same restrictions, &c. as they held his real estates:—Held, that the personal estate was to be enjoyed in specie, though it consisted in part of long annuities and Bank stock. *Neville v. Fortescue*, 16 Sim. 333.

(H) CUMULATIVE OR SUBSTITUTIONAL.

A testatrix, by her will, dated in 1828, gave to her servant girl, E H, the sum of 20*l.* a-year. By a codicil, dated in 1831, the testatrix gave to her servant, E H, 20*l.* per annum for her life:—Held, that the words "my servant" were words of description merely; and that the legatee was entitled to two annuities of 20*l.* each. *Roch v. Callen*, 17 Law J. Rep. (N.S.) Chanc. 144; 6 Hare, 531.

By his will a testator bequeathed his residue between Ann Sarah Parker and ten other persons. Two of the legatees having died, by a codicil he gave the residue between eight persons and Ann Sarah Parker, G F, and Ann Parker. Ann Sarah Parker and Ann Parker were the same person:—Held, that she was entitled to one-tenth, not two-elevenths of the residue. *Read v. Strangeways*, 12 Beav. 323.

A testator having 7,300*l.* stock, bequeathed to his nephew J C 200*l.* stock, part of the 7,300*l.*, in order to enable him to resist any attempt to deprive him of property at C, and in order to deter any person from attempting the same, he directed 200*l.* of the above-named stock to be placed in a bank subject to the controul of J C and the testator's niece M, should it be found necessary to remove it for the above purpose. On no other account was the 200*l.* stock to be removed from the bank, but the interest of it might be drawn for the use and benefit of J C, the principal to continue in the bank for ten years after the testator's death, at the expiration of which time it might be withdrawn for the benefit of his family, provided no threat or intimation of a claim were made against the property. The property was recovered by law against J C in the lifetime of the testator, who paid the costs of the action:—Held, that J C was entitled to two legacies of 200*l.* stock

each, absolutely. *Inglefield v. Coghlan*, 2 Coll. C.C. 247.

(I) CONDITIONAL.

A testator bequeathed personalty after his wife's death to his son, his only child; and if his son should die under twenty-one he expressed his wish to give 500*l.* to each of his brothers and sisters A, B, and C, and any further surplus to be equally divided between them, my said brothers and sisters, or their legal heirs and successors. The testator's son survived him, and died under twenty-one. A died in the testator's lifetime:—Held, that the gift of the surplus was not a residuary gift, but was a gift of the surplus after the three sums of 500*l.* should be subtracted from it; and that the legal heirs and successors of A, B, and C were not to take unless *all of them* died so as not to take; and, therefore, that there was an intestacy as to the 500*l.* and the share of the surplus given to A. *Gibson v. Hale*, 17 Sim. 129.

A testator bequeathed a fund to trustees, on trust, as to two-thirds, for two of his daughters, for their respective lives, for their separate use, with remainder to their children; and, as to the remaining third, to pay the income to a third daughter, in the manner directed respecting the portions of the other daughters, during such time as she should continue to live apart from her husband, and directed that, should she at any time cohabit with him, the trustee should, during such time as she should so cohabit, pay the income to the other daughters. At the date of the will the third daughter was living apart from her husband, but she subsequently returned to him, and was living with him at the time of the death of the testator:—Held, that she was entitled to the benefits given to her by the will, discharged of the condition. *Wren v. Bradley*, 17 Law J. Rep. (N.S.) Chanc. 172; 2 De Gex & S. 49.

A testator, who was a publican carrying on business at a leasehold house in G Street, bequeathed this house to A, with the business, stock, and outstanding debts, conditionally upon his purchasing a certain annuity:—Held, that A, in accepting the bequest, was not to be held to pay the debts due from the testator in his business.

A testator made certain bequests to A and B, conditionally on their purchasing an annuity for S W for her life, and another annuity for S H for her life, or 500*l.* in money:—Held, that S H had not the option of taking the 500*l.* *Wilson v. Wilson*, 19 Law J. Rep. (N.S.) Chanc. 279.

(J) SURVIVORSHIP.

[See (F) Vested or Contingent, (b) *Period of vesting*.]

A testator gave two sums of stock to his widow for her life, and after her decease, one-half of the same stock was to be divided among his surviving brothers and sister, or their issue, share and share alike. The brothers and sister of the testator all died in the lifetime of the widow; and four of them only left issue living at the death of the widow:—Held, that the word "survivor" was to be construed with reference to the period of distribution, and that the issue (including remoter descendants) took in substitution the share their respective parents would have taken

if they alone had survived the widow. *Shailer v. Groves*, 16 Law J. Rep. (N.S.) Chanc. 367; 6 Hare, 162.

A married woman having power to dispose of 1,500*l.* by will, gave the interest of it to her husband for life, and directed that after his decease the principal should be divided equally between the five daughters of B: and if any of them should die, during her husband's lifetime, leaving issue, that the respective issue of such deceased daughters should have equally divided among them their mother's share; but in case any of them should die during her husband's lifetime without lawful issue, that the 1,500*l.* should be divided, share and share alike, among "the surviving said daughters:—Held, that the word "surviving" had reference to the husband, and that all the daughters having died in his lifetime, and only one having left issue, four-fifths of the 1,500*l.* were undisposed of. *Watson v. England*, 15 Sim. 1.

Bequest to one for life, remainder to two others, with a clause of survivorship if one or other of the latter should die:—Held, that the survivorship had reference to the death of the tenant for life and not of the testator; and one of the remainder-men having survived the testator but pre-deceased the tenant for life, the survivor was held entitled to the whole. *Whitton v. Field*, 9 Beav. 368.

A testator gave an annuity to his servant, and directed that the funds constituting the annuity, after the death of the annuitant, should be transferred to his two cousins, or to the survivor or survivors of them in equal shares. The two cousins died before the annuitant:—Held, that the representative of the survivor was entitled to the fund, and not the residuary legatee. *Antrobus v. Hodgson*, 18 Law J. Rep. (N.S.) Chanc. 93; 16 Sim. 450.

Testatrix, before the 1 Vict. c. 26, bequeathed the residue of her personal estate to her son A and her daughter B, to be divided equally between them, in case they were both living at the time of her decease: but if either of them should happen to die before her, or at any time after without issue, then she bequeathed the share of him or her so dying and without issue to the survivor of them. A and B survived the testatrix. A died unmarried in the lifetime of B:—Held, that the moiety of the residue given to A devolved on B. *Turner v. Frampton*, 2 Coll. C.C. 331.

(K) PAYMENT OF.

[See (F) Vested or Contingent, (b) *Period of vesting*.]

Where a testator bequeathed an annuity to his grand-daughter for life, and directed that if she should die during the lifetime of his widow, the annuity should be paid for the maintenance of the children of the grand-daughter, and that after the decease of his widow and grand-daughter, the value of the annuity should be paid to all and every the child and children of the grand-daughter, if more than one, to be equally divided among them, when and as they should respectively attain twenty-one years; and if there should be only one, then the whole to such one child, with a gift over in case of the death of the grand-daughter without issue who should attain twenty-one,—Held, that the children of the grand-daughter were not entitled to the

annuity or interest of the fund after the death of the widow and grand-daughter until they attain twenty-one. *Festing v. Allen*, 5 Hare, 575..

An absolute vested bequest was accompanied with a direction that it should not be delivered till the legatee attained twenty-five:—Held, that he was entitled to payment on attaining twenty-one. *Rocke v. Roche*, 9 Beav. 66.

A testator, who died in 1838, left a legacy to a person of weak intellect. At the end of a year after the testator's death the executors invested the amount in the funds, and regularly invested the dividends arising therefrom. A suit was instituted by the legatee, by her next friend, against the executors, in which the amount of legacy with 4l. per cent. from a year after the testator's death and the costs of the suit were claimed:—Held, that the executors were not bound to pay the legacy and interest; and it was ordered that the stock should be transferred into court, and that the costs of the suit should be paid out of the testator's general estate. *Pothecary v. Pothecary*, 18 Law J. Rep. (N.S.) Chanc. 48.

A testator distributes a sum of stock, except a small part, amongst certain legatees, as to one of whom X Y he uses expressions of resentment, and says that the bequest is more than she deserves. By a codicil he leaves the surplus stock to be appropriated as his executors think proper among the several legatees. The executors in appropriating the stock cannot omit X Y. *Inglefield v. Coghlan*, 2 Coll. C.C. 247.

Residuary personal estate was given in trust for all the sons and daughters of A and B (who were living), the shares to be vested at twenty-one, though "not payable or transmissible" until the deaths of A and B. The will contained powers of maintenance:—Held, that the sons and daughters, on attaining twenty-one, acquired vested interests, subject to the rights of future born children, and that after attaining twenty-one they were entitled in the lifetime of A and B to payment of their shares of the income, though not of the capital. *Ellis v. Maxwell*, 12 Beav. 104.

A testator bequeathed the residue of personal property to trustees upon trust to apply the dividends and income of it in the maintenance and education of the children of his two sons until they severally attained twenty-one years of age; and when each grandchild attained that age to raise and pay 2,000l. to each, and when all the grandchildren attained that age to pay the surplus of the said residuary estate to them as tenants in common, each grandchild upon the age of twenty-one years to take a vested interest:—Held, upon bill filed by all the children of one of the sons living at the death of the testator, when the youngest of them attained twenty-one (the other son being then a bachelor), that the plaintiffs were not entitled to a division of the trust funds in exclusion of any other children who might be born of either of the sons; but that the plaintiffs were entitled to the whole of the income, and would be entitled to the principal if no other such child should be born and attain the age of twenty-one years. *Mainwaring v. Beevor*, 19 Law J. Rep. (N.S.) Chanc. 396; 8 Hare, 44.

(L) INVESTMENT.

An application for a transfer of consols purchased

by means of a legacy paid into court under the 36 Geo. 3. c. 52. may be made on motion. *Ex parte Bennett*, 19 Law J. Rep. (N.S.) Chanc. 375.

An infant being entitled to a legacy of 50l., the executors under the will invested that sum, minus the legacy duty, in the 3l. per cent. consols, and tendered the amount produced by sale of the stock, with the interest upon it, to the infant upon her coming of age. A bill was filed against the executors by the legatee for the amount of the legacy, with 4l. per cent. interest:—Held, that the executors ought to have paid the legacy into court, under the Legacy Act, and a decree was made for the plaintiff, with costs. *Rimell v. Simpson*, 18 Law J. Rep. (N.S.) Chanc. 56.

(M) ABATEMENT.

[See (E) On what Property chargeable—
(S) Priority and Contribution.]

A testator gave a charitable legacy, which he directed to be raised and paid out of such part of his personal estate as he could by law charge with the payment of the same. The testator's general personal estate was more than sufficient for the payment of his debts, funeral and testamentary expenses and legacies; but the pure personality was insufficient for these purposes:—Held, that the charitable legacy ought to abate in the proportion which the pure personality bore to the general personality. *Robinson v. Geldart*, 18 Law J. Rep. (N.S.) Chanc. 454.

(N) ADEMPMENT AND SATISFACTION.

[See *Porter v. Smith*, 16 Sim. 251.]

A testatrix *in loco parentis* to M bequeathed 10,000l. sterling to her, and afterwards transferred 12,000l. consols into the joint names of herself and M:—Held, under the circumstances of the case, that the transfer was an ademption or satisfaction of the legacy.

A legacy is given to M, with a contingent limitation over to N, in the event of M dying without children. The legacy to M is adeemed by a subsequent gift to her in the lifetime of the testatrix, to which no limitation in favour of M is attached, and the legacy is extinguished as to N. *Twining v. Powell*, 2 Col. C.C. 262.

A testator, resident in Jamaica, by his will, dated the 30th of March 1843, gave all his monies in the 3l. per cents. and Bank stock to A. On the 20th of June 1846 the testator, by a letter, directed his London agents (who had a power of attorney to sell out the stock) to sell out such a sum as would produce 800l., and apply it in the manner mentioned in the letter. The testator died on the 29th of June. On the 24th of July a part of the stock was sold out, by the London agents, in pursuance of the directions given them:—Held, that there was no ademption, and that A was entitled to a sum equivalent to all the testator's 3l. per cents. and Bank stock on the 20th of June. *Harrison v. Asher*, 17 Law J. Rep. (N.S.) Chanc. 452; 2 De Gex & S. 436.

There is a distinction between satisfaction of debts, and of a portion, by legacy. Equity leans against satisfaction of debt by legacy, but in favour

of a provision by will, being in satisfaction of a portion by contract. Small differences between the debt and the legacy negative the presumption of satisfaction, but are disregarded in the case of portions. So in case of debt, a smaller legacy is not a satisfaction of a larger debt, but may be satisfaction of a portion *pro tanto*. A gift of residue cannot be a satisfaction of a debt, because, the amount being uncertain, it may be less than the debt; but as a portion may be satisfied by a smaller legacy *pro tanto*, so on principle a residue ought to be considered as satisfaction of a portion altogether, or *pro tanto*, according to the amount. *Lady Thynne v. Earl of Glengall*, 2 H.L. Cas. 153.

(O) REMISSION OF DEBT.

A testator gave A and B 10*l.* each for mourning, and 100*l.* to J N, his executor, for his trouble. By a codicil he gave legacies to other persons, and directed that if they or any other person who had a legacy left them by his will should owe him money at his decease it should be considered as part of their legacy. At the testator's death J N owed him 4,000*l.*, and two of the other legatees owed him sums greater than their legacies:—Held, that the testator intended to remit their debts as well as to give them their legacies. *Hyde v. Neate*, 15 Sim. 554.

(P) VOID.

[See (C) What Property passes.]

Bequest to A for life, remainder to her children who should attain twenty-five, with a clause for maintenance and accumulation of surplus income:—Held, that the gift to the children was not void for remoteness.

A testatrix gave unto, and to the use and benefit of the several in-brothers and in-sisters for the time being resident in the several hospitals of or in the vicinity of Canterbury, a yearly sum of 5*l.*:—Held, that the bequest was void for uncertainty. *Flint v. Warren*, 16 Law J. Rep. (N.S.) Chanc. 441; 15 Sim. 626.

Bequest of 2,000*l.* to trustees to apply 800*l.* in building six almshouses and to pay the income of the residue to the six almsmen residing therein:—Held, that the whole was void. *Smith v. Oliver*, 11 Beav. 481.

A testator gave 5,000*l.* in trust to pay the interest to his nephew John for life, remainder to John's first son for life, remainder, as to the principal, to the children of John, and for default of such issue to pay the interest to the second and other sons of John and their respective issue, and for default of issue male of John to his nephew Charles:—Held, that the limitations subsequent to the gift to the first son of John were void for remoteness. *Burley v. Evelyn*, 16 Sim. 290.

A testator gave a legacy for the best essay on the subject of "Natural Theology," treating it as a science, and demonstrating the truth of the evidence upon which it was founded, and the perfect accordance of such evidence with reason, also demonstrating the adequacy and sufficiency of natural theology when so treated as a science to constitute a true, perfect, and philosophical system of universal religion. The testator also gave a legacy for the best essay upon "Emigration to America":—Held,

that the first bequest was void, as being inconsistent with Christianity, and the second bequest was void for uncertainty. *Briggs v. Hartley*, 19 Law J. Rep. (N.S.) Chanc. 416.

(Q) REVOKED.

[See (R) Lapse.]

Testator, by his will, distributed 7,800*l.* stock among several legatees, except 200*l.* surplus of the stock, which he directed to be applied in defraying any necessary expenses. By a codicil (dated two years after, when there was, by reason of certain erasures made in the will, a much larger surplus than 200*l.* stock), he gave "the surplus of his money in the funds" to be appropriated as his executors might think proper among the several legatees. By a subsequent codicil, dated a few days after the former, the testator, after giving specific legacies, and stating that there appeared "a surplus remaining after the legacies aforesaid were paid," begged his executor to distribute the same among the children of his son W. There was property of inconsiderable amount besides stock, to which the residuary bequest in the last codicil might be applied:—Held, that that bequest did not operate as a revocation of the bequest of the surplus of the funds contained in the second codicil. *Inglefield v. Coghlan*, 2 Coll. C.C. 247.

Testatrix, by will, gave 3,000*l.* in trust for C for life for her separate use, and after her death for her children; and if there should be no children, in trust for P. By a codicil, stating that C had been largely provided for from other sources, testatrix deducted 2,900*l.* from the legacy of 3,000*l.*, and revoked so much of the legacy accordingly, leaving C 100*l.* only:—Held, that the legacy of 3,000*l.* was revoked *in toto*, and a legacy of 100*l.* given in lieu of it for the absolute benefit of C, and that P took no interest in the 100*l.* or any part of the 3,000*l.*

Effect of conflicting dispositions in a will and a codicil, of the same residuary personal estate. *Sanford v. Sanford*, 1 De Gex & S. 67.

(R) LAPSED.

[See (T) Residue.]

Upon the construction of a will,—Held, that lapsed legacies fell into the general and not into a particular residue. *Master v. Laprimandaye*, 2 Coll. C.C. 443.

A testator bequeathed all his estate to trustees on trust to convert the same into money, and to invest the proceeds on government or real securities, and to pay the income to his wife for her life; and from and after the death of his wife, as to a moiety of the trust funds, upon trust for such purposes as his wife should by deed or will appoint; and he directed that, in default of appointment, the same should be received by her next-of-kin as in the case of the distribution of intestates' effects. The wife died in the lifetime of the testator:—Held, that the bequest of the moiety did not lapse, and that such moiety belonged to the next-of-kin of the wife. *Edwards v. Saloway*, 17 Law J. Rep. (N.S.) Chanc. 329; 2 De Gex & S. 248.

A testator gave to A a sum of stock to be paid to him within six months after the testator's decease, and in case it should happen that A should die not having received the legacy, and he should leave any

children, such children should be entitled to the same in equal proportions payable at twenty-one or marriage. A died during the testator's lifetime, leaving three children who had attained twenty-one, and were living at the testator's decease:—Held, that the legacy lapsed and the children took no interest therein. *Smith v. Oliver*, 18 Law J. Rep. (N.S.) Chanc. 80; 11 Beav. 494.

A testator devised freehold estates upon trust to sell, with a declaration that the monies to arise from such sale should be deemed part of his personal estate, and that the income thereof till sale should be considered as part of the income of his personal estate, and be subject to the disposition of his personal estate thereafter mentioned. He then gave his personal estate, upon trust for four persons as tenants in common. By a codicil he revoked the residuary gift to one of the four, who was also his heir-at-law and customary heir:—Held, that the heir was entitled to so much of the lapsed residue as consisted of real estate. *Gordon v. Atkinson*, 1 De Gex & S. 478.

The son of a testator was dead at the time the latter made his will, but left issue, who survived the testator:—Held, that the bequest in the will to the son did not lapse or become void, but passed, as part of his personal estate, to his administrator under the 83rd section of the 1 Vict. c. 26. *Mower v. Orr*, 18 Law J. Rep. (N.S.) Chanc. 361; 7 Hare, 473.

Bequest of pecuniary legacies to each of four persons for life; interest at 5l. per cent. to be paid until the heir attained twenty-one, and in case of the demise of any of the above parties without legitimate issue, then his or her proportions were to be divided amongst the survivors. After the testator's death, one of the legatees married and died, leaving three children surviving:—Held, that as the legacy was expressly limited to the legatee for life, and as the gift over did not take effect, the gift to him was defeated, and no gift to the children was to be implied, and, as the legatee by express words took no interest beyond his life, the legacy lapsed, and that the residuary legatee was entitled. *Ranelagh v. Ranelagh*, 19 Law J. Rep. (N.S.) Chanc. 39; 12 Beav. 200.

(S) PRIORITY AND CONTRIBUTION.

A testator gave his residuary estate to trustees, upon trust, in the first place, to pay two debts due from him on his covenants, and his funeral and testamentary expenses; and then to set apart and invest a sufficient sum to meet some annuities given by his will; and then, after such investment, to pay certain legacies. The testator's estate being insufficient to pay all the annuities and legacies in full,—Held, that the annuitants were not entitled to priority, but that the annuities and legacies must all abate rateably. *Thwaites v. Foreman*, 15 Law J. Rep. (N.S.) Chanc. 397.

A testator gave legacies to different persons and an annuity for his brother's support, and directed the payment of it to commence on the first half-yearly day after his death, and the legacies to be paid at the end of two years after that event, or as much sooner as circumstances would permit, but without interest in the mean time. The property being insufficient to pay both annuity and legacies

in full,—Held, that the annuity did not take priority, but abated proportionably with the legacies. *Ashburnham v. Ashburnham*, 16 Sim. 186.

A contribution was directed among specific legatees for payment of the debts and costs of suit. One of the legatees becoming insolvent, the fund raised became deficient. The Court directed an additional contribution among the solvent legatees. *Conolly v. Farrell*, 10 Beav. 142.

A testator directed that after payment of his debts, &c. the residue should be invested, and out of the interest and dividends certain annuities paid to his daughter and other persons, and after payment of them to pay the remainder of the interest and dividends to his wife for life; with a direction that if his daughter had a child living at or born after the decease of his wife, her annuity should cease, and 20,000l. should be raised in trust for his daughter for life, and after her death for her children, and if the children should die under twenty-one, that it should sink into his residuary estate thereafter disposed of; and he further directed that after the decease of his wife his trustees should pay 5,000l., part of his residuary estate, to such person as his wife should appoint, and, subject to the trusts of his will, he disposed of the residue of his trust estate. The property was insufficient to pay the annuities and the 5,000l. in full:—Held, that the annuities were to be paid in priority to the 5,000l., and if necessary out of the corpus of the property. *Miller v. Huddleston*, 17 Sim. 71.

(T) RESIDUE.

A testator devised and bequeathed his real and personal property upon trusts for sale, and directed that his trustees should divide the net proceeds, after payment of debts, charges, expenses, and the legacies given by his will, into ten parts; and he gave a tenth part to each of ten persons named in his will; but he directed that, in case his net residue, after payment of debts, &c., should exceed 10,000l., then the sum of 10,000l. should only be applicable to the trusts thereinbefore declared, and that each tenth share should be satisfied by the payment of 1,000l.; and he gave all the residue of his said property beyond the sum of 10,000l. equally to be divided among his nephews and nieces. The residuary property exceeded 10,000l.; and one of the legatees of a tenth share having died in the lifetime of the testator,—Held, that the nephews and nieces only took the excess of the residue above 10,000l., and that the lapsed share was undisposed of. *Greer or Green v. Pertwee*, 15 Law J. Rep. (N.S.) Chanc. 372; 5 Hare, 249.

A testator bequeathed his residuary estate to A, the executor and trustee of his will, with a gift over in case of the death of A so that he might not be enabled to perform the duties thereby required of him. A proved the will, but died before he had fully performed the trusts of it:—Held, that by merely proving the will he entitled himself to the residue absolutely. *Hollingsworth v. Grasett*, 15 Sim. 52.

A testator directed his residuary personal estate to be divided into shares, of which each of his sons was to have two, and each of his daughters was to have one. What he gave to his daughters was to be in this manner: each of them was to have the

interest during her life, and after her death it was to go to her lawful heirs:—Held, that, upon the death of one of the daughters, without issue, her share formed part of the residue of the testator's estate, not disposed of by his will, and did not belong to the personal representative of the deceased daughter. *Gompertz v. Gompertz*, 16 Law J. Rep. (n.s.) Chanc. 23; 2 Ph. 107.

A gift by will of one-sixth of testatrix's residuary estate to S W was revoked by a codicil, and given to S W for life, with a direction after her decease to pay a legacy thereout, and that the remainder of such sixths should sink into the residue of the personal estate:—Held, that the remainder of the sixth share of the residue did not pass to the other residuary legatees, but was undisposed of. *Humble v. Shore*, 7 Hare, 247.

A testator bequeathed 200*l.* a year to A for her life, and directed that, after the death of A, the stock which would be required to produce 200*l.* a year should be divided equally among such of the children of A as should attain the age of twenty-one years. The testator then made a residuary bequest. A had six children, of whom five were of age at the death of A, and one was an infant:—Held, that the residuary legatee was not entitled to the dividends of one-sixth of the stock accrued and which should accrue between the death of A and the death or majority of the infant; and the dividends were ordered to be accumulated until such death or majority. *Stone v. Harrison*, 15 Law J. Rep. (n.s.) Chanc. 421; 2 Coll. C.C. 715.

Upon the construction of a will,—Held, that the testator's widow was not entitled to enjoy the testator's residuary property for her life in specie. *Johnson v. Johnson*, 2 Coll. C.C. 441.

A testatrix bequeathed leaseholds to trustees, upon trust, to sell and apply the proceeds in payment of her debts, funeral and testamentary expenses and legacies as far as the same would go; and as to all the monies and personal estate not thereinbefore disposed of, and not consisting of lands, tenements, or hereditaments, or the produce thereof, she bequeathed the same for charitable purposes. The produce of the leaseholds was more than sufficient for payment of her debts, &c., and she had not devised any other than leasehold lands to be sold:—Held, that the surplus produce of the leaseholds did not fall into the residue, but was undisposed of. *Russell v. Clowes*, 2 Coll. C.C. 648.

A testator gave and bequeathed all his real and personal estate to his trustees, upon trust, to sell and pay thereout certain legacies, and he made his brother, who was also one of his trustees, his residuary legatee; he then gave certain other legacies:—Held, that his brother took both the real and personal property after payment of all the legacies given by his will. *Evans v. Crosbie*, 16 Law J. Rep. (n.s.) Chanc. 494; 15 Sim. 600.

A testator bequeathed all his personal estate, except money laid out in stock, mortgages, and bonds, to A; and as to his money in stock and on mortgages and bonds he gave the same to B. The gift to B failed by an event analogous to a lapse:—Held, that the property intended for B passed under the residuary bequest to A. *Evans v. Jones*, 2 Coll. C.C. 516.

Bequest of 10,000*l.* consols as follows: 500*l.*

sterling to A, 600*l.* consols to B for life, and after her death to sink into the residue: gift of the residue of the 10,000*l.* consols to A, after deducting therefrom the legacies above mentioned. A died in testator's lifetime:—Held, that his 500*l.* was not to be deducted from the 10,000*l.* consols. *Carter v. Laggart*, 16 Sim. 423.

A testator gave to three persons annuities of 25*l.* each, and gave the residue of the income of his estate during the lives of the annuitants to M and N, to be paid to them during their lives in equal shares, and after the deaths of the annuitants as to the residue of his estate, he gave the same to M and N, and their several children, to be divided between them in equal shares. One of the annuitants died first, then M, and, subsequently, N:—Held, that the surplus income between the death of N and the death of the surviving annuitants, was not undisposed of, but passed by the residuary bequest. *Cunningham v. Murray*, 17 Law J. Rep. (n.s.) Chanc. 407; reversing 16 Law J. Rep. (n.s.) Chanc. 484; 1 De Gex & S. 366.

A testator gave an annuity to D, and to A, B, and C his residue, except the S canal shares, which were not to be sold till after the death of D:—Held, that the shares passed by the residuary gift. *James v. Irving*, 10 Beav. 276.

A testator, who died in 1789, by his will gave all his property to the defendant upon a series of trusts, which did not exhaust the whole beneficial interest in the estate, and he then appointed the defendant his executor:—Held, that the next-of-kin, and not the executor, were entitled to the undisposed of residue. *Mapp v. Elcock*, 18 Law J. Rep. (n.s.) Chanc. 217; reversing 16 Law J. Rep. (n.s.) Chanc. 425; 15 Sim. 568.

(U) INTEREST ON.

[See WILL, Election.]

Where a legacy is given by a father to a child, payable at a future period, interest is payable thereon by way of maintenance; but if maintenance is provided by the will for the child from other sources, interest on the legacy is not allowed until the legacy becomes payable. *Donovan v. Needham*, 15 Law J. Rep. (n.s.) Chanc. 193; 9 Beav. 164.

A by will bequeathed to B all the goods, plate, money at the bankers, linen, horses, carriages, &c. he might die possessed of, at M or elsewhere in L, on condition that B gave 3,000*l.* sterling to the Casa d' Assicurazione, to make an annuity for the life of C. C elected to take the 3,000*l.* instead of the annuity. The Master, on a reference to him, found that A, at his death, was possessed at M and elsewhere in L, of divers goods, chattels, Polish and Austrian certificates, bonds, money at his bankers, carriages, horses, &c.; and the Master also found that C was entitled to interest on her legacy. It was afterwards determined that the Austrian and Polish certificates did not pass to B by the will; by a consent order, made after the confirmation of the Master's report, a sum of 3,000*l.* was directed to be paid to C in satisfaction of her legacy, and the question of interest thereon was thereby reserved:—Held, that it was a pecuniary legacy, and that C was entitled to interest thereon at 4*l.* per cent. per annum, from the expiration of one year from the death of the testator, although the delay in payment

arose from the bequest of the articles being disputed by the residuary legatee.

Semble—the subsequent reservation of interest did not, of itself, affect the Master's report of prior date, finding the legatee entitled to interest on her legacy. *Hertford (Marquis) v. Lowther (Lord)*, 15 Law J. Rep. (N.S.) Chanc. 126; 9 Beav. 266.

Bequest of a "bond for 500*l.*, and interest at 5*l.* per cent."—Held, to carry the arrears of interest accrued due thereon at the death of the testator. *Kent v. Tapley*, 17 Law J. Rep. (N.S.) Chanc. 99.

A testator directed his trustees to raise the sum of 2,000*l.* for his son out of his real estate. The sum so directed to be raised was not paid for many years after the death of the testator:—Held, that the 42nd section of the Statute of Limitations, 3 & 4 Will. 4. c. 27, did not apply, and the legatee was entitled to interest upon the legacies from the death of the testator. *Gough v. Bull*, 17 Law J. Rep. (N.S.) Chanc. 486; 16 Sim. 323.

A testator bequeathed his personal estate to trustees upon trust to place out so much money in the funds as would produce a yearly sum of 100*l.* to be paid to his wife, and then to place out the further sum of 2,120*l.* upon the like securities, and pay the dividends of part thereof to W H for life, and afterwards to his children, and the remainder of the 2,120*l.* to other persons named; and the testator declared that in case his estate should not be sufficient to pay the legacies in full previously to the death of his wife, then such legacies should only be paid in part during the life of his wife, and the same should be made up after her decease. The estates proved to be insufficient to pay the legacies in full during the life of the testator's wife:—Held, that the legatees were only entitled to interest upon the unpaid portion of their legacies from the time at which the remainder should be capable of being paid up. *Holmes v. Crispe*, 18 Law J. Rep. (N.S.) Chanc. 440.

A testator directed his trustees to raise a sum of 12,000*l.*, for portions of the children of his son J and his daughter E, towards whom he stood *in loco parentis*, and also to levy and raise for their maintenance and education in the mean time, until the respective portions should become payable, such yearly sum (not exceeding what the interest of the expectant portion would amount to after the rate of 4*l.* per cent. per annum) as to the trustees should seem sufficient. The trustees raised for maintenance less than the 4*l.* per cent., and it was held, upon a petition by the legatees, that they were not entitled to interest, but to maintenance only. *Rudge v. Winnall*, 18 Law J. Rep. (N.S.) Chanc. 469; 12 Beav. 357.

(V) ANNUITY.

A testator, whose property consisted principally of foreign securities, bequeathed to his trustees so much of his personal estate as would produce 1,500*l.* a year, which sum was to be appropriated by them at their uncontrolled discretion, and the income was to be paid to his widow for life, with any increase or diminution which might take place in its amount:—Held, that the widow was entitled to have a sufficient sum invested in the 3*l.* per cents. to secure an annuity of 1,500*l.* a year. *Prendergast v. Lushington*, 16 Law J. Rep. (N.S.) Chanc. 125; 5 Hare, 171.

A testator directed his trustees to sell his personal estate, and after payment of his debts, &c., to invest the residue, and out of the produce thereof, or if need be, by the sale and conversion, from time to time, of a sufficient part of the principal, to pay two annuities; and he directed his trustees if occasion should be, from time to time to pay out of the rents and profits of his freehold and copyhold estates so much of the annuities as his said personal trust estate should be insufficient for discharging. The personal estate being exhausted, and the annual rents of the real estate being insufficient to keep down the annuities,—it was held, that the arrears were to be raised by sale or mortgage. *Fentiman v. Fentiman*, 16 Law J. Rep. (N.S.) Chanc. 436.

A testator while domiciled in Jamaica bequeathed an annuity of 100*l.* to his son for life, and after his death to be continued to his son's daughter. The testator afterwards gave other annuities in sterling money. Two codicils were made by the testator while he was domiciled in England:—Held, that the testator intended the annuity of 100*l.* to be paid in Jamaica currency, and that it was a perpetual annuity to his son's daughter, and that a sufficient sum was to be paid over to produce that annuity. *Yates v. Maddan*, 18 Law J. Rep. (N.S.) Chanc. 310; 16 Sim. 613.

A testator bequeathed an annuity to three sisters, and the survivors and survivor for their lives and the life of the survivor, with a gift to the survivor of the corpus of the fund, from the interest whereof the annuity was payable. The fund set apart to answer the annuity was improperly sold out by the surviving trustee immediately after the death of one of the annuitants, and in consequence thereof the annuity fell into arrear; but a fund, less in amount than the original fund, afterwards became available:—Held, that the survivor was entitled to a rateable proportion of this fund, in respect not only of the arrears of the annuity which became due during the joint lives of herself and her sister, but also of the arrears of the annuity which became due after her sister's death up to the time of her own decease, as well as of the corpus to which she became entitled as the survivor. *Innes v. Mitchell*, 16 Law J. Rep. (N.S.) Chanc. 415; 1 Ph. 710. But see 2 Ph. 346.

A testator, by a will not executed so as to pass freehold estate, gave freeholds and copyholds to his brother, on condition of his joining with testator's nephew in the purchase of certain annuities, and gave to the nephew freeholds, leaseholds, and personalty on a similar condition. The brother disclaimed:—Held, that the nephew must make provision for one-half of the annuities.

One of the annuities was to be paid to the widow so long as she should live, and if she had any child born, such sum to be continued for its life. There were three children born:—Held, that the direction applied to the eldest only, and that taking the annuity she was bound to give effect to the other annuity, and to the gifts to the nephew as regarded the one-third share of freeholds which descended to her.

A bequest of 500*l.* or an annuity of 25*l.* for life,—Held, not to give an option to the legatee, but to the parties interested in the property subject to the legacy. *Wilson v. Wilson*, 1 De Gex & S. 152.

Bequest of a chattel leasehold house to trustees,

on trust to pay to A an annuity for her life; and after A's death to be possessed of it on certain trusts. The house was taken by a railway company, and the purchase-money was paid into court:—Held, that A was entitled to have the corpus of the fund broken in upon for the purpose of obtaining payment of some arrears, and the payment for the future of the annuity in full. *In re the London, Brighton and South Coast Rail. Co., ex parte Wilkinson*, 19 Law J. Rep. (N.S.) Chanc. 257.

Interest not given on the arrears of an annuity unpaid for several years during the progress of the cause, although the suit was instituted by, and a receiver appointed on the application of, the residuary legatee, and the surplus income out of which the annuity was payable was brought into court, and made productive. In order to entitle an annuitant whose annuity is payable from a fund which has been brought into court to any profit which may have been made by the investment of the arrears of his annuity, he should procure the arrears to be set apart and distinguished from the general estate.

Semble—that the claim of an annuitant to interest is not affected by the circumstance that the annuity is secured by a term of years of which he is himself trustee if his title to the annuity, in the circumstances of the case, is one of sufficient doubt to require the direction of the Court.

Semble—that an annuitant who has established his right to an annuity in a proceeding directed by the Court for trying such right, may immediately apply for the appropriation of the portion of the fund necessary for its payment. *Taylor v. Taylor*, 8 Hare, 120.

A testator, after inaccurately reciting that his wife was entitled for life to 39,000*l.*, which he stated would yield 1,560*l.* a year, directed his trustees to add an annuity of 440*l.*, to raise her jointure to 2,000*l.*:—Held, that she was entitled to have her annuity made up to 2,000*l.* at all events. *Ouseley v. Anstruther*, 10 Beav. 459.

Where a testator's effects are insufficient to satisfy an annuity given by a will and the pecuniary legacies,—Held, that the annuity ought to be valued, and the amount of the valuation paid to the annuitant at once, subject to a proportional abatement with the legacies, and that though the annuitant died before the payment of the annuity in full would have equalled the abated amount of valuation, the other legatees would have no claim to the surplus. *Wroughton v. Colquhoun*, 1 De Gex & S. 357.

A general legatee of "the sum of £—long annuities," held, not entitled to dividends accruing before the expiration of a year from the testator's decease. *Collyer v. Ashburner*, 2 De Gex & S. 404.

(W) RECOVERY OF LEGACY.

The statute 3 & 4 Will. 4. c. 27. does not apply to the arrears of a mere personal annuity.

A defendant not setting up the statute by his answer, cannot have the advantage of it at the hearing. *Roch v. Callen*, 17 Law J. Rep. (N.S.) Chanc. 144; 6 Hare, 531.

(X) RIGHTS AND LIABILITIES OF THE LEGATEE.

A legatee, who owed the testator 4,000*l.*, claimed to be entitled to it under the will. By an order he

paid the 4,000*l.* into court, and it was directed to be invested in stock, and the dividends accumulated. The Court decided in favour of his claim:—Held, that he was entitled only to the stock and accumulations, though owing to a fall in the funds they were of less value than 4,000*l.* *Hyde v. Neate*, 15 Sim. 558.

[Liability to pay calls on shares bequeathed. See COMPANY.]

[See *Jaques v. Chambers*, 15 Law J. Rep. (N.S.) Chanc. 225; 2 Coll. C.C. 435—(A) Construction.

(Y) LEGACY DUTY.

[See WILL, Probate Duty.]

Parties, strangers in blood, and appointed ex-ecutors, took the whole real and personal estate of a testator, and paid the duty of 10*l.* per cent. on the whole personal residue; afterwards, on an ejectment by the heir-at-law, the testator's incapacity was clearly established, and upon a suit being instituted in the ecclesiastical court, the probate was recalled, and administration granted to the next-of-kin, liable to a less duty: by an arrangement the latter, on payment of a sum to the next-of-kin, released all their claim:—Held, that the former were, under the 36 Geo. 3. c. 52. s. 37, entitled to a return of the duty, not only on the sum paid to the next-of-kin, but of the amount retained, being retained not under the will, but as a gift of the next-of-kin; and that the Commissioners of Stamps were to account for the duty as that charged on the next-of-kin at the lower rate. *Regina v. Commissioners of Stamps and Taxes*, 6 Q.B. Rep. 657.

A testator bequeathed to R B sen., and R B jun., and four others, 4,200*l.* 3*l.* per cent. consols, in trust, as to 1,700*l.* part thereof, to apply the dividends in establishing and supporting a daily school at N, for instructing twenty boys, resident at N, on the National School principle. That the annual dividends of the 1,700*l.* should be retained by R B sen. and R B jun. for applying the same in the conduct of the school; that R B jun. should be schoolmaster during his life, and that the management of the school should for ever remain in the family of R B sen.; that the election of the boys should be in the discretion of the schoolmaster; that the schoolmaster should provide a school-room and firing out of the dividends of the said stock; that the dividends from the sum of 400*l.*, part of the said 4,200*l.*, should be applied in providing the boys with pinafores, caps, shoes, books and slates, the same to be left by the boys on their leaving the school or going out to work:—Held, that the sums of 1,700*l.* and 400*l.* were liable to legacy duty. *In re Griffiths*, 15 Law J. Rep. (N.S.) Exch. 130; 14 Mee. & W. 510.

In an information for legacy duty a special verdict stated, that the testator devised his real estates in trust to pay the rents to his brothers and sister and the survivor of them for their lives, and after the death of the survivor to convey the estates to all his nephews and nieces equally, as nearly as they could make partition, and in the mean time to pay the rents to them. That for the purpose of such partition it should be lawful for the trustees to sell all or any part of the estates, and that they should stand possessed of the money arising from such sale

upon the same trusts as were declared concerning the residue of the personal estate, namely, for his brothers and sister and the survivor of them for life, and then for his nephews and nieces. The testator died in 1819, leaving his sister and two brothers him surviving, the last of whom died in 1832. He also left ten nephews and nieces. In 1833, and at various times afterwards, the trustees sold the real estates for 9,064*l.*, with the view of dividing the proceeds of the sale among the nephews and nieces:—Held, that legacy duty was payable on the above sum, it being within the meaning of the 55 Geo. 3. c. 184. sched. part 3. tit. 'Legacies,' money arising from "real estate directed to be sold." *Attorney General v. Simcox*, 18 Law J. Rep. (n.s.) Exch. 61; 1 Exch. Rep. 749.

A, by deed dated 1802, conveyed certain lands to trustees to the use of himself for life, remainder to B, his son, for life, remainder to the defendant, his grandson, for life. The deed provided that it should be lawful for the defendant and the survivor of A and B to declare by deed any new uses or trusts of the said lands. A having died in June 1822, B and the defendant, by an indenture of October 1822, declared and appointed that it should be lawful for B by any deed or will to charge the lands with the payment of any sum not exceeding 47,000*l.* for his own or any other use. In 1823 B made his will, whereby he charged his lands with payment to his executors of 47,000*l.* to be applied in payment of his debts, &c. and the residue to the defendant. B died in 1842. The 8 & 9 Vict. c. 76, amending the law relating to duties on legacies, passed in 1845. In 1847 the executors raised 11,259*l.* 11*s.* 8*d.*, part of the 47,000*l.*, and paid it to the defendant, the debts, &c. having been previously satisfied:—Held, that the 8 & 9 Vict. c. 76. was retrospective, and that the defendant was liable to the payment of legacy duty on the sum of 11,259*l.* 11*s.* 8*d.* *Attorney General v. Marquis of Hertford*, 18 Law J. Rep. (n.s.) Exch. 332; 3 Exch. Rep. 670.

A testator by his will directed that the legacies therein given should be paid free of legacy duty. By a codicil, which he directed might be taken and considered as part of his will, he gave other legacies:—Held, that the latter legacies were not given free of legacy duty. *Early v. Benbow*, 2 Coll. C.C. 354.

A testatrix directed all her personal estate to be converted into money, and her debts and funeral expenses and legacies to be paid out of the proceeds, and that out of the residue large sums of stock should be appropriated upon certain trusts. She then gave some pecuniary legacies of small amount, and directed that all the said legacies, and all legacies thereafter given, should be paid free from legacy duty:—Held, that the exemption from legacy duty applied to the bequest of stock as well as to the pecuniary legacies. *Ansley v. Cotton*, 16 Law J. Rep. (n.s.) Chanc. 55.

In 1795 a reversion in real estate was devised to trustees upon trust, after the death of the tenant for life, to sell the estate, and to pay a part of the purchase-money to A. A, by will, made F his executor and L his residuary legatee. By a deed dated in 1828, in consideration of 6,000*l.* paid to F as executor of A, F, by the direction of L, assigned the right to the purchase-money to S. No mention

was made of the legacy duty at the time of this sale. In 1836 the estate was sold, on the death of the tenant for life, to S, and A's share of the purchase-money was allowed to him. In 1846, F, as executor of A, was made to pay the legacy duty. L died insolvent. A bill was filed by F in 1846, against the executors of S, and the devisee of the estate under his will, praying to be recouped the sum paid for legacy duty:—Held, that F had no right to recover this sum, either against the executors or the devisee. *Farwell v. Seale*, 18 Law J. Rep. (n.s.) Chanc. 189.

A testator by his will gave certain annuities and legacies, and directed, as to some of them, that the legacy duty thereon should be paid out of his residuary estate, but as to others, he directed that the legacy duty should be deducted. The executor only partially paid the legacy duties, and left various sums unpaid on both descriptions of annuities and legacies. The Commissioners of Stamps and Taxes claimed a lien upon the residuary estate of the testator for the unpaid legacy duties in priority over the costs of the suit and the unpaid legacies:—Held, that the executor was personally a debtor to the Crown for the amount of legacy duty where he had deducted it; and where a payment had been made to the legatee without deduction, the legatee, as well as the executor, was liable with respect to the duty which the legatee ought to have seen paid; but the Crown had no claim upon the residuary fund. *Wright v. Barnewall*, 19 Law J. Rep. (n.s.) Chanc. 38.

LIBEL.

[See SLANDER.]

(A) ACTION FOR, WHEN MAINTAINABLE.

- (a) *In general.*
- (b) *Privileged Communications.*

(B) PLEADING.

- (a) *Parties.*
- (b) *Prefatory Averments.*
- (c) *Innuendos.*
- (d) *Traverse.*
- (e) *General Issue.*
- (f) *Pleas of Justification.*
- (g) *Replication to Plea under the 6 & 7 Vict. c. 96. s. 2.*
- (h) *Several Pleas.*

(C) EVIDENCE.

- (a) *Of Publication.*
- (b) *Of Malice.*

(D) PRACTICE.

- (a) *Staying Proceedings.*
- (b) *What Question for the Judge, and what for the Jury.* [See (A) (b).]
- (c) *Recognizance.*

(A) ACTION FOR, WHEN MAINTAINABLE.

- (a) *In general.*

In an action for libel or slander when the words written or spoken are not in themselves applicable to the individual plaintiff, no introductory averment or innuendo can give them such an application.

The declaration in an action for libel, after an introductory allegation that the plaintiff was employed in supplying water to ships calling at St. Helena, set out a letter published by the defendant in a newspaper, which letter stated "that the ship M arrived from Bombay with the passengers in a dying state; that there is no doubt that the illness was occasioned by the water taken in at St. Helena, where it was run into a copper tank, from whence the casks were filled alongside. There is no doubt, therefore, that the poison is imbibed in this copper tank, and it behoves the authorities immediately to replace it with an iron one" (innuendo that the plaintiff had supplied bad and unwholesome water to the ship M). The second count stated, that the defendant published a letter "in substance as follows," (setting out the former letter), and that he further contriving, &c. published another letter, of and concerning the first letter, &c., containing, &c.: "I beg to correct an error in my former letter, with respect to the passengers in the ship M being poisoned by the water supplied at St. Helena from a copper tank. I stated that the tank belonged to the government. This is an error; the copper tank is fitted up in a schooner belonging to Mr. S" (the plaintiff), (innuendo as before):—Held, on motion in arrest of judgment, first, that there was nothing in the first letter to warrant the innuendo applying the imputation of supplying bad water to the plaintiff, and that the first count could not therefore be sustained. Secondly, that the second letter could not be considered a substantive libel, independently of the first, and that the first letter not having been expressly set out and declared on as part of the libel in the second count, that count also could not be supported. *Solomon v. Lawson*, 15 Law J. Rep. (n.s.) Q.B. 253; 8 Q.B. Rep. 823.

In an action for libel, to which the defendant pleaded only not guilty,—Held, that the jury were properly directed that a clergyman gives no occasion for public comment by establishing or carrying into effect any arrangements for the purposes of charity.

And where a clothing society, with the vicar at the head of it, was formed and carried on, in a parish containing 5,000 persons, on the principle of the exclusion of dissenters, it was held not to be the subject of public comment, on a plea of not guilty.

Quare, as to a sermon preached by a clergyman to his congregation and not published. *Per Pollock, C.B. and Parke, B.* that it gives no occasion for public comment. *Gathercole v. Miall*, 15 Law J. Rep. (n.s.) Exch. 179; 15 Mee. & W. 319.

An application to the Court of Queen's Bench, for a criminal information against a party for the publication of a libel, which application has been refused, is no bar to an action on the case in the other courts for the same ground of complaint. *Wakley v. Cooke*, 16 Law J. Rep. (n.s.) Exch. 225; 16 Mee. & W. 822; 4 Dowl. & L. P.C. 702.

Allegorical terms of a defamatory character of well-known import, such as imputing to a person the qualities of the "frozen snake" in the fable, are libellous *per se*, without innuendoes to explain their meaning.

To write to the members of a charitable institution calling on them "to reject the unworthy claims of Miss H," and stating that "she squandered away the money which she did obtain from the

benevolent in printing circulars abusive of Commander D," the secretary of the institution, is libellous. *Hoare v. Silverlocke*, 17 Law J. Rep. (n.s.) Q.B. 306; 12 Q.B. Rep. 624.

A libel upon the plaintiff, amongst other imputations, contained charges of misconduct in relation to his office of coroner for Middlesex on an inquest at Hounslow, and concluded in these terms—"There can be no court of justice unpolluted which this 'libellous journalist' (meaning the plaintiff), this violent agitator and sham humanitarian, is allowed to disgrace with his presidency." The defendants, in justification of the words "libellous journalist," pleaded that the plaintiff on the 29th of March 1838, being the proprietor of a public journal, intending to injure one C in his profession, published of him a false, scandalous and malicious, &c. libel, setting it out. The proof was, that in the year 1828 an action of libel had been brought by C against the plaintiff in respect of the said libel published by the plaintiff as proprietor of the *Medical Times*, in which action 100*l.* damages had been recovered:—Held, that the words "libellous journalist" imputed to the plaintiff habitual libelling and moral misconduct; and that the Judge did not misdirect the jury in stating that the question was, whether the libel on C was a scandalous and malicious libel; and that the defendant ought to have produced other evidence than that of the record of that action for the purpose of proving that it was a scandalous and malicious libel.

A coroner on an inquest ought not to exclude the testimony of parties who have material evidence to offer, on the ground that their testimony may tend to criminate themselves. *Wakley v. Cooke*, 19 Law J. Rep. (n.s.) Exch. 91; 4 Exch. Rep. 511.

A publication, reflecting on the character of the plaintiff, professed to contain a report of the proceedings before two Judges of different courts at chambers, on applications, under the Bankrupt Act, 5 & 6 Vict. c. 122. s. 42, to discharge a bankrupt out of custody. The defence (under the general issue) was, that it was a fair account of what took place before those Judges when acting in a judicial capacity:—Held, that if it was, the defendant was entitled to the verdict.

Held, also, that if the report, though not correct, was an honest one, and intended to be a fair account of what really occurred before the Judges, that would be a ground for reducing the damages. *Smith v. Scott*, 2 Car. & K. 580.

[See *post*, (B) (c).

(b) *Privileged Communications.*

In an action against a party for publishing a libel,—Held, *per Tindal, C.J. and Erle, J.*, that a person having information materially affecting the interests of another, and honestly communicating it privately to such other party, in the full belief, and with reasonable grounds for the belief, that it is true, is justified in so publishing it, although the publisher has no personal interest in the subject-matter of the libel, and although no inquiry has been made of him, and although the damage to the other party, or to his property, is not imminent.

Per Colman, J. and Cresswell, J., that such a communication is not privileged.

The libel in question was written by the mate of a vessel to the defendant, falsely charging the captain of the vessel with having endangered the vessel and lives of the crew by continued drunkenness. The vessel was at this time in port, and likely to continue there a few days. The defendant, who was slightly acquainted with the owner of the vessel, but was not interested in the vessel, and had no inquiry made of him, believing in the truth of the letter, shewed it to the owner, who, in consequence, dismissed the captain. The Chief Justice, upon these facts, having directed the jury that if the defendant acted honestly and *bona fide*, the publication was justifiable, and their verdict must be for the defendant, if otherwise for the plaintiff; and the jury having found a verdict for the defendant,—held, *per Tindal, C.J. and Erle, J.*, that the publication was justifiable, and that the direction to the jury was right; *per Coltman, J. and Cresswell, J.*, that it was wrong. *Coxhead v. Richards*, 15 Law J. Rep. (N.S.) C.P. 278; 2 Com. B. Rep. 569.

A, having had no previous knowledge of B, a trader, sold him goods to the amount of 62*l.* 10*s.*, at two months' credit. Upon going to B's shop at the expiration of the credit, A found that the whole of the stock in trade, including a portion of the goods sold by him, had been sold by auction, by B's desire, on the previous day, and at a reduction of 30 per cent., and that the proceeds were in the hands of S, the auctioneer. Upon inquiry, he could not learn where B was to be found. He thereupon went to his attorneys, and they, on his behalf, served on S a notice not to part with the proceeds, "the said B having committed an act of bankruptcy." B had, in fact, committed no act of bankruptcy, the goods having been sold for the purpose of his retiring from business:—Held, *per Tindal, C.J., Coltman, J. and Erle, J. (Cresswell, J. dissentiente)*, that he had such an interest in serving the notice as to render it a privileged communication, if it was served with good faith and under the *bona fide* belief that B had committed an act of bankruptcy. *Blackham v. Pugh*, 15 Law J. Rep. (N.S.) C.P. 290; 2 Com. B. Rep. 611.

Where the defendant, in a letter addressed to the Secretary of State, stated, that the plaintiff, who was town clerk and clerk to the Justices of the borough of A, was in close intimacy with one R C G and one D H, who had been brought before the Justices of that borough on a charge of embezzling the monies of T K their master, and that when the papers of the two prisoners were produced various accommodation transactions with the plaintiff were discovered, "thus clearing up the mystery as to the uses to which the plunder had been appropriated," and called on the Secretary of State to institute inquiry, &c. (innuendo, that the plaintiff had conspired with and was an accomplice of the said R C G and D H, in embezzling the monies of the said T K, and had made use of the proceeds of the said embezzlement; and also that the plaintiff, as such clerk and legal adviser as aforesaid, had acted corruptly and dishonestly in his office, &c.)—Held, first, that the communication could not be considered privileged or confidential by reason of its being an application addressed to the Secretary of State.

Secondly, that the falsehood of part of the state-

ment was sufficient to support the presumption of malice, supposing the occasion of the publication to be evidence to rebut such presumption.

Lastly, that the Judge properly left it to the jury to say, whether the libel bore the meaning alleged in the innuendo; as the words were such as were capable of conveying that meaning. *Blagg v. Sturt*, 16 Law J. Rep. (N.S.) Q.B. 39; 10 Q.B. Rep. 899.

A letter written to a bishop, informing him of a report current in a parish in his diocese, that the incumbent of a district in that parish had collared the schoolmaster, and that a fight ensued between them, is a privileged communication if such letter was written to the bishop honestly, to call his attention to a rumour in the parish which was bringing scandal on the church, and not from any malicious motive; and it is not material that the writer of the letter did not live in the district to the incumbent of which the letter referred. *James v. Boston*, 2 Car. & K. 4.

(B) PLEADINGS.

(a) Parties.

A and B may join in an action for a libel containing imputations injurious to a trade carried on by them jointly as partners. *Le Fanu v. Malcolmson*, 1 H.L. Cas. 637.

(b) Prefatory Averments.

Declaration averred that the defendant used the words "blacklegs and black-sheep," to denote persons guilty of fraud, and persons of disreputable character; that divers persons had formed a club, called "The Royal Western Yacht Club;" that the defendant, intending to cause it to be believed that the plaintiff was a confederate of persons guilty of fraudulent play at cards, and of being blacklegs and black-sheep in the sense aforesaid, in a certain newspaper, called, &c., published of and concerning the plaintiff the following libel,—*"Royal Western Yacht Club, expulsion of two blacklegs,"* (meaning an expulsion from the club of two persons, being blacklegs in the sense in which that word was used as aforesaid). The declaration then stated that suspicion had attached to two members (meaning the aforesaid two persons) of the club, owing to two gentlemen having been plucked at cards, at the residence of one of the two suspected members, in a manner that seemed to indicate foul play; that an inquiry took place which resulted in the expulsion of the two suspected persons. The declaration then stated that a person, "known to be a confederate of the expelled parties sought admission into the club; his name was O'B" (meaning thereby, the plaintiff):—Held, on motion in arrest of judgment, that as it appeared from the innuendos, coupled with the prefatory averments, that the defendant had published libellous matter of and concerning the plaintiff, it was not necessary to allege in the declaration that the libel was published of and concerning the Royal Western Yacht Club, and the other prefatory averments. *O'Brien v. Clement*, 16 Law J. Rep. (N.S.) Exch. 77; 16 Mee. & W. 159; 4 Dowl. & L. P.C. 563.

(c) Innuendos.

Though defamatory matter may appear only to

apply to a class of individuals, yet if the descriptions in such matter are capable of being, by innuendo, shewn to be directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter.

In such a case the innuendo does not extend the sense of the defamatory matter, but merely points out the particular individual to whom matter, in itself defamatory, does in fact apply.

Therefore, after verdict, a declaration which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel, imputing that 'in some of the Irish factories' (meaning thereby the plaintiff's factory) cruelties were practised, though there was no allegation otherwise connecting the libel with the plaintiff, was held good. *Le Fanu v. Malcolmson*, 1 H.L. Cas. 637.

In case for a libel, stating that a party had been hounded and robbed in a public-house kept by the plaintiff, the declaration stating in the innuendo the meaning to be, that he had been feloniously, &c., and intending to impute that the plaintiff's house was the resort of felons, thieves, and depraved and bad characters; on which issue the jury found for the defendant, the Court not seeing that they had manifestly done wrong in not finding the libel to bear the meaning put on it by the plaintiff, refused to disturb the verdict. *Broome v. Gosden*, 1 Com. B. Rep. 728.

In case for libel in an advertisement, "warning" J C and Co. (meaning the plaintiffs) that certain shares were bought under a false representation, and that unless the deposit and expenses were repaid legal proceedings would be taken, without any innuendo to whom the warning was intended to apply, or that the false representations were imputed to the plaintiffs:—Held, insufficient to maintain the action. *Capel v. Jones*, 4 Com. B. Rep. 259.

If words charged to be libellous may, in their ordinary acceptation and without the aid of extrinsic circumstances, be reasonably understood as derogatory to the character of the plaintiff, judgment cannot be arrested. So where the words used are in terms general, and the innuendos apply them to the plaintiff, and the jury so find, the judgment cannot be arrested.

Thus a passage in a newspaper warning certain persons to avoid the traps laid for them by desperate adventurers,—innuendo, meaning the plaintiff amongst others, was after verdict held to be libellous.

A declaration in libel, after an inducement, inserted before the first count, that the plaintiff was a barrister and the editor and proprietor of a weekly publication called the *Medical Times*, &c., charged, in the second count, that the defendant, in a certain publication, &c. published, &c. omitting the words "of and concerning the plaintiff as the editor of the said weekly publication." It then set out the libel, in which the following words were complained of as libellous:—"A body which has disgusted the government, and which other persons, not belonging to the profession (thereby meaning the plaintiff as such barrister as aforesaid), and whose weekly vocation it is to bring everything belonging to the profession into disrepute and contempt,—(thereby meaning

that the plaintiff was in the habit, as editor of the said weekly publication called the *Medical Times* as aforesaid, of bringing the medical profession into disrepute and contempt)" :—Held, on writ of error, that the words themselves were actionable, the jury having found that they were derogatory to the plaintiff, and that the innuendo might be rejected as surplusage.

Quære—Whether any special averment that the libel was of and concerning the plaintiff as editor of the weekly journal, was necessary, the libel itself sufficiently shewing the reference of the words to the plaintiff in that character. *Wakley v. Healey*, 18 Law J. Rep. (N.S.) C.P. 241; 7 Com. B. Rep. 591.

A count in a declaration in an action on the case for libel alleged the libel as follows:—"There is a strong reason for believing that a very considerable sum of money was transferred from Mr. T's (meaning the said W T's) name in the books of the Bank of England, by power of attorney obtained from him by undue influence after he became mentally incompetent to perform any act requiring reason and understanding," innuendo "thereby meaning that the said plaintiff and the said J H T had transferred or caused to be transferred the said money from the said W T's name in the said Bank by means of a power of attorney obtained by them from the said W T by undue influence exercised by them over the said W T, and at a time when the said W T had become mentally incompetent to give a power of attorney and to perform any act requiring reason and understanding:"—Held, in error, affirming the decision below (18 Law J. Rep. (N.S.) C.P. 155; 7 Com. B. Rep. 251), first, that although the libellous words pointed at no particular person, yet as they imputed in substance that some one had been guilty of the offence, the plaintiff might, by innuendo, apply them to himself, and that it was a question of evidence whether they applied to him.

Held, secondly, that the innuendo that the libel meant to impute that the plaintiff and J H T had actually transferred the stock was not too large, since the words of the libel, that there was strong reason for believing the stock had been transferred, were capable of the interpretation thus put on them; and that after verdict the Court would presume that the jury had found that they bore the meaning averred in the innuendo. *Meryweather v. Turner*, 19 Law J. Rep. (N.S.) C.P. 10.

[See (A) (a).]

(d) *Traverse.*

A declaration in libel stated as inducement that the plaintiff was a surgeon and member of the College of Surgeons, which said college had the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and their cures. The libel was alleged to be published of and concerning the plaintiff as such surgeon, and of and concerning the said college and its said power. One of the libels complained of contained a statement that the college had the power of expelling its members. The second plea was, that the plaintiff was not a surgeon and member of the College of Surgeons, having the power of expelling persons guilty of unprofessional conduct, and of unprofessionally advertising themselves and

their cures:—Held, that the traverse put in issue the power of the college to expel, and that the statement in the libel itself was not sufficient evidence of such power. *Wakley v. Healey*, 18 Law J. Rep. (N.S.) Exch. 426; 4 Exch. Rep. 53.

(e) *General Issue.*

In an action for libel the plea of not guilty puts the malice in issue.

Where the libel is contained in a report of judicial proceedings, it is a good defence that the report was a fair substantial, though not a *verbatim*, report of the proceedings, and the evidence may be given under the general issue. *Hoare v. Silverlock*, 19 Law J. Rep. (N.S.) C.P. 215.

[See *post*, (h) *Several Pleas.*]

(f) *Pleas of Justification.*

A declaration in libel alleged that the libel stated that the plaintiff, who was seeking admission into a club, gave an entertainment a few days before he was to be elected; that he was afterwards blackballed, and on the next morning bolted, and some of the poor tradesmen had to lament the fashionable character of his entertainment. The defendant pleaded in justification, that the plaintiff did suddenly leave and quit the town without paying every one and all of the debts contracted by him with *divers* persons in the town, and without notice to them, and with intent to defraud and delay them, whereby the said persons, to wit, on &c., remained unpaid and defrauded:—Held, on special demurrer, that the plea was bad, in not stating the names of the tradesmen alleged to have been defrauded. *O'Brien v. Clement*, 16 Law J. Rep. (N.S.) Exch. 76; 16 Mee. & W. 150; 4 Dowl. & L. P.C. 343.

A declaration set forth a libel stating, that the plaintiff who was seeking admission into a club, gave an entertainment a few days before he was to be elected; that he was afterwards blackballed, and on the next morning *bolted*, and some of the tradesmen had to lament the fashionable character of his entertainment.

The defendants pleaded by way of justification, that on the following morning the plaintiff suddenly *left and quitted* the town and neighbourhood of P, leaving *divers* of the tradesmen of that town and neighbourhood, to whom he owed *divers* sums of money, unpaid, to wit, T T, W S, &c.:—Held, that the plea was bad, as not amounting to a justification of the libel, which imputed to the plaintiff a fraudulent evasion of his creditors. *O'Brien v. Bryant*, 16 Law J. Rep. (N.S.) Exch. 77; 16 Mee. & W. 168; 4 Dowl. & L. P.C. 341.

(g) *Replication to Plea, under the 6 & 7 Vict. c. 96. s. 2.*

The 2nd section of the 6 & 7 Vict. c. 96. enables a defendant in an action of libel to plead, by way of defence, certain special matters therein stated, and enacts, that, "to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea":—Held, that the replication under this statute need not deny all the facts stated in the plea, but the plaintiff may traverse as much of it as he thinks necessary. *Chadwick v. Herapath*, 16 Law J. Rep. (N.S.) C.P. 104; 4 Dowl. & L. P.C. 653; 3 Com. B. Rep. 855.

(h) *Several Pleas.*

The general issue and a special plea of apology and payment of money into court, under the 6 & 7 Vict. c. 96. s. 2, to the same cause of action, will not be allowed.

Under the general issue, in an action for libel, you may disprove the fact of publication, or shew that it is not of an injurious character, or that it was published on some justifiable occasion. *O'Brien v. Clement*, 15 Law J. Rep. (N.S.) Exch. 285; 15 Mee. & W. 435; 2 Dowl. & L. P.C. 676.

(C) EVIDENCE.

(a) *Of Publication.*

The defendant communicated to the editor of a certain newspaper certain facts concerning A B, such as that he had been hung up in effigy in a ludicrous character, &c., at the same time saying to the editor that he wished he would "shew up" A B. The editor knew of the facts themselves from other quarters. An article subsequently appeared in the newspaper, containing in substance the matters so narrated, and which article it appeared that the defendant saw and expressed his approbation of after publication. The jury found that the article was libellous:—Held, that the defendant was rightly convicted of the publication. *Regina v. Cooper*, 15 Law J. Rep. (N.S.) Q.B. 206; 8 Q.B. Rep. 533.

On the trial of an action for a libel in a newspaper, a witness stated, that he was president of a literary institution having eighty members; that about the date of the paper proved one was brought (he could not say by whom) to the reading-room of the institution, and left there gratuitously; that, a fortnight after, it was taken away without his authority, and never returned; that he had searched for it, but could not find it, and believed it to be lost or destroyed; that the title of it was the same as that proved, and, as far as he could judge from a glance at it, it contained the libel in question, and he believed it was a copy of that paper. He was not cross-examined:—Held, first, that secondary evidence of the contents of the copy was properly admitted. Secondly, that there was evidence for the jury that the paper so sent to the institution was a copy of that which contained the libel. Thirdly, that, though sent by a person unknown, it was evidence against the defendant, not to shew malice, but to affect the damages, by shewing the extent of circulation. *Gathercole v. Miall*, 15 Law J. Rep. (N.S.) Exch. 179; 15 Mee. & W. 319.

In an action for libel, in order to prove that the defendant had published the libel, which was contained in a printed pamphlet, a witness was called, who stated in substance, that the defendant gave her a copy of the pamphlet; that she lent it several times to persons, expecting that they would return it to her; that the persons to whom she had lent it had returned her the same, or a copy, but that she could not swear it was the very same, though she had no reason to doubt it:—Held, that there was evidence for the jury that the pamphlet returned to the witness was the same given to her by the defendant. *Fryer v. Gathercole*, 18 Law J. Rep. (N.S.) Exch. 389; 4 Exch. Rep. 262.

In an action against the proprietor of a news-

paper for a libel the evidence given of publication was, that the plaintiff had, many years after the libel was printed, sent a person to the newspaper-office to buy a copy of the newspaper in which it appeared, and to whom a copy was accordingly sold at the office:—Held, sufficient evidence of publication.

Where the first count set out a libel which was referred to in the subsequent counts alleging other libels, and the original cause of action for libel in the first count was barred by the Statute of Limitations, but a re-publication of it within six years was proved, it was held that the Judge was not bound to direct the jury to give damages for the libel in the first count with reference only to its re-publication. *The Duke of Brunswick v. Harmer*, 19 Law J. Rep. (n.s.) Q.B. 20.

(b) *Of Malice.*

Where the alleged libel was a complaint made by the defendant of the incompetency of the plaintiff, a surveyor who had been sent to him for employment, and the innuendo charged that the defendant meant that the plaintiff was not a competent and skilful surveyor,—Held, that evidence of the general competency and abilities of the plaintiff was inadmissible to shew malice. *Brine v. Bazalgette*, 18 Law J. Rep. (n.s.) Exch. 348; 3 Exch. Rep. 692.

[See (A) (b).]

(D) PRACTICE.

(a) *Staying Proceedings.*

Seven actions having been brought against the defendant by the same plaintiff for different publications of the same libel, a rule was made absolute for staying proceedings in all but one until that one was tried. *Jones v. Pritchard*, 18 Law J. Rep. (n.s.) Q.B. 104.

(b) *What Question for the Judge and what for the Jury.*

[See (A) (b).]

(c) *Recognizance.*

An application under the 1 Will. 4. c. 73. to enforce the recognizances taken under the 60 Geo. 3. c. 30. must state distinctly that the defendant in the action for libel was either the editor, conductor, or proprietor of the newspaper; and an allegation that he was the printer and publisher is insufficient.

Semble—Under that statute a rule calling on the bail to shew cause why the plaintiff should not have leave, pursuant to the statute, to proceed upon the recognizances is correct in form. *Ex parte the Duke of Brunswick, in re Clements*, 18 Law J. Rep. (n.s.) Exch. 304; 4 Exch. Rep. 492.

LIBERTY.

Union of liberties with counties facilitated by the 13 & 14 Vict. c. 106; 28 Law J. Stat. 318.

LIEN, AT LAW.

[See SHIP AND SHIPPING, Freight.]

- (A) IN GENERAL.
- (B) INNKEEPERS, LIVERY-STABLE KEEPERS, AND TRAINERS.
- (C) WRONGFUL REMOVAL.

(A) IN GENERAL.

A certificated conveyancer is not entitled to a lien upon deeds delivered to him, and "with and in respect of" which he has done business; the business not having been done upon the deeds, or their value thereby increased. *Steadman v. Hockley*, 15 Law J. Rep. (n.s.) Exch. 332; 15 Mee. & W. 553.

The unpaid vendor of a real estate conveyed to a purchaser has not at law any lien on the title deeds for his purchase-money. *Goode v. Burton*, 16 Law J. Rep. (n.s.) Exch. 309; 1 Exch. Rep. 189.

An attorney has no lien on his client's money in his hands, beyond the amount in which the latter is indebted to him. *Miller v. Atlee*, 3 Exch. Rep. 799.

(B) INNKEEPERS, LIVERY-STABLE KEEPERS, AND TRAINERS.

An innkeeper received the carriage and horses of a person not residing at his inn. Whilst they were in his possession the owner took refreshments occasionally at the inn, and a friend of his resided there for some time at the owner's credit, and by his direction:—Held, that the innkeeper had no lien upon the carriage, &c. for the amount of his bill, which included charges for the keep of the horses, the standing of the carriage, and refreshments for the owner and his friend. *Smith v. Dearlove*, 17 Law J. Rep. (n.s.) C.P. 219; 6 Com. B. Rep. 132.

Where a guest brings a chariot to an hotel at which he takes up his abode, the keeper of the hotel has a lien on the chariot for its standing room and any labour bestowed on it; and this holds good whether the chariot is the property of the guest, or hired by him from a third party.

Quære—Whether he has a lien on it for the board and lodging, &c. of the guest. *Turrell v. Crawley*, 18 Law J. Rep. (n.s.) Q.B. 153; 13 Q.B. Rep. 197.

A livery-stable keeper has no lien upon a horse standing at livery in his stables, in respect of monies paid to a veterinary surgeon for blistering the horse according to the owner's directions. *Orchard v. Racksrau*, 19 Law J. Rep. (n.s.) C.P. 303.

The labour and skill expended by a trainer on race-horses intrusted to him for the purpose of being trained is such as may on general principles give him a lien on the horses against the owner. But this right of lien may be destroyed by any agreement or usage inconsistent with the continuing right of possession by the trainer.

An owner of race-horses intrusted them to A for the purpose of having them trained to run at races generally. During the time the horses were with A they were (according to the usage in such cases) sent in charge of A's servant to run at such races as the owner selected. They were placed in stables hired by A until the race, and were then ridden by jockies selected and paid by the owner. The owner

frequently selected one of A's servants as his jockey. After the race the horses were re-delivered to A's servants, and taken back by them to his stables:—Held, that, under these circumstances, A had no lien on the horses. *Forth v. Simpson*, 18 Law J. Rep. (N.S.) Q.B. 263.

(C) WRONGFUL REMOVAL.

A being indebted to B it was agreed that B should keep A's cow till the debt was paid, that A might drive her away every morning and night to be milked, and if he did not return her, that B might re-take her whenever or wherever he found her. A drove her away and kept her three weeks, whereupon B re-took her. In trespass by A against B, for so doing,—Held, that these facts supported a plea denying A's property in the cow. *Richards v. Symons*, 15 Law J. Rep. (N.S.) Q.B. 35; 8 Q.B. Rep. 90.

LIEN, IN EQUITY.

[See LIMITATIONS, STATUTE OF.]

S & Co. were merchants at Stralsund, and in May 1841 their agent sold to T a quantity of wheat, the amount to be drawn for on T at three months' date, payable on handing over invoice and bills of lading. S & Co. sent the invoice, with the bills of lading, to T, and at the same time drew on him at three months' date for the amount. T received the invoice and bills of lading on the 8th of June 1841, and requested R to accept for him a bill payable at three months for 1,000*l.*, which he did on receiving from T a memorandum authorizing him to dispose of the cargo of wheat on T's account, subject to the usual commission and charges, before the bill became due, T undertaking to provide R with cash to the amount of the advance, should T wish R to hold it beyond that time. On the 1st of July 1841, the wheat arrived in the port of London, and about the same time T stopped payment. On the 2nd of July, Z, the plaintiffs' agent in London, gave a verbal, and on the 3rd of July a written message to the master of the vessel, not to part with the wheat without the orders of S & Co. On the 5th of July a fiat issued against T, and on that day Z gave notice again to the master of the vessel not to part with the wheat; the wheat, however, was allowed by Z to be delivered to R on giving him notice that S & Co. claimed to be entitled to the same, and did not, by removing the stop, abandon their rights. S & Co. insisted on their right to the balance of the proceeds of the wheat, after satisfying R's legal claim, and R claimed to be entitled to apply the proceeds of the wheat, not only in payment of the 1,000*l.* bill, and freight and other charges of the ship, but also in satisfaction of the balance of the general account, which he alleged to be subsisting between him and T. S & Co. then offered R 1,200*l.* in discharge of his acceptance and charges in respect of the wheat, and demanded the delivery of the cargo to them, which was refused. The wheat was afterwards sold by R for 1,822*l.* net proceeds:—Held, that S & Co. were entitled in equity to the residue of that sum, after payment of the amount due to R in respect of the acceptance and charges, and freight of the ship, and that S &

Co. had no remedy at law. *Spalding v. Ruding*, 15 Law J. Rep. (N.S.) Chanc. 374.

A authorized a sale of his share in a brewery to B, his partner, whom he made his executor. B treated the sale as duly made, carried on the business till his death, after which it was carried on by C, his executor. Afterwards the sale was set aside and A's estate became entitled to share in the profits since his death. C then became bankrupt, having the trade property in his possession:—Held, that the trade creditors during C's time had no lien for their debts on A's share, and that the property was not in the order or disposition of C. *Stocken v. Dawson*, 9 Beav. 239.

LIMITATIONS, STATUTE OF.

[See LEGACY, Interest on; Recovery of—LIEN, IN EQUITY—RATE—TITHE.]

(A) WHERE THE STATUTE APPLIES.

- (a) *Under the 21 Jac. 1. c. 16.*
- (b) *Under the 3 & 4 Will. 4. c. 27.*
- (c) *Under the 3 & 4 Will. 4. c. 42.*

(B) COMPUTATION OF TIME.

(C) HOW THE STATUTE MAY BE BARRED.

- (a) *Acknowledgment.*
- (b) *Part Payment.*
- (c) *Indorsement on subsequent Writ under the 2 Will. 4. c. 39. s. 10.*

(D) PLEADING.

(A) WHERE THE STATUTE APPLIES.

- (a) *Under the 21 Jac. 1. c. 16.*

[*Fannin v. Anderson*, 5 Law J. Dig. 425; 7 Q.B. Rep. 811.]

From 1825 to 1837 A, B & C carried on business in partnership as bankers; and during that period D W deposited with them various sums of money, for which the bank gave him promissory notes in the following form:—"I promise to pay three months after sight D W or order £—, with interest at 3*l.* 10*s.* per cent. per annum, 21st January 1826. For A & Co. (signed) B." In March 1837 A died, having appointed B and another his executors, and B & C continued his business till 1842. Interest was yearly paid on the notes by A, B & C, and by B & C after A's death up to December 1842; and on each such payment an indorsement was made on the notes in this form:—"Paid one year's interest, due March 1836, £—, for A & Co.," and was signed by the clerk of the bank. In 1843 B & C became insolvent; and in the month of December, in the same year, the executors of D W filed their bill on behalf of themselves and all other the creditors of A, against the executors of A and the devisees and legatees under his will, praying an account of the personal estate of A, and of the rents and profits of his real estate, and that the legacies might be refunded, and the real estates sold, and that the same might be applied in satisfaction of A's debts. The defendants, by their answer, pleaded the Statute of Limitations:—Held, first, that the payments of interest

by B were not to be taken as made by him in his character of executor of A. Secondly, that the acts of the surviving partners of A had not the effect of keeping the plaintiffs' debt alive as against the real or personal estate of the deceased partner. Thirdly, that the form of the pleadings prevented the plaintiffs working out payment of their debt through the equities of the partners. Fourthly, that the presentment of the notes for payment of the interest was a "sight," and that the statute began to run from such presentment. *Way v. Bassett*, 15 Law J. Rep. (n.s.) Chanc. 1; 5 Hare, 55.

In 1825, the plaintiff brought an action against a lunatic for a debt. The lunatic and his committee thereupon filed a bill in equity to restrain the plaintiff from prosecuting the action. By an order made in this suit in July 1825, by consent, it was ordered that the plaintiff should be restrained from further prosecuting the action, or commencing any other proceedings at law in respect of the debt, and that the proceedings in the suit should be stayed, and that the plaintiff should be at liberty to carry in his claim before the Master in the matter of the lunacy. In 1828 the Master reported that the plaintiff's claim required further consideration; and, in 1830, made a report as to debts, in which no notice was taken of his claim. The commission of lunacy was never superseded, and the lunatic died in 1843. A bill filed by the plaintiff in 1844 against the lunatic's representatives (so constituted by a will dated before the lunacy), in respect of the debt, was dismissed, with costs. *Roche v. Cooke*, 17 Law J. Rep. (n.s.) Chanc. 93; 1 De Gex & S. 675.

(b) *Under the 3 & 4 Will. 4. c. 27.*

In the year 1801, the testator, being seised in fee of a messuage, put his daughter and her husband (the defendant) into possession of it, and they continued in occupation, without any payment of rent, until 1837, when the testator died. By his will, dated in 1837, he devised the messuage to his said daughter for life, remainder to the lessor of the plaintiff in fee, and also devised an annuity of 5*l.* to his daughter. This annuity was received by the defendant regularly, and he and his wife (the testator's daughter) continued in possession of the premises till 1844, when she died:—Held, first, that the testator's right of entry having been barred by the 7th section of the 3 & 4 Will. 4. c. 27, the right of the lessor of the plaintiff was also barred; secondly, that the receipt of the annuity by the defendant did not conclude him, so as to prevent his setting up his adverse possession as against the testator. *Doe d. Dayman v. Moore*, 15 Law J. Rep. (n.s.) Q.B. 324; 9 Q.B. Rep. 555.

The testator died in 1784, having, in 1776, demised the land under a lease to a tenant for sixty-one years; the defendant, and those under whom he claimed, received rent under the lease from the death of the testator to the year 1837, when the lease expired. An action of ejectment being brought in that year immediately upon the determination of the lease,—Held, that the right of the lessor of the plaintiff to bring the action would have been barred by length of time, under the 3 & 4 Will. 4. c. 27. s. 9, if it were not saved by section 15 of the same act.

But held, lastly, that such right of action was saved by the 15th section. *Doe d. Angell v. Angell*, 15 Law J. Rep. (n.s.) Q.B. 193; 9 Q.B. Rep. 328.

A, the devisee of a term for lives in a messuage, in 1793 conveyed it to Richard J, his heirs and assigns, during the remainder of the term, with reversion to A, her heirs and assigns, in case Richard should die without children. A died in 1799. In 1811, Richard purchased the reversion in fee, and at the same time a satisfied outstanding term was for his protection assigned to a trustee to attend the inheritance. In 1812, Richard died without issue, leaving Lewis, the ancestor of the plaintiff, his heir-at-law. Lewis was also the heir-at-law of A. Lewis did not take possession in 1812, and the messuage in question continued to be occupied by others than those entitled to it. The last life in the lease fell in 1835, when the lessor of the plaintiff, being heir-at-law of Lewis and also of Richard, brought the present ejectment:—Held, first, under the 3 & 4 Will. 4. c. 27. s. 3, that the title of Lewis to the term accrued in 1812, and by the 5th section his right to the reversion accrued in 1835; that the 5th section applying only to the cases where another person than the tennor was the reversioner, and the land not having been recovered by any person, the right of Lewis was barred by the lapse of twenty years from 1812, and the right of the lessor of the plaintiff claiming the reversion through him was barred also.

Quære—Whether the term merged, either by the purchase of the reversion by Richard in 1811, or on his death in 1812, by the descent of the reversion to his heir Lewis.

Semble—that the satisfied term ceased and determined under the statute 8 & 9 Vict. c. 112, on the 31st of December 1845, and would have afforded no defence to this ejectment. *Doe d. Hall v. Mouldale*, 16 Law J. Rep. (n.s.) Exch. 169; 16 Mee. & W. 689.

Three females being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for partition by deed of the lands held in coparcenary, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery within twenty years after her death, and before the 3 & 4 Will. 4. c. 27, to recover her share, which had been held by the husband of one of the other coparceners,—Held, that the possession was under the agreement, and not adverse.

Held, also, that nothing could be presumed, beyond what was contemplated by the agreement, which provided for a deed and not for a recovery. *Doe d. Millett v. Millett*, 17 Law J. Rep. (n.s.) Q.B. 202; 11 Q.B. Rep. 1036.

A, some time before 1824, being under contract to purchase, let B, his son, into possession of the premises contracted for as tenant at will. The conveyance to A was executed in 1824, and A mortgaged the premises in 1829. B occupied the premises from the time he was let into possession till 1834, when he died, and his widow, the defendant, occupied them till the day of the demise in the declaration (the 8th of January 1845). The jury.

finding that B's tenancy at will commenced more than twenty-one years before the day of the demise in the declaration,—Held, first, that the conveyance to A did not determine the tenancy at will of B.

Secondly, That the mortgage by A did not determine such tenancy even if it could be supposed to exist, with reference to the Statute of Limitations, after the expiration of one year from its commencement; and that an action of ejectment against the defendant was barred by the statute 3 & 4 Will. 4. c. 27. ss. 2, 7. *Doe d. Goody v. Carter*, 18 Law J. Rep. (N.S.) Q.B. 305; 9 Q.B. Rep. 863.

Under the 3 & 4 Will. 4. c. 27. ss. 2, 3, and 34, the right to rent is extinguished by the lapse of twenty years from the time of the last payment of such rent, although twenty years have not expired since the rent became due.

Where a Statute of Limitations extinguishes the right and does not merely bar the remedy, the defence under such statute need not be pleaded specially, and therefore in an action of replevin evidence of the lapse of twenty years since the last payment of rent may be given under a plea in bar of *non tenuit*. *De Beauvoir v. Owen*, 19 Law J. Rep. (N.S.) Exch. 177; 5 Exch. Rep. 166; affirming the judgment of the Court of Exchequer. *Owen v. De Beauvoir*, 16 Mee. & W. 547.

The petitioner claimed a sum of money due from the estate of a testator on a judgment entered up on a bond given in 1793. The Statute of Limitations was set up as a bar, and it was contended that the statute did not apply to a charge upon personal estate, and that a suit instituted in 1817 against the testator's estate would prevent the statute from running. That suit was for the arrears of an annuity due to the party who instituted it, and it prayed that the estate might be administered, and that certain documents, which were in the possession of the obligee, and upon which he claimed a lien in respect of the money due upon the bond, might be produced, and the lien, if any, of the obligee might be ascertained:—Held, that the Statute of Limitations was a bar to any proceedings upon a judgment after twenty years, although such judgment was a charge upon personal estate only, and that the suit of 1817 was not in the nature of a creditors' suit, and there was not such an acknowledgment of the debt due upon the judgment as would prevent the statute from running. *Watson v. Birch*, 16 Law J. Rep. (N.S.) Chanc. 188; 15 Sim. 523.

More than twenty years after the death of a testator, the representative of one of his executors, and the residuary legatee under the will, file a bill against the representative of a co-executor to recover residuary assets of the testator alleged to have been possessed by the co-executor. The plaintiffs are barred by the 3 & 4 Will. 4. c. 27. s. 40. as to assets possessed by the executor more than twenty years before the filing of the bill, but not as to assets possessed by him since. *Adams v. Barry*, 2 Coll. C.C. 290.

Where an annuity, charged upon land, is given by will to A, and the land is devised to B in fee, B is not a trustee for A within the 25th section of the 3 & 4 Will. 4. c. 27, so as to entitle A to recover more than six years' arrears of the annuity. *Francis v. Grover*, 15 Law J. Rep. (N.S.) Chanc. 99; 5 Hare, 39.

In consequence of the invalidity of an appointment, the plaintiff became entitled to a sum which was to be raised out of real estate under the trusts of a term of 500 years, which was still subsisting, but no steps for questioning the validity of the appointment, or for the recovery of the money, had been taken till more than twenty years had elapsed since the title accrued:—Held, that the right of the plaintiff was not barred by the Statute of Limitations, 3 & 4 Will. 4. c. 27, that statute not applying to cases of this nature between trustees and *cestuis que trust*. *Young v. Waterpark (Lord)*, 15 Law J. Rep. (N.S.) Chanc. 63.

A mortgagee who had entered into possession of the mortgaged premises in 1816, in 1827 executed a transfer to another, who thereupon entered into possession, and in 1828 transferred to a second transferee, who also entered into possession. The mortgagor was not a party to either transfer, and never received any acknowledgment in writing of his right to redeem. In 1833, the 3 & 4 Will. 4. c. 27. passed. In 1845, the representative of the mortgagor filed this bill for redemption against the representatives of the second transferee:—Held, that the statute operated retrospectively by taking from the mortgagor the benefit of the acknowledgment of the mortgage title contained in the transfers of 1827 and 1828, and that the suit was barred. *Batchelor v. Middleton*, 6 Hare, 75.

A contract for sale of an estate was made in March 1811, the purchase-money to be paid in May following, and the purchaser was let into possession immediately on the execution of the contract. The purchase-money was not paid, but the purchaser and persons claiming under him continued in possession. In 1844 the assignees of the vendor filed the bill, claiming a lien on the estate for the purchase-money, and interest from the day fixed for the completion of the contract:—Held, that the right of the vendor to recover the purchase-money as a lien or charge on the land was barred by the 3 & 4 Will. 4. c. 27. s. 40.

Such equitable title of the vendor to recover from the vendee the purchase-money is not an express trust within the 3 & 4 Will. 4. c. 27. s. 25. so as to be kept alive under that section.

The vendor's right to recover the purchase-money as a lien or charge on the estate is not preserved by the existence of a suit by creditors of the deviser under whose will the sale took place, nor of suits by the residuary devisees and legatees of the purchaser for the administration of his estate. *Toft v. Stephenson*, 7 Hare, 1.

The 3 & 4 Will. 4. c. 27. s. 42. takes away from an incumbrancer upon land; in all cases, the right of recovering as against the land more than six years' arrears of rent or interest; and the statute 3 & 4 Will. 4. c. 42. s. 3. merely restores the personal remedy against the debtor on the covenant.

An annuity and certain extra premiums for insuring the life of the grantor were charged upon land, and also secured by the covenant of the grantor:—Held, reversing the order of the Court below, that the annuitant was only entitled to recover against the land the arrears that had accrued due and the premiums paid by him within six years from the time of instituting proceedings to recover the same. *Hunter v. Nockolds*, 19 Law J.

Rep. (n.s.) Chanc. 177; 1 Hall & Tw. 644; 1 Mac. & G. 640; reversing 18 Law J. Rep. (n.s.) Chanc. 407.

(c) *Under the 3 & 4 Will. 4. c. 42.*

Arrears of a fee-farm rent held not recoverable under section 42. of the 3 & 4 Will. 4. c. 27. after the expiration of six years from the last receipt, and no acknowledgment in writing relating thereto; and held that the 42nd section is not repealed by the 3 & 4 Vict. c. 42. s. 2. *Humfrey v. Gery*, 7 Com. B. Rep. 567.

In July 1817, a mortgage was executed by the defendant, for securing, first, to the defendant's bankers, the payment of a sum of 1,620*l.* and upwards, and interest; and, secondly, to the plaintiff a sum of 1,500*l.* and interest, and the plaintiff thereby became a surety with the defendant for payment to the bankers of the amount so due to them. A power of sale was given to the bankers, which they exercised in the year 1834, but the proceeds of the sale were not sufficient to satisfy the amount due to them. By a deed-poll, dated the 7th of August 1817, after reciting the existence of the debt due from the defendant to the plaintiff, and the fact that the plaintiff had become surety for the defendant in divers instances, and that the defendant had considerable expectations from the relations and friends of himself and his wife, and that he was desirous as far as might be of securing the payment of the debt due to the plaintiff, the defendant, in the most extensive terms, nominated the plaintiff his attorney irrevocable, to sue for and receive from all persons whomsoever, all sums of money, and all legacies and bequests, which should or might become due or payable to him, or his wife, &c. Several of the relatives of the defendant and his wife, subsequently to the date of the deed-poll, bequeathed legacies to the defendant and his wife respectively; and in the year 1842 the plaintiff filed this bill, seeking the benefit of the deed-poll, and a decree for payment to the plaintiff of the legacies so bequeathed to the defendant and his wife in satisfaction, so far as the same would extend, of the debt due to the plaintiff:—Held, that the plaintiff's debt was not barred by the Statute of Limitations, 3 & 4 Will. 4. c. 42, notwithstanding the lapse of twenty-five years between the date of the security and the filing of the bill; that the power of attorney contained in the deed-poll was in the nature of a covenant, and that whilst the trusts of the indenture of July 1817 remained unsatisfied, the Statute of Limitations would not run against the plaintiff's debt. *Bennett v. Cooper*, 15 Law J. Rep. (n.s.) Chanc. 315; 9 Beav. 252.

(B) COMPUTATION OF TIME.

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not run against the mortgage title until his death.

The same where the mortgagee is tenant in common of the estate. *Wynne v. Styan*, 2 Ph. 303.

In June 1829, the plaintiff, a mortgagee with power of sale, employed F & S, as his solicitors, to give notice of sale. F & S gave such notice, and under their advice the plaintiff sold the property without the concurrence of the mortgagor. In 1841, on a bill by the representatives of the mortgagor, a

decree for redemption was made on the ground of the insufficiency of the notice. In 1846, the plaintiff brought an action on the case for negligence against F & S, and then filed a bill of discovery in aid of the action. A demurrer to the bill of discovery was allowed, on the ground that the cause of action arose more than six years before the suit.

In an action on the case for negligence, the cause of action was held to arise immediately upon the commission of the negligent act, and not when the negligence was discovered and the damage ensued.

A demurrer on the ground of the Statute of Limitations may be a good defence to a bill of discovery in aid of an action at law. *Smith v. Fox*, 17 Law J. Rep. (n.s.) Chanc. 170; 6 Hare, 386.

(C) HOW THE STATUTE MAY BE BARRED.

(a) *Acknowledgment.*

The following letter, by the defendant, to a clerk of the plaintiff, in answer to one applying for payment of a debt, was held insufficient to defeat a plea of the Statute of Limitations:—"I will not fail to meet Mr. H (the plaintiff) on fair terms, and have now a hope that before perhaps a week from this date, I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." *Hart v. Prendergast*, 15 Law J. Rep. (n.s.) Exch. 223; 14 Mee. & W. 741.

In order to give in evidence an acknowledgment in writing, to take a specialty debt out of the Statute of Limitations, 3 & 4 Will. 4. c. 42, the replication must state such acknowledgment. *Kent v. Gibbons*, 16 Law J. Rep. (n.s.) Q.B. 120; *nom. Kempe v. Gibbon*, 9 Q.B. Rep. 609.

To a plea under the 3 & 4 Will. 4. c. 42. s. 5, that the cause of action on a deed did not accrue within twenty years, a replication, alleging a written acknowledgment of the debt within twenty years, need not set out the writing in its terms. *Kempe v. Gibbon*, 17 Law J. Rep. (n.s.) Q.B. 298; 12 Q.B. Rep. 662.

To an action by the executor of an attorney to recover the amount of a bill of costs for work done by the testator, the defendant pleaded the Statute of Limitations and a set-off for money lent, &c., to which latter plea the plaintiff replied the Statute of Limitations.

The testator had transacted the law business of the defendant, and had received his tithes and rents. In a letter written by the defendant's agent the defendant desired to have the testator's account for the purpose of settling. In a second letter written in Welsh, and addressed by the same party to the testator, the writer stated that he would come to the testator's house for certain title deeds. In a subsequent letter by the testator to the defendant, the former says, "I have received a Welsh letter from your agent, and as far as I am able to understand it he requests to have the abstracts of title, and my bill against you and account. . . . I should be glad to hear from you, as I am no Welsh scholar myself, precisely what is wanted." To this the defendant wrote the following answer:—"Being one of those people who think short accounts make long friends, I directed my agent last year to apply to you for your bill, in order that we might settle the tithe account, &c.

What he applied to you in Welsh the other day was for my title deeds." In a letter written three months subsequently, the agent stated to the testator that the defendant was anxious to have his bill. The defendant, for the purpose of taking his set-off out of the statute, put in evidence an account furnished by the testator to the defendant, in obedience to a rule of court. This account contained items to the credit of the defendant for tithes and rents received by the testator for the defendant, and also items to the credit of the testator for cash paid and work done, and claimed a large balance as due to the testator. The defendant also put in evidence an affidavit of the testator, made on the occasion of his furnishing such account, in which a large balance was claimed by the testator in like manner:—Held, that neither the letters nor the account and affidavit were sufficient, within the 9 Geo. 4. c. 14, to take either the plaintiff's claim or the defendant's set-off out of the Statute of Limitations. *Williams v. Griffith*, 18 Law J. Rep. (N.S.) Exch. 210; 3 Exch. Rep. 335.

D, in 1824, executed a mortgage to P of houses to secure payment of 400*l.*, and by the same deed covenanted for the re-payment of the money at a certain day. In 1828 D executed a deed to which P was no party, which, after reciting that D had executed a mortgage of the houses to P, conveyed them and other property to trustees to sell, and out of the proceeds to pay off all mortgages and other incumbrances, and then to pay D's creditors:—Held, in an action of covenant on the mortgage-deed (breach, non-payment of the money), that the recital in the deed of assignment in 1828 was not an acknowledgment of a debt, sufficient under the 5th section of the 3 & 4 Will. 4. c. 42, to take the case out of the operation of the 3rd section of the same statute. *Howcutt v. Bowser*, 18 Law J. Rep. (N.S.) Exch. 262; 3 Exch. Rep. 491.

(b) Part Payment.

Where money is paid by a debtor on behalf of a creditor, the character of such payment is matter rather of evidence than of law.

B, a solicitor, managed the affairs of A, a female relative, to whom in 1820 he was indebted in the sum of 1,153*l.* for money lent. In accounts rendered by B to A from time to time up to 1823, B debited himself with interest on this sum, taking credit in the same accounts for various payments made on behalf of A to A's landlord, for the rent and tithes of the farm she occupied, and also for various cash payments to A. There was no statement of account of interest, nor any proof of payment either of principal or interest to A by B after 1823, but B up to the death of A in 1842, regularly paid to her landlord on her account her yearly rent of 76*l.*:—Held, in an action for the 1,153*l.* money lent and interest thereon brought against B in 1843 by A's administrator, that these facts were evidence from which the jury might infer that the payment of A's rent by B was a payment on account of the interest due from B to A, so as to take the case out of the Statute of Limitations. *Worthington v. Grimsditch*, 15 Law J. Rep. (N.S.) Q.B. 52; 7 Q.B. Rep. 479.

In an action for money lent the defendant pleaded the Statute of Limitations; and at the trial the

plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill in Chancery, in which the defendant admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity, and not of interest. Assuming that an acknowledgment of a payment must be in writing, and signed, under the 9 Geo. 4. c. 14. s. 1, in order to bar the operation of the Statute of Limitations,—Held, that the evidence for the plaintiff was sufficient to go to the jury. That the construction of the admission in the answer was for the Court, and that the whole of it should have been left to the jury; but that they might believe the fact of the payments having been made half-yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest.

Words used at the time of making a payment qualify it; but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment. *Baldon v. Walton*, 17 Law J. Rep. (N.S.) Exch. 357; 1 Exch. Rep. 617.

Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some evidence of a part payment to take the case out of the Statute of Limitations.

Semble—It would not be evidence if no specific sum was due, but the demand was only on a *quantum meruit*.

Per Tindal, C.J.—If two admitted demands were due at the time of the part payment, so that it was doubtful to which demand the payment applied, such a part payment would not take either demand out of the Statute of Limitations. *Burn v. Boulton*, 15 Law J. Rep. (N.S.) C.P. 97; 2 Com. B. Rep. 476.

The plaintiff applied to the defendant for 15*l.* 6*s.*, as interest due to her upon a promissory note made by the defendant. The defendant gave the plaintiff a sovereign, stating that he had paid her 4*l.* in April; that he owed her the money, but would not pay it. The Judge directed the jury that if the defendant by the part payment admitted his liability, the law created the promise to pay, and that the case was not barred by the Statute of Limitations:—Held, that this was a misdirection; that to take the case out of the statute the facts must be such as to warrant the jury in inferring a promise to pay, and that those facts ought to have been left to the jury. *Wainman v. Kynman*, 16 Law J. Rep. (N.S.) Exch. 232; 1 Exch. Rep. 118.

A parish vestry having agreed to borrow money for building almshouses, the defendants, being two of the parish officers, in 1830 gave to the testator, who advanced the money, a promissory note signed thus:—

“ Joseph Hughes, } Church-	“ Or others for the time being.”
“ E. R. } wardens.	
“ John Evans, } Overseers.	
“ W. E. }	

Interest on this note had been regularly paid by the overseers for the time being up to 1847, and had been by them debited to the parish. An action having been brought upon the note, and the Statute of Limitations pleaded,—Held, that the

very form of the note made the existing parish officers the agents of the defendants for the payment of the interest on the note, and therefore that the Judge was wrong in withdrawing the form of the note from the consideration of the jury, and stating that the question was, whether the interest had been paid with the authority or knowledge of the defendants. *Jones v. Evans or Hughes*, 19 Law J. Rep. (N.S.) Exch. 200; 5 Exch. Rep. 104.

A, B and C made a joint and several promissory note. A died, leaving B his executor. C, being afterwards sued on the note, pleaded the Statute of Limitations; and the plaintiff, in order to take the case out of the statute, proved a payment of interest on the note by B within six years:—*Semble*—that the plaintiff was entitled to recover, without reference to the question whether B had paid such interest as the executor of A or as a party to the note. *Griffin v. Ashby*, 2 Car. & K. 139.

(c) *Indorsement on subsequent Writ, under the 2 Will. 4. c. 39. s. 10.*

To take a case out of the Statute of Limitations by means of a subsequent writ under the Uniformity of Process Act, 2 Will. 4. c. 39. s. 10, the memorandum required by that section must be proved to have been indorsed on the writ at the time of the service.

In support of a plea of the Statute of Limitations, the defendants put in evidence a copy of an *alias* writ of summons served upon them, which did not contain a memorandum of the date of the first writ and of the return, pursuant to the Uniformity of Process Act, 2 Will. 4. c. 39. s. 10. The plaintiff, without producing the original *alias*, gave in evidence an examined copy of the roll, which stated the *alias* writ in the usual form, and he gave no further proof that the *alias* contained the requisite indorsement at the time of its service. A verdict having been found for the plaintiff on this issue, and a motion made to enter a verdict for the defendants, the Court directed the rule to be absolute for a new trial, provided the plaintiff produced an affidavit stating that the necessary indorsement had been made on the writ at the time of its being served, otherwise a verdict to be entered for the defendants. *Walker v. Collick*, 18 Law J. Rep. (N.S.) Exch. 387; 4 Exch. Rep. 171.

(D) PLEADING.

[*Fannin v. Anderson*, 5 Law J. Dig. 430; 7 Q.B. Rep. 811.]

To an action of debt on bond, the defendant craved oyer of the bond and of the condition, which was that the defendant should pay to the plaintiff's testator the sum of 670*l.* on the 1st of February then next, according to and in full performance of the covenant or condition mentioned in an *indenture* dated, &c., and made between &c., and should perform the covenants, grants, articles, conditions and agreements, comprised and mentioned in the said recited indenture; and then pleaded that no cause of action in respect of the said writing obligatory, by reason of any breach of the condition of the writing obligatory, or of the said covenants, grants, articles, conditions, and agreements, in the said indenture, had accrued at any time within twenty years next before the commencement of the suit:—

Held, first, that the plea was bad, in not setting out the indenture, as the same might contain negative or alternative covenants, in which case performance ought to be pleaded specially, or it might contain impossible covenants, in which case the bond would be single, and the plea to the breaches only would be bad; secondly, that the plea was bad in not stating affirmatively that the condition had been duly performed.

Semble—that the proper form of plea would be to set out the indenture; to aver performance of all that was performed within twenty years; to admit the breaches beyond that time; and to plead to those breaches the Statute of Limitations. *Sanders v. Coward*, 15 Law J. Rep. (N.S.) Exch. 97; 15 Mee. & W. 48; 3 Dowl. & L. P.C. 281.

In trespass *qu. cl. fr.* the defendant pleaded, deducing title by an inclosure act to an allotment of land, including the *locus in quo*, to T T, who entered and became and continued possessed thereof, just before the said time when, &c. The plea then justified the trespass by the defendants, as servants of T T, and by his command. The plaintiff replied that the defendants entered and committed the trespasses, after the passing of the 3 & 4 Will. 4. c. 27; that the entry was made to recover the said close in which, &c.; that the right to make such entry did not first accrue to T T, or the defendants, or to any person through whom T T or the defendants claimed the estate in the said close at any time within twenty years next before such entry:—Held, on special demurrer, that the replication was good, it being sufficient for the plaintiff to bring the case within the 2nd section of the statute; and that if the defendants sought to avail themselves of a right of entry under the 15th section, they ought to plead it in a rejoinder. *Jones v. Jones*, 16 Law J. Rep. (N.S.) Exch. 299; 16 Mee. & W. 699; 4 Dowl. & L. P.C. 494.

Where defendants by their answer claim the benefit of "the Statute" of Limitations, that will entitle them to the benefit of any Statute of Limitations applicable to their case. *Adams v. Barry*, 2 Coll. C.C. 290.

A bill stated that A C, being seised of Whiteacre, demised it for sixty years from 1765; that A C was in his lifetime in possession or receipt of the rents of Blackacre, which was under lease for terms, of which sixty-seven years were unexpired in 1767; that A C died intestate in 1768, leaving T C his heir-at-law; that T C died in 1817, leaving M S his heiress-at-law; that M S was then and until her death under coverture; that M S died in 1836, leaving the plaintiff her heir-at-law; that the defendant was in possession of the property, and that the plaintiff had brought an action of ejectment in 1845. The bill prayed for a discovery in aid of the action. The defendant put in a plea, whereby he denied that Whiteacre was under lease at the death of A C, and denied that T C, or those claiming under him, had made any claim to Whiteacre or Blackacre between the death of A C and the action of ejectment, and pleaded the 3 & 4 Will. 4. c. 27. The plea was allowed, with costs. *Scott v. Broadwood*, 15 Law J. Rep. (N.S.) Chanc. 257; 2 Coll. C.C. 447.

LOAN SOCIETIES.

The 3 & 4 Vict. c. 110. continued by the 13 & 14 Vict. c. 45; 28 Law J. Stat. 79.

LOCAL ACT.

[See STATUTE.]

Preliminary inquiries to be made in cases of application for local acts. 9 & 10 Vict. c. 106; 24 Law J. Stat. 286.

The 9 & 10 Vict. c. 106, as to preliminary inquiries in applications for local acts repealed and amended by the 11 & 12 Vict. c. 129; 26 Law J. Stat. 339.

LONDON COAL ACT.

[See PENALTIES.]

LORD'S DAY.

[See ARREST.]

LOTTERY.

[See ART-UNION—COMPANY, Companies registered under the 7 & 8 Vict. c. 110.]

LUNATIC.

[See BANKRUPTCY, Act of Bankruptcy—Poor—PROTECTION—TRUST AND TRUSTEE.]

- (A) COMMITTEE.
- (B) CONVEYANCE BY.
- (C) MAINTENANCE.
- (D) GUARDIAN.
- (E) CUSTODY AND CONTROUL.
- (F) COMMISSION.
 - (a) *Effect of finding under.*
 - (b) *Compromise.*
 - (c) *Superseding.*
 - (d) *Carriage of.*
- (G) PRACTICE.
- (H) INSANE PRISONER.

The laws concerning lunatic asylums and the care of lunatic paupers amended by the 9 & 10 Vict. c. 84; 24 Law J. Stat. 203.

The laws relating to the regulation of lunatic asylums altered by the 10 & 11 Vict. c. 43; 25 Law J. Stat. 156.

(A) COMMITTEE.

The committee of a lunatic is personally responsible in that character only to the Great Seal, and an order on him made by the Master of the Rolls in respect of a liability established against him in that court will be discharged as being without jurisdiction. *Ames v. Parkinson*, 2 Ph. 388.

Securities belonging to a lunatic's estate ordered to be deposited with the Master for the purpose of

reducing the amount of the committee's recognizances. *In re Eagle*, 2 Ph. 201.

The controul of the committee over a lunatic's estate will not generally be interfered with, except in case of improper conduct on the part of the committee: and therefore a petition presented on behalf of a joint-stock company, in which a lunatic was a shareholder, praying for a reference, whether it would be for the benefit of the lunatic that the amount due in respect of his shares by virtue of a call which had been made by the company, should be paid out of his estate, which petition was opposed by the committee, was dismissed, with costs. *In re Hitchon*, 15 Law J. Rep. (N.S.) Chanc. 126.

Notwithstanding the provisions contained in the Land-tax Redemption Act (42 Geo. 3. c. 116.) it is the duty of the committee of a lunatic to obtain the sanction of the Lord Chancellor before proceeding to a sale of any part of the lunatic's estate for the purpose of raising monies wherewith to redeem the land-tax. *In re Wade*, 1 Hall & Tw. 202.

The residence of a committee at a great distance from the lunatic and his estate is not *per se* a disqualification for the office.

The 13th General Order in Lunacy of October 1842 enables the Master to institute inquiries and report thereon without a previous order of reference for that purpose; but such report requires the sanction of the Great Seal before it can be acted upon.

Where the committees of a lunatic, acting with the sanction of the Master, but (by mistake) without the authority of the Great Seal, had expended large sums in improving the estate, and had done other acts of an important character, the Court refused to discharge the committees, or to direct a reference at their cost to inquire as to the propriety of such acts, no *mala fides* being shewn, and no improper items being pointed out in the accounts which had been passed by the Master.

In proceedings in Lunacy, the attendance of the heir-at-law is required, not for the protection of his own interest, but for the protection of the lunatic.

Where an infant heiress-at-law, residing with her mother, a widow, was represented before the Master by her mother's solicitor, and the accounts had been regularly passed, the Court refused, on the petition of the heiress-at-law, to re-open the accounts on the sole objection, that the heiress at the time of passing such accounts had no legal guardian appointed. *In re Brown*, 19 Law J. Rep. (N.S.) Chanc. 96; 1 Mac. & G. 201; 1 Hall & Tw. 348.

An *ad interim* committee is incapable of conveying under the 1 Will. 4. c. 60. s. 3. *In re Poulton*, 1 Mac. & G. 100; 1 Hall & Tw. 476.

An order was made for payment of a lunatic's maintenance to a married woman (committee of the person) on her separate receipt, her solicitor undertaking that the money should be duly applied. *In re Edwards*, 2 Mac. & G. 134.

(B) CONVEYANCE BY.

[See PRACTICE, IN EQUITY, Accounts.]

Where an equitable interest has been conveyed by a person of unsound mind to a party taking without fraud or notice of the unsoundness of mind, and the case is such that the deed would be void at

law on the ground of the lunacy, equity will relieve against the conveyance. *Price v. Berrington*, 7 Hare, 394.

(C) MAINTENANCE.

Where the whole income of the lunatic amounted only to 21*l.* 16*s.* 11*d.*, being the dividends arising out of a sum of stock to which the lunatic was entitled, the Court allowed an annuity of 80*l.* for the life of the lunatic to be purchased and paid for out of the fund. *In re Fisher*, 19 Law J. Rep. (N.S.) Chanc. 521; 2 Hall & Tw. 449.

(D) GUARDIAN.

Who may be appointed. *Biddulph v. Lord Camoys*, 9 Beav. 548.

(E) CUSTODY AND CONTROUL.

A return to a *habeas corpus*, directing the keeper of a lunatic asylum to bring up the body of R F, certified that the said R F was, on a certain day received under the 2 & 3 Will. 4. c. 107, and that on the day and year aforesaid the keeper received an order and medical certificates, in the form directed by that act (setting them out). It then further certified, that on the 22nd of November 1845, an order and two medical certificates, under the 8 & 9 Vict. c. 100. (setting them out), were delivered to the keeper; and concluded, "that the said R F is now detained under our custody, under and by virtue of the last-mentioned act of parliament:"—Held, that the return was sufficient under the 2 & 3 Will. 4. c. 107, as it sufficiently appeared that the order and certificates returned were received at the same time with the lunatic, and that they were those under which he was received.

The 8 & 9 Vict. c. 100. s. 1, which repeals the 2 & 3 Will. 4. c. 107, leaves orders made under the latter act so far valid as to amount to a justification of a detainer in an asylum.

Semble—The medical certificates required by the 8 & 9 Vict. c. 100. s. 46. must state specific facts upon which the opinion of the insanity of the party confined under them is founded, and a statement that he has a general suspicion of the motives of every person, and makes ungrounded statements, is not sufficient. *In re Fell*, 15 Law J. Rep. (N.S.) M.C. 25; 3 Dowl. & L. P.C. 373.

A return to a *habeas corpus*, directed to the keeper of a licensed lunatic asylum, set out the order for her admission, in the form given by the 8 & 9 Vict. c. 100. s. 45. sched. B: some of the particulars required to be stated were stated, others were left in blank, and the reason given for these not being inserted was, "her being constantly watched by an attendant whom she fears:"—Held, that the order was sufficient.

One of the medical certificates given under ss. 45. and 46. sched. C, stated that the medical man formed his opinion from the fact that the patient "laboured under delusions of various kinds, and was dirty and indecent in the extreme:"—Held, sufficient.

Held, also, that the provisions of s. 46. were directory only; that a strict compliance with them in point of form was not essential to the validity of the certificate upon *habeas corpus*.

The other medical certificate stated that the medical man formed his opinion from "a conversation he had had" with the lunatic: the word "fact" being erased:—Held, that as the certificate contained that which was equivalent to the formal requisites of the statute, the omission was not fatal.

Held, also, *per Erie, J.*, that the object of the statute was to leave the controul of lunatics as at common law, making parties liable to indictment for misdemeanour who did not comply with the provisions of the statute. *In re Shuttleworth*, 16 Law J. Rep. (N.S.) M.C. 18; 9 Q.B. Rep. 651.

In a plea of justification for the detention or recapture by the proprietor or superintendent of a licensed house or registered hospital, or other authorized person, of a person who has been received into such asylum under an order and certificates required by the 8 & 9 Vict. c. 100, it is not necessary to aver that such person is a lunatic, as s. 99. of the statute affords a complete defence for such detention or recapture.

Such order and certificates are equally a justification for taking a wife from her husband.

Where to an action by the husband for depriving him of the society of Elizabeth his wife, the defendant justified under the 8 & 9 Vict. c. 100. s. 99. by a plea setting out an order and certificates relating to Elizabeth Durie, and averring the detention of the "said Elizabeth then being the patient named in the order and certificates," and the recapture "of the said Elizabeth" after her escape,—Held, upon special demurrer, that the plea was not bad for not admitting or denying that she was the wife of the plaintiff, for in either case it justified the alleged trespass. *Norris v. Seend or Seed*, 18 Law J. Rep. (N.S.) Exch. 300; 3 Exch. Rep. 782.

(F) COMMISSION.

[*In re Watts*, 5 Law J. Dig. 433; 1 Ph. 512.]

(a) Effect of finding under.

The finding of a person's insanity under a commission of lunacy is not binding on third parties, but it destroys the natural presumption of sanity, and casts on the party alleging it the proof of sanity. *Snook v. Watts*, 11 Beav. 105.

(b) Compromise.

The defendants issued a commission of lunacy against the plaintiff; and at the hearing, before the Commissioners, an agreement was entered into, that the proceedings should be dropped in consideration of the plaintiff's assigning her property to trustees. This agreement was signed by her counsel; and in order to carry it out, her title-deeds were placed in the defendants' hands. On the trial of an issue, as to whether the plaintiff was entitled to the deeds notwithstanding the agreement,—Held, first, that it was not open to the defendants to dispute the title of the plaintiff to the deeds independently of the agreement.

Held, secondly, that the agreement was entered into under duress, and was not binding on the plaintiff, notwithstanding the consent of her legal advisers. *Cummings v. Ince*, 17 Law J. Rep. (N.S.) Q.B. 105; 11 Q.B. Rep. 112.

(c) *Superseding.*

A lunatic applying for a supersedeas cannot at the same time assert his soundness of mind, and claim the benefit of any relaxation of practice in point of form, conceded to those of unsound mind.

Although the Great Seal may withhold a commission, if not required for the protection of person or property, where the circumstances of the case create great difficulty in ascertaining whether there exists unsoundness of mind of a character to subject the party to the operation of a commission, yet very different considerations will regulate the discretion of the Court in deciding upon an application for superseding a commission which has once regularly issued.

The existence of a delusion is the symptom or result of a diseased mind, and therefore, so long as it continues, whether exhibiting itself more or less distinctly, there must still be unsoundness. The most satisfactory proof of recovery is the conviction of the non-reality of the delusions, which arose from the disease.

Semble—a commission will not be superseded when any declared illusion continues to exist.

A petition for a supersedeas having failed, the Court, under the circumstances, refused to make any order as to costs, but directed the matter on this point to stand over, by way of affording a security against the repetition of the application, except on proper grounds.

Where a petition for a supersedeas was presented in the name of a lunatic, and was dismissed, the Court refused to make any order as to costs, although it was apparent that the petition originated with third parties, the Court considering it had no power to make those parties pay the costs.

Semble—that the Lord Chancellor will not adjudicate upon a case in favour of the petitioner for a supersedeas, where it clearly appears that improper means have been used in getting up the petition. *In re Dyce Sombre*, 1 Mac. & G. 116; 1 Hall & Tw. 285.

Irregularity and impropriety of private communications to a Judge upon a matter publicly before him, such communications being a high contempt of Court. *Ibid.*

Practice as to superseding a commission. *In re Gordon*, 2 Ph. 242.

(d) *Carriage of.*

Rule as to person entitled to carriage of the commission. *In re Webb*, 2 Ph. 10; *In re Nesbitt*, 2 Ph. 245.

The carriage of a commission of lunacy given to the secretary of the Lunatic's Friend Society in preference to the next-of-kin of the lunatic. *In re Anstie*, 1 Mac. & G. 200; 1 Hall & Tw. 313.

Where two petitions were presented for a commission to inquire into the state of mind of an alleged lunatic, one by the infant tenant in tail in remainder expectant upon the decease of the alleged lunatic, and the other by his natural daughter, who was named in his will as his residuary legatee, the Court gave the carriage of the commission to the infant tenant in tail.

The Court, however, directed that the Master should not appoint a committee until the further

order of the Court, and afterwards gave the daughter liberty to carry in proposals for the appointment of a committee of the estate as well as of the person of the lunatic.

The mother of the infant tenant in tail was appointed committee of the estate in preference to the London banker of the lunatic, who was proposed by the lunatic's daughter, and who had been preferred by the Master in lunacy. *In re Webb*, 17 Law J. Rep. (N.S.) Chanc. 276; 2 Ph. 532.

(G) PRACTICE.

Reports by Masters in lunacy, in pursuance of directions given by the Lord Chancellor under the 8 & 9 Vict. c. 100, s. 95, are to be, within one calendar month, filed with the Secretary of Lunatics, and submitted to the Lord Chancellor for confirmation. *Orders of the 1st of December, 1845. Order I*, 15 Law J. Rep. (N.S.) Chanc. 466.

When the report has been confirmed, the Masters are without any special order to inquire and report, as to the heirs-at-law and next-of-kin of the lunatic and the persons entitled to his estate, under the Statute of Distributions, to whom notice of attending the Master is to be given; and also to report the situation of the lunatic, on the nature of the lunacy, who are the most fit and proper persons to be appointed guardians and receivers, the fortune of the lunatic, the amount of income arising therefrom, how the lunatic has been maintained, and the proper amount of maintenance past and future. Provided, that the Masters may, after direction by the Lord Chancellor and before the confirmation of the report, take evidence as to the said inquiries. *Ibid. Order II.*

The Masters in lunacy, after the confirmation of the report, are to receive proposals or conduct inquiries as to the protection, care, and management of the person or estate of the lunatic, and to report thereon; but every such report to be submitted for confirmation. *Ibid. Order III.*

Receivers appointed under the provisions of the said Act, are, without any special order, to attend before one of the Masters in lunacy, and have their accounts passed. The General Orders, &c. with respect to the accounts of committees and receivers of lunatics, shall so far as the same may be applicable, be in force with respect to the accounts of receivers of the estates of lunatics under certificate. *Ibid. Order IV.*

The Master in lunacy may determine what parties may attend him, at the expense of the estate. *Ibid. Order V.*

The Masters in lunacy may make separate reports, and state circumstances specially. *Ibid. Order VI.*

The protection, &c. of the lunatic shall continue for six months after such person shall cease to be detained as a lunatic, unless the Lord Chancellor shall otherwise direct. *Ibid. Order VII.*

Until further order, the like fees are to be received as under the 5 & 6 Vict. c. 84, and all such fees to be paid into the Bank of England to the credit of the Sutors' Fund. *Ibid. Order VIII.*

A Vice Chancellor has jurisdiction to order the income of the fortune of an infant resident abroad, and there found a lunatic, to be applied for his bene-

fit, without the petition being heard by the Lord Chancellor. *Volans v. Carr*, 2 De Gex & S. 242.

Where a lunatic, whose husband had expended upon her support and attendance sums which his own income was insufficient to meet, became entitled to some property for her separate use, the Court refused to order a sale of any portion of the principal of her property, for the purpose of repaying the expenses of her past maintenance; but ordered these expenses to be repaid out of the monies arising from past dividends, so far as they would extend, and the residue of those expenses to be repaid out of so much of the future income as would remain after providing thereout in the first place for the future maintenance of the lunatic; and also ordered the costs of the suit and the legacy duty to be paid out of the principal. *Edwards v. Abrey*, 15 Law J. Rep. (N.S.) Chanc. 404; 2 Ph. 37.

Practice as to making allowance out of lunatic's estate. *In re Clarke*, 2 Ph. 282.

A reference as to the propriety of advancing a large sum out of the capital of a lunatic's estate to enable his eldest son to purchase an estate refused. *In re Thomas*, 2 Ph. 169.

The Lord Chancellor has no jurisdiction under the 1 Will. 4. c. 65. s. 34. to deal with the property of a party declared lunatic by a foreign jurisdiction, except only in conformity with the laws of the country where the lunacy has been declared. *Newton v. Manning*, 1 Mac. & G. 362.

The act 1 Will. 4. c. 65. does not render it imperative on the Lord Chancellor, on the application of a *curator bonis* of a lunatic appointed by the Court of Session in Scotland, to order a transfer of stock standing in the lunatic's name in the Bank of England (the property of the lunatic), into the curator's name.

The Lord Chancellor will order payment by the bank to the *curator bonis*, of the past dividends due on the stock, but not future dividends. *In re Morgan*, 1 Hall & Tw. 212.

Application by the *curator bonis* of a Scotch lunatic for the transfer of stock standing in the lunatic's name in the Bank of England refused; the Court not being satisfied that the security given by the curator in Scotland was sufficient, and holding that it was a matter of discretion to refuse or accede to the application.

Terms of order of reference to the Master in such a case, the decree of the Scotch Court appointing the curator not being sufficient to establish the lunacy under the terms of the 1 & 2 Geo. 4. c. 15. and the 1 Will. 4. c. 65. *In re Stark*, 2 Mac. & G. 174; 2 Hall & Tw. 467.

Where two petitions are presented, one praying for the confirmation of the Master's report, and the other in the nature of exceptions to it, the counsel for the cross-petition are entitled to begin. *In re Townsend*, 16 Law J. Rep. (N.S.) Chanc. 266; 1 Ph. 804.

Where two petitions in the same matter are answered on the same day, that which is first presented is entitled to pre-audience. *In re Brookman*, 1 Mac. & G. 199; 1 Hall & Tw. 485.

Natural daughter of lunatic allowed to carry in proposals for a committee of the estate as well as the person. *In re Webb*, 2 Ph. 116.

The former reports of the debts of a lunatic having

been lost, the Master in Lunacy was directed to receive and consider any secondary evidence as to debts. The Master made his report accordingly, but did not therein state the grounds upon which he proceeded; whereupon it was referred back to the Master to state the evidence on which he based his report.

Money for the discharge of the debts of a lunatic under 10*l.* will not be directed to be paid to the solicitor, but to the committee of the lunatic. *In re Iredale*, 1 Hall & Tw. 254.

Where a testator directed the whole income of a trust fund to be paid to his widow, if she was capable of managing her own affairs, but a smaller annual sum if she was legally declared incapable, the expenses of a reference to the Master to inquire as to the propriety of issuing a commission in lunacy respecting her, on which the Master decided in her favour, were directed to be paid out of the dividends of the trust fund, and not out of the corpus. *Winthrop v. Winthrop*, 15 Law J. Rep. (N.S.) Chanc. 403.

(H) INSANE PRISONERS.

An order by two Justices under the statute 3 & 4 Vict. c. 54, directing a weekly payment to be made by the guardians of a union for the maintenance of a criminal lunatic whose settlement is adjudged to be in one of the parishes of such union, need not in terms direct the payment to be made on behalf of such parish, if the order recites all the facts necessary to establish the liability of such parish. *Regina v. the Justices of Berkshire*, 18 Law J. Rep. (N.S.) M.C. 105.

MALICE.

- (A) MALICIOUS ARREST AND IMPRISONMENT.
- (B) MALICIOUS PROSECUTION.
- (C) MALICIOUS INJURIES TO PROPERTY.

(A) MALICIOUS ARREST AND IMPRISONMENT.

The foundation of an action for a malicious arrest, under the 1 & 2 Vict. c. 110, being that the party obtaining the *capias* has imposed on the Judge, by falsehood, the declaration must allege that the Judge's order was obtained by falsehood or fraud, and must state the circumstances constituting such falsehood or fraud.

But where the declaration alleged that the defendants, not having reasonable or probable cause to believe that the plaintiff was about to quit England, *falsely* and maliciously, and without reasonable or probable cause, caused and *procured* a Judge to make an order for arresting the plaintiff,—Held, that the declaration, although bad on special demurrer in not setting out the circumstances of falsehood or fraud, was good after verdict, and must be taken to mean that the order was procured by false evidence or by means of falsehood, and that the allegations as to the defendants not having had reasonable or probable cause for supposing that the plaintiff intended to quit the country, might be rejected as surplusage. *Daniels v. Fielding*, 16 Law J. Rep. (N.S.) Exch. 153; 16 Mee. & W. 200; 4 Dowl. & L. P.C. 329.

A direction to the jury, in an action of case for a malicious arrest under a Judge's order upon an

affidavit not fairly disclosing the contract for which the original action had been brought, that they must be satisfied of there being a total want of reasonable cause and of malice, to entitle the plaintiff to a verdict.—Held, wrong. *Gibbons v. Alison*, 3 Com. B. Rep. 181.

A declaration in case stated that the plaintiff being indebted to H L in 36l. H L, by the defendant, his attorney, for the recovery thereof, sued out a writ of summons, and declared against the plaintiff; that afterwards the plaintiff presented a petition to the Court of Bankruptcy, and obtained an order for protection from process, whereof the defendant had notice. Yet the defendant, well knowing that the plaintiff was protected from process, but wilfully and maliciously intending to injure him, procured a judgment to be signed against him in the said action, and wilfully and maliciously intending, &c., sued out a *testatum ca. sa.*, under which the sheriff arrested the plaintiff.—Held, that the declaration was bad, in omitting to state that the defendant arrested the plaintiff without reasonable and probable cause. *Roret v. Lewis*, 17 Law J. Rep. (N.S.) Exch. 99; 5 Dowl. & L. P.C. 371.

In an action for indorsing a writ of *ca. sa.* and imprisoning the plaintiff thereon for a larger sum than was due on the judgment (part having been paid), and for indorsing a *fi. fa.* and seizing the plaintiff's goods for a greater sum than was due on a second judgment.—Held, (in error, affirming the judgment of the Queen's Bench, 15 Law J. Rep. (N.S.) Q.B. 284; 10 Q.B. Rep. 152) that the declaration in such a case is insufficient if it do not contain averments of malice and of want of reasonable and probable cause. *De Medina v. Grove*, 17 Law J. Rep. (N.S.) Q.B. 321; 10 Q.B. Rep. 172.

A declaration in case for a malicious arrest stated, that the defendant not having any reasonable or probable cause of action against the plaintiff to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously, and unjustly procured from the Hon. Sir J P, then being, &c., an order to arrest, by falsely and maliciously representing to him, by means of a certain false affidavit, that the plaintiff was indebted to him, and thereupon maliciously caused a *capias* to be issued, &c., and falsely and maliciously and without having any reasonable or probable cause of action whatsoever against the plaintiff to the amount for which he caused him to be arrested, afterwards caused the plaintiff to be arrested:—Held, on special demurrer, that the declaration was not bad for not more particularly setting out the false statements, nor for not stating that the facts were false to the defendant's own knowledge, nor for not stating that he had no probable cause for believing the facts to be true. *Ross v. Norman*, 19 Law J. Rep. (N.S.) Exch. 329; 5 Exch. Rep. 359.

The plaintiff was in custody under an attachment from the Court of Chancery, for non-payment of the costs to the plaintiff in a suit in equity, the defendant in this action. After the costs were paid, the solicitor of the plaintiff in equity (the now defendant) refused to give an order to the sheriff to discharge the plaintiff, saying, "let him go to the Court to purge his contempt." The Judge in equity discharged him on motion:—Held, that no action was maintainable for refusing to give

the order to the sheriff, and thereby prolonging the plaintiff's imprisonment, except on proof of express malice. *Moore v. Guardner*, 16 Mee. & W. 595.

(B) MALICIOUS PROSECUTION.

A declaration, alleging that the defendant maliciously, and without probable cause, preferred an indictment against the plaintiff for perjury, is supported by proof that some of the assignments of perjury in the indictment, which was set out at length in the declaration, were preferred without probable cause.

The plaintiff's counsel stated that he should offer no evidence as to the transactions to which the other assignments of perjury related:—Held, that the defendant was not at liberty to give evidence to shew that there was probable cause for those other assignments of perjury. *Ellis v. Abrahams*, 15 Law J. Rep. (N.S.) Q.B. 221; 8 Q.B. Rep. 709.

In an action for maliciously indicting the plaintiff for an assault on the defendant, the following facts were proved:—The defendant came to the plaintiff's house, which was let out as chambers, to inquire for a Mr. S, and on being informed that no such person lived there, uttered abusive language, and on the plaintiff requesting him to go away, laid hands on him, whereupon the plaintiff forced him out. There was conflicting testimony as to the degree of violence used by the plaintiff. The plaintiff was indicted by the defendant for the assault, and acquitted. On the trial of the action the learned Judge directed the jury, that if the defendant preferred the indictment with a consciousness that he was in the wrong, there was no reasonable or probable cause for the indictment:—Held, that the mere fact of the plaintiff having assaulted the defendant did not of itself constitute reasonable and probable cause without reference to the other circumstances of the case, and that the direction of the Judge was substantially correct. *Hinton v. Heather*, 15 Law J. Rep. (N.S.) Exch. 39; 14 Mee. & W. 131.

Though the question of reasonable and probable cause for a prosecution is for the Judge, yet the want of belief by the defendant that he had reasonable and probable cause, is evidence for the jury of malice. Proof of absence of such belief is, however, necessary on the part of the plaintiff, when reasonable and probable cause is made out in the opinion of the Judge. *Turner v. Ambler*, 16 Law J. Rep. (N.S.) Q.B. 158; 10 Q.B. Rep. 252.

Though the question of reasonable and probable cause is to be determined on facts the existence of which, in cases of doubt, can only be properly decided by the jury, yet it is not necessary for the Judge, when there are a variety of facts, to leave each fact specifically to the jury, but to decide, on a general view of the circumstances, whether there is or is not reasonable and probable cause for the prosecution.

Where one of several defendants, in an indictment for conspiracy, pays the costs of himself and the others of defending the indictment, he may recover such costs as damages in an action for a malicious prosecution. *Rowlands v. Samuel*, 17 Law J. Rep. (N.S.) Q.B. 65; 11 Q.B. Rep. 39.

In case for a malicious prosecution for perjury against two defendants, one of whom suffered judgment by default, and the other pleaded to issue, the

Judge left it to the jury to say whether the defendant believed, or had reasonable or probable cause for believing, that the plaintiff was guilty of 'perjury, and whether he acted maliciously. The jury found that he did not believe that the plaintiff was guilty of perjury, but that he had acted from improper motives, and with a view to exclude his evidence on a new trial. The Judge thereupon held that there was evidence of malice:—Held, that this ruling was correct.

Held, also, that in such an action the plea of not guilty does not put in issue the termination of the prosecution by the acquittal of the plaintiff.

Held, also, that the defendant, who had suffered judgment by default, was a competent witness for the plaintiff. *Hadrick v. Heslop*, 17 Law J. Rep. (n.s.) Q.B. 313; 12 Q.B. Rep. 267.

In an action against A for malicious prosecution of B, by maliciously causing an indictment for a riot to be preferred against him, it was proved, on the part of the defendant, by Mr. C P, the city solicitor, that he preferred the indictment by order of Mr. Ald. C:—Held, that the defendant's counsel might ask Mr. C P whether the defendant had desired him not to prosecute on his behalf, but could not ask him, generally, what the defendant had said to him on the subject of the prosecution. *Osterman v. Bateman*, 2 Car. & K. 728.

In an action for malicious prosecution, a person is liable who gives evidence in support of the charge, and who represents himself as preferring it, although it is preferred at some other persons' expense, and such other persons have told him that he shall be a witness only, and they employ the counsel and solicitor; and if it be shewn that, during the examination on the charge, such person is in his hearing repeatedly alluded to as prosecutor, and does not deny that character, this is evidence from which a jury may infer that he represented himself as the person preferring the charge.

Similarity of handwriting is not, *per se*, and without other circumstances, "probable cause" for preferring a charge of forgery against a person whose handwriting is like that of a forged instrument. *Clements v. Ohrlly*, 2 Car. & K. 686.

(C) MALICIOUS INJURIES TO PROPERTY.

[See FIRE.]

[*Regina v. Tiney*, 5 Law J. Dig. 434; 1 Den. C.C. 63.]

The plaintiff, a servant of a railway company, who were authorized to enter upon certain land of the defendant, for the purpose of boring to ascertain the nature of the soil, when in the act of digging pits in the land, *bond fide* and reasonably believing himself entitled so to do, was apprehended by the owner of the land, under the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, and taken before a magistrate, and fined 7s. The defendant *bond fide* believed the plaintiff had committed an offence against the act:—Held, that as the plaintiff had not in fact committed such offence, the defendant was not justified in apprehending him merely because he *reasonably supposed* the plaintiff had committed such offence. *Parrington v. Moore*, 17 Law J. Rep. (n.s.) M.C. 117; 2 Exch. Rep. 223.

A was on the 20th of February 1847 committed

under the 7 & 8 Geo. 4. c. 30, "for wilfully and maliciously destroying a quantity of fruit trees in a garden in her occupation, for which she had been convicted in 4l. 13s. 8d. for the said offence, and 8s. 6d. for costs." In March she was brought by *habeas corpus* before a Judge, who refused to discharge her, considering the commitment good. At the April Sessions, in support of such commitment, a conviction was entered and filed against A (under section 24. of the above statute), which stated that she did, on, &c., "wilfully and maliciously commit injury and spoil to certain real property, to wit, to certain apple trees, gooseberry trees, and other fruit trees then and there growing, the property of Sir H B" (stating 4l. 13s. 8d. to be the amount of the damage). An action having been brought against the magistrates who signed the commitment and conviction, a second and more formal conviction of the same date as the preceding conviction and commitment, and under the same section, was drawn up and filed at the Midsummer Sessions. This conviction also stated that A did, on, &c., "wilfully and maliciously commit damage, injury, and spoil to certain real property, to wit, twenty apple trees, twenty gooseberry trees, and twenty other fruit trees then and there growing, the property of Sir H B":—Held, that the defendants, the magistrates, were at liberty to give in evidence the second conviction, the former not having been quashed or pronounced invalid.

But held, secondly, that, looking at both convictions, it was left quite uncertain whether they were for the same offence as that stated in the commitment, and that they therefore did not support it, and afforded no answer to the action.

Held, also, that the commitment and both the convictions were defective for not shewing some specified amount of damage.

The 24th section of the 7 & 8 Geo. 4. c. 30. is only applicable to cases in which the damage done is less than 1s. *Charter v. Greame*, 18 Law J. Rep. (n.s.) M.C. 73; 13 Q.B. Rep. 216.

MANDAMUS.

(A) WHEN IT LIES.

- (a) *To inferior Tribunals.*
- (b) *To Justices and Sessions.*
- (c) *To Corporate Bodies and Public Companies.*
- (d) *To Public Commissioners.*
- (e) *To ministerial Officers.*
- (f) *To Trustees.*
- (g) *To enforce Orders not questioned by Certiorari.*
- (h) *On Second Application.*

- (B) WRIT AND RETURN.
- (C) COSTS.

(A) WHEN IT LIES.

[*Regina v. Commissioners of Excise*, 5 Law J. Dig. 437; 6 Q.B. Rep. 975.]

- (a) *To inferior Tribunals.*

The Court will never grant a mandamus, commanding the enrolment in an inferior court of an

instrument, which, though in part valid, would in its terms give power to commit unlawful acts. Nor will they by mandamus enforce the process of an inferior court, the Judge of which has power to compel obedience to its process. *Regina v. Conyers*, 15 Law J. Rep. (N.S.) Q.B. 300; 8 Q.B. Rep. 981.

A statute provided that if the election of certain deputies should be objected to, and notice in writing should be given or delivered to the party objected to four days before the first meeting, it should be lawful for the deputies assembled at such meeting (exclusive of those objected to), and they were required to inquire into and determine the validity of such disputed election. Where proof was given that notice of objection had been in due time served on the wife of the party objected to at his dwelling-house, and the meeting decided that personal service was essential, and refused to inquire into the election,—Held, that there had been a mistake of the law and a declining of jurisdiction, and that consequently a mandamus to inquire should be issued.

But, where evidence was given of personal service of a notice upon the party objected to in due time, but the meeting disbelieved the witness and decided that the disputed election was valid,—Held, that the deputies having decided upon a question of fact over which they had jurisdiction, their decision was final, and that the Court of Queen's Bench could not interfere. *Regina v. Goodrich*, 19 Law J. Rep. (N.S.) Q.B. 413.

(b) *To Justices and Sessions.*

[*Regina v. Justices of Warwickshire*, 5 Law J. Dig. 436; 6 Q.B. Rep. 750.]

Where, at a sessions held in January, the Court confirmed an order in bastardy, subject to a case for the opinion of the Court of Queen's Bench, or to a mandamus to hear the appeal at the option of the appellant, who decided upon not bringing up the case, but applied for a mandamus in Easter term,—Held, under the circumstances, that the application was not made too late. *Regina v. Justices of Cheshire*, 15 Law J. Rep. (N.S.) M.C. 114; 4 Dowl. & L. P.C. 94.

An order of removal was made before the passing of the 9 & 10 Vict. c. 66; but no removal took place till after the act had passed. After the removal an appeal was entered against the order, and the chief ground was, that the pauper had resided in the respondent parish five years next before the application for the warrant. The Sessions refused to hear the appeal on the ground that the order was before the act, and the removal after it, and the statute gave no right of appeal against the removal.—The Court granted a mandamus commanding the Justices to hear the appeal. *Regina v. Justices of Middlesex*, 16 Law J. Rep. (N.S.) M.C. 135.

Where an application was made to Justices for a warrant of removal on the complaint of the overseers of the applying parish, which stated, amongst other things, that the pauper sought to be removed had not resided there for five years exclusively of the time to be excluded according to the provisions of the 9 & 10 Vict. c. 66, and it appeared at the hearing before the Justices that the pauper had during part of the five years anterior to the passing

of the statute been in receipt of relief from another parish, and the Justices decided that the pauper was under the circumstances irremovable, and refused to make the warrant,—Held, that no mandamus would lie, as the Justices had not declined to exercise their jurisdiction, but had entered upon the inquiry and had decided, though erroneously. *Regina v. Blanshard*, 18 Law J. Rep. (N.S.) M.C. 110; 13 Q.B. Rep. 318.

An appeal against an order of removal was dismissed at the borough sessions, for which notice of appeal had been given; and an order for costs made in favour of the respondents, the appellants not appearing pursuant to their notice. At the next sessions the appellants applied to rescind the former order for costs, and to be allowed then to enter and respite their appeal to the following sessions, on the ground of *mala fides* on the part of the respondents. The Sessions, however, after hearing all the facts, refused to grant the application:—Held, that a mandamus to enter continuances and hear the appeal would not lie. *Regina v. Recorder of Bolton*, 18 Law J. Rep. (N.S.) M.C. 139.

(c) *To Corporate Bodies and Public Companies.*

By the Norwich and Brandon Railway Act, 7 Vict. c. xv. s. 241, the company were required to construct a bridge over a river, so as to leave the same width of water-way under the same as existed at the time when the act passed, at the point where the river was crossed, and so that there should be at all times a clear height of five feet above the ordinary level of the river. It was then provided, that after notice was given to the company by any owner or occupier of lands adjoining the railway, that the said bridge was not made according to the true intent and meaning of the act, it should be lawful for such owner or occupier to apply for and obtain an order from a Justice of the Peace, enabling such person to make such bridge accordingly, the expenses to be defrayed by the company. A bridge being in the course of construction by the railway company which did not comply with the act in either of the required particulars, notice was given to the company requiring them to construct a bridge, leaving the same width of water-way, &c., and so that there should be a clear height of five feet, &c., to which an answer was sent, stating the intention of the company to make the bridge of the required height; but that service of any process in relation to the other matters would be accepted on behalf of the company. The bridge was in fact raised to the proper height, and a cutting at the side of the river was commenced and discontinued; and other letters being then sent on the subject to the railway company, they returned no answer. Upon a rule for a mandamus, it was held, first, that the above circumstance disclosed a sufficient refusal by the company; and, secondly, that the remedy given under the act by application to a Justice did not apply, so as to prevent a mandamus being granted. *Regina v. Norwich and Brandon Rail. Co.*, 15 Law J. Rep. (N.S.) Q.B. 24; 3 Dowl. & L. P.C. 385.

Where a town council, in obedience to a mandamus, assessed compensation for the loss of certain offices of profit, under the provisions of the 5 & 6 Will. 4. c. 76, and the Lords of the Treasury, on appeal,

assessed a larger amount of compensation,—Held, that the assessment under the mandamus estopped the town council from denying the right to compensation; and, therefore, the Court of Queen's Bench was right in granting a mandamus calling upon the town council to execute a bond according to the provision of the act, to secure the amount assessed by the Lords of the Treasury. *Mayor, &c. of Sandwich v. Regina*, 16 Law J. Rep. (N.S.) Q.B. 432; 10 Q.B. Rep. 563.

(d) *To Public Commissioners.*

By the 9 & 10 Vict. c. 38, the Commissioners of Woods and Forests were authorized to treat for and purchase lands for the purpose of forming Battersea Park. Where notice of their intention to take lands had been given, but there had been no actual taking,—Held, that a mandamus would lie to compel the Commissioners to issue their warrant to the sheriff to summon a jury to assess compensation.

The fact of the Commissioners having no funds is matter of return to the mandamus. *Regina v. Commissioners of Woods and Forests, (In re Budge)*, 17 Law J. Rep. (N.S.) Q.B. 341.

Commissioners appointed under a public act, to do on behalf of the executive government certain things for the benefit of the public, are not liable in the same manner as a private company is held to be in consideration of the statute granted to them.

Where under the powers of an act for forming a royal park (9 & 10 Vict. c. 38.) the Commissioners of Woods and Forests had given notice to a landowner that they required his land for the purposes of the act, and he had in consequence sent in his claim for compensation, to which the Commissioners did not agree, and he accordingly required to have a jury summoned to assess the amount, which they refused to do, the return to a mandamus commanding the Commissioners to summon a jury stated that they acted only on behalf of Her Majesty under the provisions of the act; that they had expended or appropriated the whole of the funds which they had been able to raise, and that they had no means of raising any further sums at present; and that they gave notice to the claimant and others only for the purpose of ascertaining what sum would be required to purchase the lands for the purposes of the act, and to determine whether its objects could be effected, and that it seemed probable that the sum which they were authorized to expend would be exceeded:—Held, that under these circumstances, the notice to treat did not operate as a contract by the Commissioners, and that the mandamus could not be supported. *Regina v. Commissioners of Woods and Forests*, 19 Law J. Rep. (N.S.) Q.B. 497; 15 Q.B. Rep. 761.

(e) *To ministerial Officers.*

The general rule that indictment and not mandamus is the proper mode of enforcing obedience by a ministerial officer to an order of Sessions, does not prevail where the Court sees that the ministerial officer is put forward merely as a nominal party, and that other persons are those who are to be compelled to perform the duty. *Regina v. Surveyors of Highways for Wood Ditton*, 18 Law J. Rep. (N.S.) M.C. 218.

(f) *To Trustees.*

The adwoson of the vicarage of O was vested in certain persons upon trust upon every avoidance to present to the ordinary for institution, &c. such person as should be nominated by the majority of the parishioners. A vacancy having occurred, there were two candidates, and it was disputed which of them had the majority of votes. The trustees having refused to present, a mandamus was applied for:—Held, that as the relation of trustee and *cestui que trust* existed between the presentors and the nominators, the only remedy of the latter for want of presentation was in equity: if, however, the landowners had a legal right, they might assert it by *quare impedit*; but that in either case mandamus would not lie to compel them to present.

Held, also, that the nominee had no legal right to be presented, which he could himself enforce, and that, therefore, he could not have a mandamus to compel the trustees to present him, but his only remedy, under the circumstances, was in equity. *Regina v. Trustees of Orton Vicarage*, 18 Law J. Rep. (N.S.) Q.B. 321.

Trustees under a private act had power to make new lines of road, and for that purpose a compulsory power was given them over lands, &c. Seven years after the compulsory power had expired, a mandamus compelling them to make the new roads was refused. *Regina v. Trustees of the Rochdale and Halifax Road*, 12 Q.B. Rep. 448.

(g) *To enforce Orders not questioned by Certiorari.*

Orders made by the Poor Law Commissioners cannot in any case be questioned otherwise than by being brought into the Queen's Bench by *certiorari* (*dubitante Coleridge, J.*) *Regina v. Overseers of the Oldham Union*, 16 Law J. Rep. (N.S.) M.C. 110; 10 Q.B. Rep. 700.

As a general rule the validity of orders of the Poor Law Commissioners can only be disputed by *certiorari* under the 4 & 5 Will. 4. c. 76. s. 105.

Whether there is an exception to this rule in case of a manifest want of jurisdiction—*quare*. *Regina v. Governor, &c. of Bristol*, 18 Law J. Rep. (N.S.) M.C. 132; 13 Q.B. Rep. 405.

(h) *On second Application.*

A mandamus was quashed on the ground that it was not drawn up in conformity with the rules under which it issued. A rule was afterwards obtained for amending the first-mentioned rules, so as to make them agree with the mandamus. This rule was discharged:—Held, that the prosecutor ought to be allowed to make a second application on the same affidavits for a rule for a mandamus in the terms of the first mandamus, though the object of such application was the same as that which was sought by the rule for amending the rules. *Regina v. East Lancashire Rail. Co.*, 16 Law J. Rep. (N.S.) Q.B. 127; 9 Q.B. Rep. 980.

(B) WRIT AND RETURN.

[*Regina v. Mayor, &c. of New Windsor*, 5 Law J. Dig. 439; 7 Q.B. Rep. 908.]

Under a railway act, 6 & 7 Will. 4. c. lxxxi., the company were required "to make proper watering-

places for cattle in all cases where by means of the railway the cattle of any person occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same at all times with water." The railway was made through and intersected certain closes of Sir W M, in which there were ancient ponds or watering-places for cattle, and by means thereof the cattle in portions of the closes had been deprived of access to the ancient watering-places, and a mandamus issued requiring the company to make proper watering-places in such portions of the closes respectively, which they refused to do. On a traverse of the return to this mandamus and demurrer thereto, it was held, that the writ was erroneous in ordering the company to do more than the act required, viz., to make a pond in each of the several portions of the closes which had been cut off from the residue of such closes, and that there was nothing on the face of the writ to shew that one watering-place would not have been sufficient and proper for the whole of the severed portions.

Quære—Whether this provision of the statute applied at all to cases where the fields in which the watering-places were situated were actually intersected by the railway; and whether the damage was not a matter of compensation under the act. *York and North Midland Rail. Co. v. Milner*, 15 Law J. Rep. (n.s.) Q.B. 397.

L, a householder, had his name placed upon the burgess list of a parish, signed by the overseers. The mayor and assessors expunged L's name, but did not reject the list altogether. A mandamus issued to the mayor, commanding him to insert L's name on the burgess roll. The return alleged that the burgess list was not signed by the churchwardens:—Held, on demurrer, that this afforded no answer to the writ, even if the churchwardens ought to have signed the list.

Semble—that their signature was unnecessary.

The writ of mandamus set forth the title and qualification of L to have his name inserted in the burgess roll, and alleged, among other things, in the terms of the statute 5 & 6 Will. 4. c. 76. s. 9, that he had paid all such rates (including therein all borough rates directed to be paid under the provisions of that act) as had become payable by him. The return traversed this allegation in its terms:—Held, on demurrer, that the traverse was good.

Quære—Whether it was necessary that the writ should have contained this allegation.

A return, alleging the non-payment of certain rates as a ground of disqualification, must shew with certainty and particularity the nature of the rates, the times when they were made, and how the prosecutor was assessed to and became liable to pay them.

Quære—Whether the title of the prosecutor ought not to be inquired into, and finally decided, upon affidavit, upon the application for a mandamus. *Regina v. Mayor of Dover*, 16 Law J. Rep. (n.s.) M.C. 97; 11 Q.B. Rep. 260.

The present Supreme Court of Judicature at Madras is for every purpose substituted for the Mayor's Court formerly in existence there. It is bound, therefore, to receive and obey a writ of

mandamus from the Court of Queen's Bench for the examination of witnesses, under the provisions of the statute 13 Geo. 3. c. 63. s. 40. Such writ was directed to the Chief Justice and other Judges of the Court, commanding them to hold a court for such examination. The return made by the Chief Justice and one other Judge shewed that the Court was held by them only:—Held, that the writ in this respect was properly executed.

It appeared from the return, that the witnesses were sworn, that the original examinations were taken by the sworn officers in open court and in writing, and subsequently transcribed upon parchment in the Crown Office at Madras (by whom it did not appear), that the parchment writings were carefully collated and compared by the sworn officers with the originals, and such parchment writings were annexed to the return, which stated them to be the examinations:—Held, that this was a substantial compliance with the directions of the statute 13 Geo. 3. c. 63. s. 40, and that such examinations were receivable in evidence. *Regina v. Douglas*, 16 Law J. Rep. (n.s.) Q.B. 417; 13 Q.B. Rep. 42.

A return to a mandamus, to give compensation to the late clerk of the peace for the borough, who had been removed without misconduct, stating that by an agreement verbally made between the officer and the defendants, he would be replaced at an increased salary, to commence from the date of his dismissal, and that he had received such increased salary, and accepted it as an absolute compensation for loss, &c., held bad: such agreement could only bind the corporation when made under seal. *Regina v. Mayor, &c. of Stamford*, 6 Q.B. Rep. 433.

Where a mandamus was issued to Justices commanding them to issue a distress warrant against G for non-payment of the poor-rate, the Court refused, in the exercise of the discretion given by the 1 Will. 4. c. 21. s. 4, to permit G to make the return, and conduct the proceedings in the names of the Justices, no substantial objection being made by him to the rate, and his conduct in opposing it not appearing to be *bonâ fide*. *Regina v. Cheek*, 16 Law J. Rep. (n.s.) M.C. 65; 9 Q.B. Rep. 942.

A writ of mandamus, in setting forth the title and qualification of L to have his name inserted in the burgess roll, alleged, *inter alia*, in the terms of the statute 5 & 6 Will. 4. c. 76. s. 9, that he had paid all such rates (including therein all borough rates directed to be paid under the provisions of that act,) as had become payable by him. The return traversed this allegation in its terms:—Held, on demurrer, that the return was good. *Regina v. Mayor of Dover*, 17 Law J. Rep. (n.s.) M.C. 75; 11 Q.B. Rep. 260.

A defendant is entitled on demurrer to a traverse of facts stated in the return to impeach the validity of the writ; (affirming the judgment of the Court of Queen's Bench, on error in the Exchequer Chamber). *Clarke v. Leicester and Northampton Canal Co.*, 6 Q.B. Rep. 898.

A writ of mandamus can only be tested in term time.

But the Court will, in its discretion, amend the writ, if improperly tested in vacation, after return has been made to it. *Regina v. Conyers*, 15 Law J. Rep. (n.s.) Q.B. 800; 8 Q.B. Rep. 981.

(C) COSTS.

A Court of Quarter Sessions dismissed an appeal, upon a frivolous objection taken by the respondents to the notice of appeal; and a rule *nisi* for a mandamus to the Sessions to hear the appeal being afterwards obtained, cause was shewn against it by the respondent parish, the Justices not taking any part in the proceedings. The mandamus having been issued and obeyed, the Court, under the 1 Will. 4. c. 21. s. 6, ordered the respondent parish to pay the costs. *Regina v. Justices of Surrey*, 15 Law J. Rep. (N.S.) M.C. 117; 9 Q.B. Rep. 37.

The general rule that an unsuccessful party must pay the costs, is applicable to cases where the party who has obtained an erroneous decision in his favour at the Quarter Sessions unsuccessfully opposes the issuing a writ of mandamus to correct such decision. This Court, however, may, in the exercise of its general jurisdiction, make an exception under particular circumstances.

Semble—that if no opposition were offered to the application for the mandamus, costs would not be incurred. *Regina v. Justices of Cumberland, Regina v. Justices of Lancashire*, 17 Law J. Rep. (N.S.) M.C. 133; 5 Dowl. & L. P.C. 430.

It is well settled, as a general rule, that where a party appears in opposition to a mandamus, and supports an objection which turns out to be untenable, he must pay the costs of the mandamus, under the 1 Will. 4. c. 21. s. 6. *Regina v. Justices of Surrey*, 19 Law J. Rep. (N.S.) M.C. 171.

Where a party unsuccessfully opposes a rule for a mandamus to set right the Sessions, who have wrongly decided a matter in his favour, he will in general be made to pay the costs of the mandamus, unless, perhaps, the matter is wrongly decided by the Court itself, uninfluenced by any improper objection on his part.

On an application for a rule for the payment of such costs, it is not necessary that a demand of the costs from the opposite party should have been previously made. *Regina v. Justices of Cheshire*, 5 Dowl. & L. P.C. 426.

MARKETS.

[See FAIRS AND MARKETS.]

King Charles I., in 1639, granted to H, his heirs and assigns, a market at E, with all tolls and profits. By indenture in 1646, between H of the one part, and four persons therein named, described as all of E, yeomen and bye-law men for the present year, on behalf of themselves and the inhabitants of E, of the other part, after reciting the charter of 1639, the four bye-law men, in consideration of the charge H had been at in procuring the said market, did grant to H a court house, with the waste lands adjoining the market-place, together with the market-place in E; H, in the same deed, covenanted that the four persons and the inhabitants aforesaid, their heirs and assigns for ever, should have a free market in E, toll free. In an action of debt for stallage, brought by the plaintiff, claiming under H, against the defendant as an inhabitant,—Held, in the absence of any proof of the existence of a market prior to 1639, that non-pay-

ment of tolls by the inhabitants since 1646 was no evidence of their exemption by immemorial customary usage. *Lockwood v. Wood*, 15 Law J. Rep. (N.S.) Q.B. 36; 6 Q.B. Rep. 67, n.

A party entitled to sell goods in a market has a right to place them on the soil of the market in the usual baskets, &c. that are necessary for containing them.

Trespass for taking goods, to wit, potatoes, baskets, &c. Fifth plea, that one M T was possessed of a close, part of May Day Green, and because the goods were wrongfully upon it, incumbering it, and doing damage, the defendants, as servants of M T, seized the goods, &c. Replication, that a market had been used to be held in the close in which, &c. for the sale of provisions; and that the plaintiff brought into the close the potatoes and the baskets necessary for containing them, being no inconvenience to the holding of the market. Rejoinder, that A, being seised in fee of May Day Green and of the market, demised the said close and the other parts of May Day Green from year to year to W, the defendant; that W demised the close for half a year to M T, for erecting a stall, the said close so being part of May Day Green, not being an unreasonable quantity of land for that purpose, and there being sufficient ground left for others; that the plaintiff against the will of M T set down the goods upon the close, and because they were wrongfully standing on and incumbering the soil, and doing damage, the defendants, as servants of M T, seized them:—Held, that the rejoinder was ill, the right of M T being subject to the plaintiff's right of market. *Townend v. Woodruff*, 19 Law J. Rep. (N.S.) Exch. 315; 5 Exch. Rep. 506.

MARRIAGE.

[See COVENANT, Construction of—PERJURY—SETTLEMENT.]

- (A) VALIDITY OF.
- (B) ARTICLES.
- (C) SETTLEMENT.
- (D) BREACH OF PROMISE OF.
- (E) NULLITY OF.
- (F) MARRIAGE ACT.
- (G) EFFECT OF ON WIFE'S CHOSES IN ACTION.
- (H) CLERGYMAN REFUSING TO PERFORM MARRIAGE.

Marriages of Quakers and Jews solemnized before the 1st of July, 1837, declared valid by the 10 & 11 Vict. c. 58; 25 Law J. Stat. 198.

The marriage of British subjects resident in foreign countries facilitated by the 12 & 13 Vict. c. 68; 27 Law J. Stat. 94.

(A) VALIDITY OF.

The 5 & 6 Will. 4. c. 54. renders absolutely void all marriages solemnized after the time of its passing between persons within the prohibited degrees, and which were previously voidable only by sentence of the Ecclesiastical Court pronounced during the life of both parties.

Therefore a marriage with a deceased wife's

sister contracted after the passing of that act is absolutely void.

The "prohibited degrees of consanguinity and affinity," in the 5 & 6 Will. 4. c. 54. refer to the decisions of the Ecclesiastical Courts at that time.

"The degrees prohibited by God's law" in the 32 Hen. 8. c. 38. are those enumerated in the 25 Hen. 8. c. 22, and the 28 Hen. 8. c. 7. *Regina v. Chadwick*, 17 Law J. Rep. (N.S.) M.C. 33; 11 Q.B. Rep. 173.

A marriage in an interest suit, pleaded to have been lawfully solemnized in a British possession, according to the rights and ceremonies of the Church of England, by a priest in holy orders of that church, in the parish church of which he then was the minister, in pursuance of a licence for that purpose first duly obtained, held to be *prima facie* valid, and to be sufficiently pleaded; and that it was for the opposing party to plead and prove the invalidity of the marriage.

The marriage was subsequently pleaded to be invalid, as had contrary to the *lex loci*, but after evidence taken, the Court pronounced for the marriage, with costs. *Ward v. Dey*, 1 Robert. 759.

(B) ARTICLES.

Where marriage articles provide *simpliciter* for the limitation of the wife's property to herself and her husband successively for life, with remainder to their children, with remainder over to strangers, the Court would *prima facie* order the insertion in the settlement of a power of appointment to the wife in default of children; and it would be the duty of counsel preparing a settlement under similar instructions to insert such a power, or, at least, to call the attention of the parties to the propriety of introducing it. *Harbidge v. Wogan*, 5 Hare, 258; 15 Law J. Rep. (N.S.) Chanc. 281.

The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon.

The Court, in decreeing specific performance of such articles, does not inquire into the cause of the separation.

The stopping of a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation; and so, it seems, is a covenant by a third party to pay his debts.

Seemle—that the Court, after decreeing specific performance of the articles, may restrain the wife, as well as the husband, from proceeding in the suit for nullity. *Wilson v. Wilson*, 1 H.L. Cas. 538.

In March 1837, T S H died intestate as to his real estate, and indebted to an amount far exceeding his personal estate, leaving Mary S H his only child and heiress-at-law. In August 1837, Mary S H, then a minor, married the defendant Insall, and, previously to the marriage, articles were executed, by which Mary S H and Insall covenanted to settle the descended estates for the benefit of herself, her intended husband, and children; and by the articles it was provided that the parties thereto might at any time within six months after Mary S H came of age, vary all or any of the limitations agreed to be made, and that in the settlement to be made should be contained a power of revocation and new appointment. Mrs. Insall attained her age in

January 1839, and in May 1840 a settlement was executed, purporting to be in pursuance of the articles, and containing a power of revocation, and two days afterwards the power was exercised in providing for the debts of T S H. In September 1840, Mrs. Insall died, and in 1844, a suit was instituted by a child of the marriage, impeaching the deeds of May 1840, and in that suit, to which no creditor of T S H was a party, it was held, that the settlement (except as to the legal estate) was invalid, and that the property was bound by the trusts of the articles. In a creditors' suit, instituted in 1844, it was held, that the descended estates comprised in the articles were assets available for the payment of the debts of T S H. *Pimm v. Insall*, 17 Law J. Rep. (N.S.) Chanc. 374; 7 Hare, 193; affirmed, 19 Law J. Rep. (N.S.) Chanc. 1; 1 Mac. & G. 449; 1 Hall & Tw. 487.

(C) SETTLEMENT.

J B I and E B were not possessed of any property, but, upon their marriage, articles of settlement were entered into, by which it was agreed that all the property which E B was then or might thereafter become entitled to should be settled for such purposes as E B should appoint, and in default of appointment for her separate use for life, with remainder to her husband for life, with remainder to the children of the marriage; and it was agreed that the settlement should contain a covenant by the husband, that all the property which he or his wife should thereafter become entitled to, should be settled upon similar trusts. At that time the husband was greatly indebted, and a short time afterwards he took the benefit of the Insolvent Debtors Act. His brother afterwards died, and as his heir-at-law and one of the next-of-kin, the husband became entitled to real and personal estate of considerable value. The official assignee then gave notice to all parties of the insolvency; and it was, upon a bill filed by the wife against the assignee, to establish the articles of settlement, held, that the property, to which the husband became entitled from his brother, was subject to the provisions in the articles, and though in the hands of the assignee, it was not liable to pay the creditors of the husband.

Held, also, that as the assignee was a necessary party to the suit instituted for the convenience of the trustees to establish the settlement, he was, as he had caused no unnecessary expense, entitled to his costs. *Hardy v. Green*, 18 Law J. Rep. (N.S.) Chanc. 480; 12 Beav. 182.

(D) BREACH OF PROMISE.

Declaration, that in consideration that the plaintiff had promised to marry the defendant, the defendant promised to marry her within a reasonable time next after he should be thereunto requested so to do. Averment, that the plaintiff was always ready and willing to marry the defendant. Breach, that the defendant wrongfully married another woman, contrary to his promise. Plea, that the defendant was never requested by the plaintiff to marry her:—Held, on special demurrer, that the plea was bad, and that the declaration was good, as the marriage of the defendant to another woman was a breach of his contract with the plaintiff, by

which he dispensed with the condition precedent of a request on her part. *Short v. Stone*, 15 Law J. Rep. (n.s.) Q.B. 143; 8 Q.B. Rep. 358; 3 Dowl. & L. P.C. 580.

A declaration in an action for a breach of promise of marriage stated that the defendant promised the plaintiff to marry her, that the plaintiff was ready and willing to marry him, but that the defendant married another woman. Plea, that the defendant was not requested by the plaintiff to marry her:—Held, on special demurrer, that the plea was bad; and that the defendant having pleaded over, the declaration was good without the averment of the lapse of a reasonable time.

Semble—that the declaration would have been good, even on special demurrer. *Caines v. Smith*, 15 Law J. Rep. (n.s.) Exch. 106; 15 Mee. & W. 189; 3 Dowl. & L. P.C. 462.

A declaration averred, that in consideration that the plaintiff being unmarried, at the request of the defendant, promised the defendant to marry him within a reasonable time, defendant promised plaintiff to marry her within a reasonable time; that the plaintiff, confiding in the defendant's promise, has hitherto remained unmarried, and has always been ready to marry the defendant until she had notice that he was a married man. Breach, that the defendant has not married the plaintiff, but on the contrary, at the time the defendant made his promise he was married and still is married to another woman. The plaintiff obtained a verdict. On motion to arrest the judgment,—Held, that the declaration shewed a sufficient consideration.

Also that the defendant's promise was not unlawful; there being at the time the promise was made a possibility of performance, as the defendant's wife might have died within "a reasonable time."

Also that the allegation that the plaintiff remained unmarried for a reasonable time was a sufficient consideration, as being a prejudice to her caused by the conduct of the defendant. *Wyld v. Harris*, 18 Law J. Rep. (n.s.) C.P. 297; 7 Com. B. Rep. 999.

(E) NULLITY OF.

A young lady, eighteen years of age, entitled to considerable property, her parents being dead, having been passing her vacation at the house of one of the executors named in her father's will, whom she considered as her guardian, was induced by his brother, who was residing in the same house, and was fifty-two years of age, to promise to marry him; she withdrew that promise a few days afterwards, but was importuned again and prevailed upon to renew it, and the marriage was celebrated without the knowledge of any of her friends, upon a false statement made by him of her age and residence in the publication of the banns and in the register of the marriage. There was no cohabitation nor consummation of the marriage, as she alleged. She, after a few days, went to a friend's house, and by his advice applied for an act to annul the marriage, the same being considered valid in law:—Held, that it did not appear by the evidence, that the marriage was not solemnized with the free consent of the lady, and that the case made was not such as to justify legislative interference. *In re Field's Marriage Annuling Bill*, 2 L.H. Cas. 48.

DIGEST, 1845—1850.

A marriage had in New South Wales (before a Presbyterian minister), where there was a fact of consent between the parties to become husband and wife,—Held, to be a valid marriage notwithstanding a non-compliance with the provisions of a local act, in which there were no words constituting a nullity, and that the husband was entitled to a sentence of divorce by reason of the adultery of the wife. *Catterall v. Catterall*, 1 Robert. 580.

Allegation on behalf of a woman, responsive to a libel of nullity of marriage by reason of bigamy, pleading deception, fraud and cognizance by the man of the existence of the husband of the first marriage at the date of the second fact of marriage, rejected.

Misconduct, however gross, of a party proceeding, by reason of bigamy, is no bar to a sentence of nullity. *Miles v. Chilton*, 1 Robert. 684.

(F) MARRIAGE ACT.

The 23rd section of the Marriage Act, 4 Geo. 4. c. 76, directs that the property of the wife shall be so settled under the direction of the Court, that the offending party shall derive no pecuniary benefits "from the marriage." In a settlement executed under the Court in pursuance of that section, the terms were, that if the wife died before her husband, leaving children, the whole was to go to the children. If there were no children then she was to have a power of appointment, by will only in the lifetime of her husband, but by deed or will after his death. If she survived her husband and there were children, then she was to have a power of appointment over one third, and the rest was to be settled on her children. *Attorney General v. Lucas*, 18 Law J. Rep. (n.s.) Chanc. 100; 17 Law J. Rep. (n.s.) Chanc. 382.

(G) EFFECT OF ON WIFE'S CHOSES IN ACTION.

Marriage does not operate as an assignment to a husband of a judgment recovered by his wife *dum sola*, by virtue of the Irish Act, 9 Geo. 2. c. 5, passed for the more effectual assigning of judgments, amended by the 25 Geo. 2. c. 14, and made perpetual by the 12 Geo. 3. c. 19. s. 3.

An examined copy of the enrolment of the memorial is good evidence of an assignment under the 9 Geo. 2. c. 5. *Fitzgerald v. Fitzgerald*, 19 Law J. Rep. (n.s.) C.P. 126; 8 Com. B. Rep. 592.

(H) CLERGYMAN REFUSING TO PERFORM MARRIAGE.

A man and a woman, who had obtained a registrar's certificate for marriage without a licence, called on the clergyman of the parish at his house, after nine o'clock in the evening, and requested him to appoint a time for marrying them on or before a certain day, by which the certificate would have ceased to be available. He said he would not marry them unless the man, who had not been confirmed, expressed a willingness to be confirmed:—Held, that assuming a refusal to marry to be an indictable offence, no indictment could be maintained in this case against the clergyman, since the parties had not demanded and tendered themselves to be married by him, at a time or place at which he could legally have been called upon to perform the ceremony.

Seemle—that the indictment should have averred that the parties were persons who could lawfully intermarry. *Regina v. James*, 19 Law J. Rep. (N.S.) M.C. 179; 2 Den. C.C. 1.

MARSHALLING.

In 1844, a person mortgaged some household furniture, fixtures, stock in trade, and personal chattels, but was permitted by the mortgagee to remain in possession of them. In August 1847 all the property in the mortgagor's house, consisting partly of property included in the mortgage, and partly of property belonging to the mortgagor absolutely, was distrained by the direction of his landlord. The mortgagee thereupon directed the bailiff to hold the goods included in the mortgage as his bailiff. A part of the goods so distrained was sold, and satisfied the landlord's claim. After this sale the mortgagor became bankrupt:—Held, that the mortgagor was entitled as against the assignees to the benefit of the doctrine of marshalling, so as to throw the landlord's debt exclusively on the property not subject to the mortgage. *Ex parte Stephenson re Stephenson*, 17 Law J. Rep. (N.S.) Bankr. 5.

MASTER AND SERVANT.

[See NEGLIGENCE—POOR, Settlement—PRINCIPAL AND AGENT.]

- (A) CONTRACT OF HIRING AND SERVICE.
- (B) TRUCK ACT.
- (C) LIABILITY OF MASTER FOR ACT OF SERVANT.
- (D) OFFENCES BY SERVANTS.
- (E) DISCHARGED SERVANT.
 - (a) *Remedy for Wages.*
 - (b) *When Wages not apportionable.* [See (A).]
 - (c) *Pleading and Evidence in Action for Wages.*

(A) CONTRACT OF HIRING AND SERVICE.

The plaintiff declared on a contract by the defendant to employ the plaintiff in his service until the service should be determined by due and reasonable notice, and alleged as a breach, that the defendant wrongfully dismissed him without notice; with a count for work and labour. The defendant pleaded to the special count, that the plaintiff misconducted himself by refusing to work, and that the defendant discharged him; and he also pleaded to that count, that the defendant, in consequence of the plaintiff's misconduct in absenting himself, summoned him before a magistrate under the statute 4 Geo. 4. c. 34; and that the magistrate discharged him. The proof was, that the plaintiff was hired generally as an agricultural labourer, and left work before eight o'clock on a particular day because beer was not supplied, and that he was on the following day taken before a magistrate, who ordered his discharge from service:—Held, that the hiring being general, the defendant was entitled to a verdict on the first count on the ground of variance.

Held, secondly, that the defendant was entitled to a verdict on both the special pleas, though the jury did not find that the plaintiff wrongfully absented himself; and lastly, that the facts stated in those pleas being proved, the plaintiff was not entitled to recover on the count for work and labour. *Lilley v. Elwin*, 17 Law J. Rep. (N.S.) Q.B. 132; 11 Q.B. Rep. 742.

A contract whereby an infant agreed to enter into the service of a master for twelve months, at certain weekly wages, and to serve him at all times during that term, and to work fifty-eight hours a week, contained a proviso, that in case the steam-engine should be stopped from accident, or any other cause, the master might retain all wages of the servant during that time:—Held, that the agreement was void against the infant, and that a conviction for absenting himself from such service could not be supported. *Regina v. Lord*, 17 Law J. Rep. (N.S.) M.C. 181; 12 Q.B. Rep. 757.

(B) TRUCK ACT.

The deductions made either by the master manufacturer, or by the undertaker or middleman who rents frames of such master manufacturer, from the workmen or artificers employed by him, in respect of frame-rent, winding, and a poundage compensation of 1d. in 1s. for every 1s. above 14s. per week earned by such workman or artificer, the balance being paid in money to such workman or artificer, is not a payment of the portion so deducted to the workman, of a portion of his wages in goods, or otherwise than in the current coin of the realm, within the 1 & 2 Will. 4. c. 37. Held, also, that there was not in this case any demise of a "tenement" within section 23; and *quære*, whether there was a demise of anything at a rent therein reserved, within that clause. *Chawner v. Cummins*, 15 Law J. Rep. (N.S.) Q.B. 161; 8 Q.B. Rep. 311.

(C) LIABILITY OF MASTER FOR ACT OF SERVANT.

Where servants in the performance of their ordinary work for their master use the implements of another person, without the leave of the owner or any direction from their master, and injure them, and the owner seeks a compensation from the master for the wrongful act of his servants, the proper form of action is case, not trespass. *Gordon v. Rolt*, 18 Law J. Rep. (N.S.) Exch. 432; 4 Exch. Rep. 365.

(D) OFFENCES BY SERVANTS.

No other instrument is necessary to authorize the detention of a servant sentenced by a magistrate to imprisonment and hard labour for an offence under the 4 Geo. 4. c. 34. s. 3. than a warrant of commitment, founded on a sufficient information; and the legality of the imprisonment must depend on the legality and sufficiency of that instrument alone.

Seemle—that such an instrument is an order, and not a conviction.

Whether such an instrument is to be construed less strictly, as an order, or more strictly, as a conviction, it is bad if it does not shew on the face of it, either that the contract between the master and servant was in writing, in which case a failure to enter into the service is an offence under the act, or

that the servant had entered into the service, in which case it is an offence in the servant to absent himself from his service, although the contract is not in writing. *Lindsay v. Leigh*, 17 Law J. Rep. (N.S.) M.C. 50; 11 Q.B. Rep. 455.

(E) DISCHARGED SERVANT.

(a) *Remedy for Wages.*

A menial servant, who has been discharged without cause, cannot, under the common *indebitatus* count for wages, recover wages for the month subsequent to his discharge. He ought to declare specially. *Fewings v. Tindal or Tisdal*, 17 Law J. Rep. (N.S.) Exch. 18; 1 Exch. Rep. 295.

The plaintiff was hired by the defendant at a yearly salary, payable quarterly, and was wrongfully dismissed by the plaintiff in the middle of a quarter. He then brought an action against the defendant, declaring in a special count for breach of the agreement, and in *indebitatus assumpsit* for the wages due for the year during which he had actually served. The plaintiff in this action recovered the wages for the year, and also on the special count damages for the dismissal, but the jury expressly omitted to give any damages for the broken quarter. He afterwards brought *indebitatus assumpsit* for work and labour to recover a proportional part of the quarter's salary up to the day of dismissal:—Held, that the second action could not be sustained, as he had by the previous action elected to treat the contract as existing, and had recovered damages for its non-performance, and could not afterwards treat it as rescinded, and recover on a *quantum meruit*.

Held, also, that this defence was open under *non assumpsit*, as, under the circumstances, no debt had accrued.

The damages in the former action should have been calculated to include the wages for the broken quarter. *Goodman v. Pocock*, 19 Law J. Rep. (N.S.) Q.B. 410; 15 Q.B. Rep. 576.

(b) *When Wages not apportionable.*

[See (A) CONTRACT OF HIRING.]

(c) *Pleadings and Evidence in Actions for Wages.*

In an action for dismissing a servant, a plea that the defendants did not wrongfully, without reasonable or probable cause, dismiss the plaintiff in manner and form, &c., puts in issue only the fact of dismissal; and affirmative evidence is not admissible under it for the purpose of shewing that there was reasonable cause for the dismissal. *Powell v. Bradbury*, 18 Law J. Rep. (N.S.) C.P. 116; 7 Com. B. Rep. 201.

To an action for the wrongful dismissal of a servant, the defendants pleaded in justification that the plaintiff had been guilty of various acts of misconduct, which were specified in the plea, and that by reason of the premises they had dismissed him:—Held, that the replication, *de injuria*, only put in issue the misconduct, and not whether it was known to the defendants at the time of the dismissal. *Spotswoode v. Barrow*, 19 Law J. Rep. (N.S.) Exch. 226; 5 Exch. Rep. 110.

A declaration in *assumpsit* against the defendant for dismissing the plaintiff, his servant, during the

period for which he was employed, stated that the defendant refused to permit the plaintiff to continue in his service during the said period, and wrongfully dismissed him without reasonable cause. Plea, that the plaintiff disobeyed the defendant's orders, without this that the defendant dismissed him *without reasonable cause*, concluding to the country. The dismissal having been admitted at the trial, the Judge refused to receive evidence, on the part of the defendant, of the reasonable cause of the dismissal, being of opinion that the dismissal alone was in evidence, and accordingly directed a verdict for the plaintiff:—Held, that the direction was wrong; that, although the averment in the declaration of reasonable cause was immaterial, and the plea was specially demurrable in putting it in issue, yet issue having been joined thereon, the question of reasonable cause was essential to the determination of that issue. *Lush v. Russell*, 19 Law J. Rep. (N.S.) Exch. 244; 5 Exch. Rep. 203.

MERCHANT SEAMAN'S ACT.

[See PENALTIES.]

MERGER.

[See DEED—LIMITATIONS, STATUTE OF.]

METROPOLIS.

(A) PAVING ACT.

(B) POLICE ACTS.

The act for the construction and use of buildings in the metropolis, 7 & 8 Vict. c. 84, amended by the 9 Vict. c. 5; 24 Law J. Stat. 46.

The office of Registrar of public Carriages consolidated with the Commissioners of Police by the 13 Vict. c. 7; 28 Law J. Stat. 10.

Provisions for the interment of the dead in and near the metropolis by the 13 & 14 Vict. c. 52; 28 Law J. Stat. 89.

(A) PAVING ACTS.

Ashes falling from the furnace of a brass-founder, and containing particles of metal, were by him subjected to a process whereby a portion of the metal was extracted. The residue having been given by him to his apprentices as a perquisite, was by them sold to a brass-refiner, for the purpose of extracting a further quantity of metal. The plaintiff, who was employed by the brass-refiner, whilst in the act of conveying the ashes from the brass-founder's premises for this purpose, was apprehended by the defendant under the Metropolitan Paving Act, 57 Geo. 3. c. 29, which gives the power of apprehending all persons who, not being employed by or contracting with the Commissioners under the act, shall carry away any "dust, cinders, or ashes," within the district:—Held, that the ashes in question were not "dust, cinders, or ashes" within the meaning of the act of parliament.

The 136th section of that act enacts that no action shall be brought against any person for anything done in pursuance of the act until after twenty-one days' notice in writing; and "if it shall appear that such action was brought before twenty-one days' notice was given," the jury shall find a verdict for the defendant:—Held, that the defendant could not avail himself of a want of notice of action without specially pleading it. *Law v. Dodd*, 17 Law J. Rep. (N.S.) M.C. 65; 1 Exch. Rep. 845.

(B) POLICE ACTS.

County magistrates who, acting under the 3 & 4 Vict. c. 84. s. 6, convict a party of an offence under the 2 & 3 Vict. c. 71, are entitled to the privileges of a metropolitan police magistrate, under the last-mentioned statute, and, therefore, to the same limitation of three months upon any action against them, which a police magistrate would have had.

The Metropolitan Police Acts are not local and personal acts, or acts of a local and personal nature, within the statute 5 & 6 Vict. c. 97. *Barnett v. Cox*, 16 Law J. Rep. (N.S.) M.C. 27; 9 Q.B. Rep. 617.

A metropolitan police magistrate, sitting alone, has jurisdiction to hear and determine an information by the auditor of a metropolitan poor-law district, for non-payment of disbursements regularly disallowed, and surcharged by such auditor, and certified to the Poor-Law Commissioners under the 7 & 8 Vict. c. 101. s. 32, where such information is laid within nine calendar months from the time of the disallowance, as required by the 12 & 13 Vict. c. 103. s. 9, although not until after the limitation of six calendar months mentioned in the 2 & 3 Vict. c. 71. s. 44. has expired. *Regina v. Tyrwhitt*, 19 Law J. Rep. (N.S.) M.C. 249; 15 Q.B. Rep. 249.

By the statute 10 Geo. 4. c. 44. s. 10. (the Metropolitan Police Act) a receiver for the metropolitan police district is to be appointed, who is to receive all monies applicable to the purposes of that act and to pay thereof all salaries, &c. to the police force, and all other charges and expenses in carrying that act into execution; and by section 37. all sums adjudged by Justices to be paid for offences against the act are to be paid to the receiver, to be applied as part of the funds for the purposes of the police. By the 2 & 3 Vict. c. 47. a portion of all penalties adjudged by any magistrate, whether sitting at a police court or not, within the police district, are to be paid to the receiver for the purposes of the act. By the 2 & 3 Vict. c. 71. police courts are established, and the receiver of the metropolitan police district is to receive all fees, &c. applicable to the purposes of this act, and is to pay all the expenses and charges attending the courts and in carrying the act into execution. In an action by the receiver against the clerks to Justices acting for a part of the metropolitan police district for which no police court had been established, for monies payable to him as receiver under the above acts, the defendants claimed to retain against him the fees payable for summonses, &c. applied for by police constables acting under the directions of the Commissioners of Police, and to which they were entitled under a table of fees sanctioned as required by the 26 Geo. 2.

c. 14:—Held, that the defendants were entitled to demand these fees from the constables applying for the summonses, &c., but that they had no right to retain them as against the receiver out of the monies payable to him under the provisions of the above acts. *Wray v. Chapman*, 19 Law J. Rep. (N.S.) M.C. 155.

MINE.

[See VENDOR AND PURCHASER.]

(A) RIGHTS AND DUTIES OF OWNERS OF MINES.

(a) *As regards adjoining Mines.*

(b) *Right of Action.*

(1) *For Consequences of wrongful Excavation.*

(2) *Against the Hundred.*

(c) *Under Local Custom.*

(B) AUTHORITY AND LIABILITY OF DIRECTORS AND MANAGERS.

(C) MINING LEASES.

An act for the inspection of coal mines, 13 & 14 Vict. c. 100; 28 Law J. Stat. 296.

(A) RIGHTS AND DUTIES OF OWNERS OF MINES.

(a) *As regards adjoining Mines.*

Each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, has a right to work his own mine in the manner most convenient and beneficial to himself, although the natural consequences may be that some prejudice will accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party.

The plaintiff and the defendant occupied adjoining collieries. A predecessor of the defendant, but with whom he had no privity, committed a trespass, and made holes, called "thyrilings," in a barrier (of coal belonging to the plaintiff) which separated the two collieries. The defendant, in working his mine, broke down a seam of coal of his own, and the consequence was, that the water flowed from his mine into the plaintiff's through the "thyrilings":—Held, that there was no duty incumbent on the defendant to prevent the water from flowing from his mine into the plaintiff's. *Smith v. Kenrick*, 18 Law J. Rep. (N.S.) C.P. 172; 7 Com. B. Rep. 515.

(b) *Right of Action.*

(1) *For Consequences of wrongful Excavation.*

Case, for breaking and entering a coal mine whilst in possession of S, and before the plaintiffs were possessed of it, and getting coal therefrom, and causing an aperture to be made therein, and the declaration alleged that though the defendant, after the plaintiffs became possessed of the mine, was requested to stop up the aperture, yet he had neglected to do so, whereby water deluged and damaged the plaintiffs' mine. Plea, that H, the former owner of the plaintiffs' coal mine, brought an action on the case against the defendant for breaking and entering the mine, in possession of S, and making excavations, and carrying away coal

therefrom, and thereby injuring his reversionary estate, and that several sums were on that occasion awarded and paid to H and to S, and to the plaintiffs, in respect of the injuries sustained by them respectively by the matters in the declaration in that cause alleged, and that the breaking and entering in the present action was part and parcel of the grievances in the said action of H mentioned, and in respect of which such damages were awarded, and that the same were so awarded and paid in respect of such damages and all consequential damages to arise or happen in consequence thereof. The plaintiffs new assigned that the defendant, after the commencement of the first action, and after the making of the award in the plea mentioned, kept and continued the aperture open and unfilled up and neglected to divert or turn off the water, whereby it flowed into the plaintiffs' mine. To the new assignment the defendant pleaded the action brought by H, and the award in his favour, and averred that the grievances newly assigned were merely consequential damages arising to the plaintiffs by reason of the matters and injuries in the declaration in the said action by H alleged. The plaintiffs set out the award, and replied *absque hoc*, that the damages were consequential damages, arising to the plaintiffs by reason of the matters and injuries in the declaration in the action by H alleged. At the trial it was proved that the coal mine was demised to the plaintiffs by S, in 1839, and that at that time H was mortgagee, S being mortgagor in possession, and that before the demise to the plaintiffs the defendant broke and entered and took away the boundary coal; that in 1840 the plaintiffs worked the mine till they came to the place where the excavations were made by such breaking and entering, and the water came in and continued to flow in ever since; that according to the custom of mining the defendant, whose mine was on the rise, had a right to work to the extremity of his mine without leaving any barrier. It further appeared that, in 1841, H, the mortgagee, brought an action against the defendant for the breaking and entering above mentioned, and that the cause was referred to an arbitrator, with liberty to the now plaintiffs and S to become parties to the reference; that substantial damages were awarded to H and the now plaintiffs, and nominal damages to S:—Held, that on the above facts, the defendant was entitled to a verdict on not guilty, and on the issue raised on the plea to the new assignment. *Clegg v. Dearden*, 17 Law J. Rep. (N.S.) Q.B. 233; 12 Q.B. Rep. 576.

(2) *Against the Hundred.*

The lessees of a mine constructed a wooden trough, by means of which water was conveyed from a distance to a pool half a mile distant from their mine, being as near as the nature of the ground would admit of. The water so brought was used for the purpose of washing the ore obtained from the mine:—Held, in an action by the lessees against the hundred for the felonious destruction of such trough, that it was an "erection used in conducting the business" of the plaintiffs' mine within the meaning of the 7 & 8 Geo. 4. c. 31. s. 2. *Barwell v. Hundred of Winterstoke*, 19 Law J. Rep. (N.S.) Q.B. 206.

(c) *Under Local Custom.*

A custom for a miner or bounder to enter and work land, in search of minerals, (such working not having been commenced or prosecuted by the owner or other person), rendering a portion of the produce to the lord or owner of the soil, and giving due notice of his proceedings, is not an illegal or unreasonable custom; and the interest so acquired by virtue of the custom is, if the bounder continues in possession and works the mine, such an interest in the mine as may be recovered in ejectment; but such customary right cannot exist unless there be a *bond fide* continuing by the bounder to search for ore: and, therefore, where the plaintiff declared on his possession of a certain "tenement," to wit "the right to dig and get ore found and being within certain tin bounds," and charged the defendant with disturbing him, and carrying away the ore, &c.,—Held, that although the statement of the plaintiff's right might properly describe that which existed when he first took possession of the bounds under the custom, yet in order to make out his right as claimed he must shew a *bond fide* continuing to work the mine, and that the annual renewal by new cutting the turves, however useful for ascertaining the limits, could not be considered as equivalent to such working.

Held, also, that such a claim was to be tried as a custom limited in local extent, and not as the local law of a particular district. *Rogers v. Brenton*, 17 Law J. Rep. (N.S.) Q.B. 34; 10 Q.B. Rep. 26.

(B) *AUTHORITY AND LIABILITY OF DIRECTORS AND MANAGERS.*

A certain number of persons formed themselves into a company or association, to raise a fund for working mines in America, and 6,000*l.* was subscribed in shares of 100*l.* each. The deed by which the company was formed was dated November 1, 1833, and it provided, that the directors should have the power of creating and issuing new shares from time to time, and that the shares should be assignable. Bills of exchange having been drawn on the company by their agent in America, which they required funds to meet, an agreement, dated December 24, 1835, was entered into by three of the directors with the plaintiffs, for borrowing the sum of 5,800*l.* from them, which sum was accordingly advanced by the plaintiffs. In an action by them against certain of the shareholders, of whom A was one, to recover the sum so advanced,—Held, that the fact of A having, on the 17th of December 1835, attended a special general meeting of the company, at which resolutions were passed relating to the sale of certain of the company's mines, in order to provide for the payment of the bills, was sufficient evidence to go to the jury, to fix him with liability as a shareholder, though A did not sign the deed, nor was he proved to be the proprietor of any shares, or to have attended any other meeting, or to have done any other act in connexion with the company.

Held, also, that his attendance at that meeting, together with the nature of the business transacted at it, shewed sufficient authority in the directors to enter into the contract declared on, on behalf of A and the other shareholders present.

Held, lastly, that the association could not be

considered a nuisance and public grievance at common law, it not having been found such by the jury on the pleas raising that question. *Harrison v. Heathorn*, 12 Law J. Rep. (N.S.) C.P. 282; 5 Man. & G. 322; 6 Sc. N.R. 735.

The defendants agreed by deed to form themselves into a mining company; that one B should be the resident director or manager of the mine; that he should employ workmen, provide all needful implements, materials and machinery, and so direct the mine as most effectually to promote the interests of the company; that he should transmit to the secretary his accounts monthly of the sums paid for wages, salaries, materials, and otherwise, together with a statement of all debts and liabilities due from the company: provided always, that he should not expend or engage the credit of the company for any sum exceeding 50*l.* in any one month, without the express authority, in writing, of the managing directors:—Held, that under this deed B had no authority to bind the company by the acceptance of bills of exchange.

Held, also, that a managing director who was represented at a meeting of directors by proxy was not bound by a resolution of the directors present at such meeting, authorizing the resident director to accept bills for the company. *Brown v. Byers*, 16 Law J. Rep. (N.S.) Exch. 112; 16 Mee. & W. 252.

A, one of many co-adventurers in a mine, assumed the entire management of it, and, without the direction of his co-adventurers, opened an account with a banker in the name of the adventurers, and over-drew that account to a considerable amount. In assumption by the bankers against B and F, two of A's co-adventurers in the mine for the balance of their account,—Held, that there was no implied authority to one adventurer from his co-adventurers in a mine to pledge their credit for money borrowed by him for the purposes of the mine. *Ricketts v. Bennett*, 17 Law J. Rep. (N.S.) C.P. 17; 4 Com. B. Rep. 686.

(C) MINING LEASES.

A lease of alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached:—Held, that the coal pillars could not be removed. *The Earl of Glasgow v. Hurler and Campsie Alum Co.*, 3 H.L. Cas. 25.

To an action of trespass for breaking and entering a coal mine, and carrying away the coals, the defendants pleaded, setting out a deed made between J S of the one part, and Joseph, Matthew, and James J of the other part, whereby J S granted, bargained, sold, and confirmed to Joseph, Matthew, and James J, their executors, &c., all the coal mines, veins and seams of coal of J S under his closes, (naming them), with full and free liberty to them, their executors, &c., at all times during the term thereby granted to dig for and get the same in a fair and workmanlike manner; that in consideration of 420*l.* paid by them to J S, by yearly instalments

until the end of twelve years, they should have the liberty of sinking pits on the said closes for getting coals at any times thereafter during the terms thereinbefore granted; that J S granted to Joseph, Matthew, and James J, their executors, &c., that they, their executors, &c. should enjoy the liberty of getting coals for any time or term of years computing from the time of their beginning to sink until six acres should be gotten, and at the expiration of the term of twelve years, the full quantity of six acres being not then gotten, to have liberty to get the remainder, and when all the coals were gotten to the quantity of six acres, the business of getting coals to be carried on until such time as all the coals in the closes were gotten, paying 70*l.* per acre, &c. Averment, that Joseph, Matthew, and James J entered generally into the coal mines; that they won and dug the six acres before the expiration of the twelve years; that Joseph J died; that James J also died, and devised all his estate in the said coal mines to Robert, James, and William J, whom he appointed his executors, and that they as such devisees elected to take the aforesaid estate by way of use under and by virtue of the statute for transferring uses into possession, and then elected that the said indenture should operate and enure under the said statute, whereupon they became entitled to the said coal mines for the residue of the said term. The plea then alleged an entry of the plaintiffs under colour of a certain demise upon the coal mines, whereupon the defendants, there still remaining eighteen acres of the coals unworked, as the servants of the said executors entered the said coal mine and dug and carried away the said coals:—Held, assuming the grant of the indenture to be a bargain and sale by way of use, that to make it operate under the Statute of Uses an election to that effect was necessary, and that to render such election valid it must have been made not by the executors, but by the bargainees themselves, the survivors or survivor, and therefore that the plaintiffs were entitled to judgment.

Quære—Whether under the present grant, the original parties having discontinued working, their executors could after a considerable lapse of time again enter as if they were the termors, until the whole of the coal had been gotten. *Haigh v. Jaggard*, 18 Law J. Rep. (N.S.) Exch. 125; 3 Exch. Rep. 54.

MISDEMEANOUR.

[See INDICTMENT.]

A bench warrant for the arrest of a defendant on a charge of misdemeanour, concluded thus—"To the end he may become bound, and find sufficient sureties," not stating before whom the prisoner should be taken for the purpose of being bailed:—Held insufficient, and that the Court was bound to discharge the prisoner arrested on such warrant. *Regina v. Downey*, 15 Law J. Rep. (N.S.) M.C. 29; 7 Q.B. Rep. 281.

In all cases of misdemeanour punishable by imprisonment, the Court of Queen's Bench has power to order the defendant to find sureties to keep the peace for a time certain. *Dunn v. Regina*, 18 Law J. Rep. (N.S.) M.C. 41; 12 Q.B. Rep. 1031.

MISTAKE.

[See DEED, Reforming.]

A bill was filed to obtain a re-assignment of some leasehold tenements, which had been assigned to a purchaser for the residue of a term of years to be computed from a specified time. It was afterwards discovered that the term did not commence till several years later, and that the lease would exist for twelve years longer than had been supposed:—Held, that the vendors were not entitled to any relief. *Okill v. Whittaker*, 16 Law J. Rep. (n.s.) Chanc. 454; 2 Ph. 338; 1 De Gex & S. 83.

A declaration of trust as to a sum of stock, proceeding upon a clear mistake of title, as recited in the deed,—Held, not to affect the rights of the party really interested, even though he had executed the deed; no intention appearing on his part to part with his interest in or to deal otherwise with the stock than to join in declaring the trust thereof according to the then presumed state of title. *Ashurst v. Mill*, *Mill v. Ashurst*, 18 Law J. Rep. (n.s.) Chanc. 129; 7 Hare, 502.

MONEY HAD AND RECEIVED.

[See COMPANY, Liability of Promoters—PLEADING—SET-OFF—VENDOR AND PURCHASER.]

- (A) WHEN MAINTAINABLE GENERALLY.
- (B) PRIVACY.
- (C) FAILURE OF CONSIDERATION.
- (D) MONEY ALLOWED BY MISTAKE ON SETTLEMENT OF ACCOUNT.
- (E) MONEY PAID IN IGNORANCE OF FACTS.
- (F) BY TENANT IN COMMON AGAINST CO-TENANT.
- (G) BY ADMINISTRATOR FOR DEBTS DUE TO INTESTATE.

(A) WHEN MAINTAINABLE GENERALLY.

On the 26th of January 1846, the sheriff, under a *fi. fa.*, sued out by the plaintiff, seized the defendant's goods. At the plaintiff's request the sale was deferred. On the 9th of May, the plaintiff paid all expenses up to that date, and then wrote to the officer in possession, "Provided the defendant satisfies all future claims, the sale may be postponed." The officer remained in possession till September, and, after a peremptory order from the plaintiff, sold the goods on the 20th of that month. On being ruled, the sheriff returned, on the 24th of October, that after deducting various sums for expenses (among which was an item of 20*l.* possession money) he had 34*l.* ready to pay to the plaintiff. The plaintiff applied to the Court to order the sheriff to pay him the sum of 20*l.* possession-money, as well as the sum of 34*l.*:—Held, that the plaintiff, by his communications with and directions to the officer, did not thereby discharge the sheriff, and that the proper course to enforce the sheriff's liability was by summary application, and not by an action for money had and received. *Botten v. Tomlinson*, 16 Law J. Rep. (n.s.) C.P. 138.

Defendant, being employed by the owner to sell a certain farm, agreed by memorandum in writing to sell the farm to the plaintiff for 2,700*l.*,

without naming the seller. The plaintiff paid the defendant 100*l.* deposit in part of the purchase-money, and two days afterwards signed a contract for sale by S (the owner) to himself, whereby he agreed to pay on its execution 100*l.* as a deposit, for which S undertook to pay interest till the completion of the purchase. The contract was afterwards rescinded for want of title in S, but the defendant before he had notice of the rescission paid S 50*l.*, retaining the other 50*l.* under an agreement with S to give him (the defendant) half of any amount he might get for the farm above 2,600*l.*, but the retention of the 50*l.* was without the consent of S:—Held, that the plaintiff could not recover in an action against the defendant for any part of the 100*l.* *Hurley v. Baker*, 16 Law J. Rep. (n.s.) Exch. 273; 16 Mee. & W. 26.

The defendants purchased in their own names railway scrip for the plaintiff, deliverable on the 29th of August, for 148*l.* 10*s.*, which sum the plaintiff paid the defendants on the 26th of August. On the 22nd of August the railway company called in the scrip for registration, and the share certificates were not delivered until December, and in the mean time a call was made in respect of the shares, which was paid by the holder. The plaintiff having repudiated the shares, the defendant declined to take them from the holder, and they were sold at a loss exceeding the 148*l.* 10*s.*, and the defendants paid such loss to the holder:—Held, that they being liable to the original holder for such loss, and the plaintiff not having supplied funds to meet the call, an action for money had and received could not be maintained by him against the defendants for the 148*l.* 10*s.* *McEwen v. Woods*, 17 Law J. Rep. (n.s.) Q.B. 206; 11 Q.B. Rep. 13.

Where the defendants agreed to execute certain works, the price to be paid by instalments, but if they made default it was agreed that they should forthwith, on demand, pay to the plaintiffs all the sum advanced; and afterwards being unable to perform them, it was agreed that the plaintiffs should complete them, and as a security to them for any advances they might make beyond the balance due to the defendants, they should have a lien on certain shares of the defendants in the plaintiffs' business:—Held, that the plaintiffs could not recover such advances by action for money paid or money had and received; there being no liability to repay until the ultimate balance was ascertained, and then only after demand. *Royal Mail Steam-Packet Co. v. Acraman*, 2 Exch. Rep. 569.

The plaintiff, a merchant in London, consigned certain cottons to the defendant and his partners, commission agents at Bombay, with directions to sell the same and remit the proceeds to the plaintiff in good bills on London. The goods were accordingly sold by the defendant and his partners in Bombay in August 1847, and produced eight rupees and upwards per piece, but no remittances either in money or bills having been made to the plaintiff, the present action was commenced against the defendant who had come over to England:—Held, first, that the plaintiff was not prevented from recovering in an action for money had and received, by reason of the proceeds having been received not in English but in foreign money. Secondly, that there was no rescinding of the contract on the de-

defendant's part; and that the action for money had and received would not lie. *Ehrensperger v. Anderson*, 18 Law J. Rep. (N.S.) Exch. 132; 3 Exch. Rep. 148.

One partner opened an account in the name of the firm, and, as a commissioner under an act, borrowed money of the bank, undertaking "not to remove his funds to the extent of the advance until it was repaid."—Held, that, assuming that this was a partnership account, the firm could not recover the balance standing to their account in the bank as money received for their use, the advance not having been repaid. *Brownrigg v. Rae*, 5 Exch. Rep. 489.

A mercantile firm at Calcutta, by letter dated the 16th of January 1841, requested the defendants, their correspondents in London, to hold a sum of money, payable on the 19th following, out of remittances and consignments on their general account, at the disposal of the plaintiff, a merchant at Liverpool, and a creditor of the Calcutta firm. On the same day the Calcutta firm wrote to the plaintiff, informing him of the directions they had given to the defendants. On the 12th of March 1841 the defendants wrote to the plaintiff "to advise him of the request of the Calcutta firm," adding—"at the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." On the 14th of March 1841, the defendants wrote to the Calcutta firm, in answer to their letter, that the state of their account would not warrant the defendants in meeting the requisition for the present; but should they be in a position to meet it before November they would do so. By letter on the 8th of January 1842, the Calcutta firm revoked their order for the appropriation of the money:—Held, that the correspondence did not create an absolute contract on the part of the defendants to pay to the plaintiff the amount in question out of the remittances and assignments; and that, consequently, he could not sue them for money had and received for his use. *Malcolm v. Scott*, 5 Exch. Rep. 601.

(B) PRIVACY.

Where the holder of a ticket in a Derby lottery sold it to the plaintiff before the race, and the horse named in it was ultimately declared to be the winner,—Held, that the plaintiff could not sue the defendant, the stakeholder, in an action for money had and received, for the amount to which the holder of the ticket was, by the conditions of the lottery, entitled, there being no privity between them. *Jones v. Carter*, 15 Law J. Rep. (N.S.) Q.B. 96; 8 Q.B. Rep. 134.

In an action for money had and received, brought to recover sums deposited with the defendant as the treasurer of a money club, it appeared that the money had been deposited not by the plaintiff, but by his son, a minor, who was a member of the club, and who had made several payments himself, but had afterwards run away from his service, and the payments were then continued by his sister from money furnished by her mother. There was no

evidence that the defendant knew anything of the plaintiff:—Held, that the proper question for the jury was whether there was any privity of contract between the defendant and the plaintiff, and that a direction that if the money deposited was the money of the plaintiff, he was entitled to recover, was wrong. *Bluck v. Siddaway*, 15 Law J. Rep. (N.S.) Q.B. 359.

A legacy having been left to the plaintiff, the defendant, who acted as agent for the executor, stated, in a letter to a third party, that he would remit the plaintiff's legacy in any way the latter might suggest. He afterwards paid 24*l.* to the plaintiff, having deducted 6*l.* 17*s.* 6*d.* for his trouble and expenses, and, afterwards, sent him an account, stating the reason of the deduction:—Held, that the plaintiff was not entitled to recover this sum in an action for money had and received. *Barlow v. Broune*, 16 Law J. Rep. (N.S.) Exch. 62; 16 Mee. & W. 126.

In an action for money had and received, brought by plaintiff, as administrator of Jane V, against defendant, as executor of Ann V, it appeared that Jane and Ann were sisters, Jane being the elder. The plaintiff's case was, that Jane had lent money to one E, who gave his promissory note for the amount, payable to Miss V. After the death of Ann, who survived Jane, defendant, as the executor of the survivor, sued E upon the note, alleging it to be payable to both sisters jointly, an alteration to that effect having, as it was said, been made in the note. E settled the action, and paid the amount of the note to the defendant:—Held, that the plaintiff could only support this action by affirming the act of the defendant in obtaining payment of a note payable to both sisters, but as he would have no right to receive payment of such a note, an action for money had and received to his use would not lie. *Vaughan v. Matthews*, 18 Law J. Rep. (N.S.) Q.B. 191; 13 Q.B. Rep. 187.

(C) FAILURE OF CONSIDERATION.

Debt for money had and received. Plea, that after the accruing of the debt, the defendant executed an annuity deed granting the plaintiff an annuity, which said writing obligatory the defendant then delivered to the plaintiff, and the plaintiff then accepted and received in full satisfaction. Replication, that no memorial of the said annuity deed was enrolled within thirty days, and that, after the thirty days, part of the annuity became due; that the plaintiff thereupon brought an action on the deed, and that the defendant pleaded that no memorial was enrolled, and that the annuity was therefore void, and the plaintiff thereupon elected that the said indenture should be null and void, and discontinued the action:—Held, on special demurrer, to be a good answer to the plea; and that the plaintiff, by shewing that, by the default or act of the defendant, the annuity deed had become no deed at all, was entitled to recover the original consideration-money for the deed. *Turner v. Broune*, 15 Law J. Rep. (N.S.) C.P. 223; 4 Dowl. & L. P.C. 201; 3 Com. B. Rep. 157.

The defendant having bought a personal chattel at a sheriff's sale, the plaintiff afterwards offered and the defendant accepted 5*l.* for his bargain, and the plaintiff paid the advanced price to the defendant.

Afterwards the chattel was claimed by a third party under a superior title, and the plaintiff was prevented from taking possession of it. Both parties knew that the sale took place under an execution:—Held, that under the circumstances there was no implied warranty of title by the defendant; and that the plaintiff could not recover back the price paid by him, as upon a failure of consideration.

Whether the vendor of a personal chattel is bound to refund the price if he has no title, *quære*. *Chapman v. Speller*, 19 Law J. Rep. (N.S.) Q.B. 239.

An agreement recited that the defendant had, as he was advised, legally put an end to a lease granted to S H of a farm, by entering thereon by reason of the bankruptcy of S H, pursuant to a power in the lease; and it was thereby agreed that the defendant should grant a lease of the farm to the plaintiff at a yearly rent, payable quarterly. The lease was to commence on a day certain, if the defendant could then legally make it, or as soon as he was in a situation to do so; the rent to commence from the commencement of the term, or on possession being given, which should first happen. The plaintiff was to pay the defendant 500*l.* on possession being given to him, as a bonus for the lease so to be granted. The plaintiff was admitted into possession, and occupied the farm for two years, and paid 250*l.* in respect of the bonus. The defendant was unable to grant the lease, the commission of bankruptcy of S H having been superseded. The plaintiff brought an action against the defendant for not making the lease, averring in the declaration that the defendant was in a situation to grant the lease, and that a reasonable time for granting it had expired; and he also claimed the 250*l.* as money had and received to his use:—Held, that the recital in the agreement was *prima facie* evidence against the defendant that he had power to grant the lease; but that, such recital purporting to be founded on the supposed bankruptcy of S H, the evidence was answered by proof that the commission against him had been superseded.

Held, also, that the granting of the lease being the consideration for the bonus, the plaintiff was entitled to recover back the 250*l.* as money paid on a consideration which had failed, although he had had a beneficial occupation for two years. *Wright v. Colls*, 19 Law J. Rep. (N.S.) C.P. 60; 8 Com. B. Rep. 150.

The plaintiffs, in London, ordered from the defendant, at Singapore, first 25 tons and then 150 tons of gum, at 18*s.* per cwt., all charges included. The defendant sent invoices and bills of lading of these two quantities as shipped at Singapore, which invoices and bills were handed to the plaintiffs in exchange for their acceptances for the respective amounts according to the invoices, and before the arrival of the goods the plaintiffs paid the amount of their acceptances. When the goods arrived, they were found to be 11½ per cent. deficient in weight, part of which deficiency was attributable to evaporation during the voyage, and the rest to the fact, that the weight of the baskets and leaves in which the gum was packed was included in the invoice weight. At Singapore the gum in question is usually purchased by gross weight, including the

baskets and leaves, but in the London market it is bought at the net weight, deducting packages:—Held, that there was a failure of consideration, and that the plaintiffs were entitled to recover the excess above the price of the net weight of the gum, at 18*s.* per cwt., from the defendant, in an action for money had and received. *Devaux v. Conolly*, 19 Law J. Rep. (N.S.) C.P. 71; 8 Com. B. Rep. 640.

(D) MONEY ALLOWED BY MISTAKE ON SETTLEMENT OF ACCOUNT.

Upon the settlement of an account between A and B, a balance was struck and paid by A to B:—Held, that B was not entitled to recover as money had and received a sum which had been, by mistake, allowed upon such settlement as due to A, such sum never having passed between the parties otherwise than by such allowance. *Lee v. Merrett*, 15 Law J. Rep. (N.S.) Q.B. 289; 8 Q.B. Rep. 820.

(E) MONEY PAID IN IGNORANCE OF FACTS.

The defendant having issued execution against one H, on the 25th of April lodged a *fi. fa.* against the goods of H, with the plaintiff, the sheriff of L. Prior to the seizure of the goods, which took place on the 27th of April, the defendant had notice of an act of bankruptcy committed by H. On the 11th of May the plaintiff, the sheriff, executed an assignment of the goods of H to the defendant for 256*l.*, by an instrument, which expressed that the defendant had paid that sum, and the plaintiff then made a return of *feri feci*. A fiat in bankruptcy having issued against H in August, the assignees sued the plaintiff, and recovered from him the value of the goods of H, with costs. The plaintiff thereupon brought the present action for money had and received, to recover the 256*l.* from the defendant. Held, first, that as between themselves, the plaintiff and the defendant were in the same situation as if the plaintiff had sold to the defendant and had received the money; the evidence shewing that the money was treated as paid over to the defendant. Secondly, that if the money was not the plaintiff's money, still he was entitled to recover the money, which he ought to have received as soon as he had been compelled to pay for the goods seized by the real owner. Thirdly, that the sheriff was not estopped in another action by his return of *feri feci* from saying that the then title of the debtor was defeated by matter subsequent. Lastly, that the money having been paid by the plaintiff necessarily in ignorance of the facts, and without any misconduct, he was not prevented from recovering it by the fact that the defendant had in the mean time paid the money to him, and therefore could not be placed in the same situation. *Standish v. Ross*, 19 Law J. Rep. (N.S.) Exch. 185; 3 Exch. Rep. 527.

(F) BY TENANT IN COMMON AGAINST CO-TENANT.

One tenant in common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being by an action of account under the 4 Ann. c. 16. s. 27. *Thomas v. Thomas*, 19 Law J. Rep. (N.S.) Exch. 175; 5 Exch. Rep. 28.

(G) BY ADMINISTRATOR FOR DEBTS DUE TO INTESTATE.

Money had and received will lie by an administrator against a stranger for debts due to the intestate received by him between the time of the death of the intestate and the grant of administration, as well as for money arising from the sale of his goods.

A died in May 1848. B, a stranger, took possession of his goods, and sold them, and received debts due to him, and conducted his funeral. In July 1848 letters of administration were granted to C:—Held, that C might recover against B in an action for money had and received, both for the amount of the debts wrongfully received and for the produce of the goods wrongfully sold by him. *Welchman v. Sturgis*, 18 Law J. Rep. (N.S.) Q.B. 211; 13 Q.B. Rep. 552.

MONEY LENT.

Where the defendant, a commercial traveller, was authorized by the plaintiff to deduct certain sums from the amount he might receive on his account, to be repaid out of the commission the defendant was to be paid by other employers,—Held, that the sums might be recovered under a count for money lent. *Shepherd v. Philips*, 2 Car. & K. 722.

In assumpsit for money lent, &c., it appeared that, nine years ago, the plaintiff's testatrix transferred 1,000*l.* 4*l.* per cent. stock to the defendant, who possessed other of the same stock, and who afterwards sold out the whole, and paid sums equal to interest on the testatrix's stock at 5*l.* per cent. until her death. Upon application by the executor, treating the transaction as a loan, the defendant asserted that he was employed by the testator to purchase an annuity, and that he had done so, but no purchase of any annuity was shewn:—Held, that there was evidence to go to the jury to support the count for money lent. *Howard v. Danbury*, 2 Com. B. Rep. 803.

MONEY PAID.

[See DEBT, ACTION OF.—See also *Pollock v. Stables*, 17 Law J. Rep. (N.S.) Q.B. 352; 12 Q.B. Rep. 765; title COMPANY, (A) (b) (2).]

The action for money paid is maintainable in every case in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, with an undertaking, express or implied, to repay the amount; and it is immaterial whether the defendant is relieved from a liability, by the payment, or not.

Where an auctioneer was employed to sell an estate by auction, which was bought in at the sale, and the Commissioners of Excise refused to remit the duty thereon, and ultimately compelled the auctioneer to pay it,—Held, that he might recover the duty from his employer in an action for money paid. *Brittain v. Lloyd*, 15 Law J. Rep. (N.S.) Exch. 43; 14 Mee. & W. 762.

Where a tenant pays property-tax assessed on the premises, and omits to deduct it in his next payment of rent, he cannot afterwards recover the amount as money paid to the use of the landlord. *Cumming v. Bedborough*, 15 Mee. & W. 438.

The plaintiff accepted a bill for 25*l.* for the accommodation of F, who was pressed at the time by the defendant, a sheriff's officer, for seven guineas, claimed as being due for possession money. F was to get the bill discounted by the defendant or elsewhere, and to give the plaintiff the surplus above the seven guineas. He deposited it with the defendant as a security for that sum, the defendant knowing the circumstances, and that the plaintiff had had no value for his acceptance. The defendant indorsed it over, and kept the proceeds. The holder sued the plaintiff, who thereupon paid him the whole amount of the bill:—Held, that the plaintiff had no right of action against the defendant as for money paid to his use on a request implied by law; but that his remedy was against F on an implied contract to indemnify the plaintiff for lending him his, the plaintiff's, acceptance. *Asprey v. Levy*, 16 Mee. & W. 851.

The plaintiff having a claim against a proposed company agreed with the defendant (a member of the managing committee) to sue other members of the committee who refused to contribute so as to relieve the defendant to the extent of the amount thus recovered:—Held, that the sum paid by the plaintiff to his own attorney for his costs in bringing these actions was properly recoverable from the defendant as money paid to his use. *Bailey v. Macaulay*, 19 Law J. Rep. (N.S.) Q.B. 73; 15 Q.B. Rep. 533.

The plaintiff being indebted to D gave him an order on M & M, who refused to pay it, and told D that they would pay the amount to the defendant, to whom D was indebted in a larger sum. They accordingly credited the defendant with the amount. The defendant gave the plaintiff a letter of indemnity against any steps which D might take against him for the amount. D afterwards brought an action against the now plaintiff, which was defended in his name by the present defendant. Judgment having been recovered against the plaintiff, he paid a sum of money to save himself from arrest:—Held, that, under the circumstances, a request by the defendant to the plaintiff to pay the money must be implied, and that an action for money paid to the defendant's use would lie, notwithstanding the special agreement to indemnify. *Lewis v. Campbell*, 19 Law J. Rep. (N.S.) C.P. 130; 8 Com. B. Rep. 541.

The plaintiff drew and indorsed a bill of exchange for the accommodation of the defendant, the acceptor, which was dishonoured when due, and he subsequently paid the holder a sum of money in discharge of his liability thereon, without having had notice of dishonour, and without any express request from the acceptor:—Held, that he could not recover the amount from the acceptor as money paid to his use. *Sleigh v. Sleigh*, 19 Law J. Rep. (N.S.) Exch. 345; 5 Exch. Rep. 514.

MONEY TAKEN FROM A PRISONER.

A defendant committed to take his trial at the assizes for assaulting a constable, had a sum of 2*l.* 3*s.* 8*d.* taken from him by the constable who conveyed him to prison, to pay for (as was alleged) the expenses of conveying him to the prison, and his maintenance in prison till the trial, this being the ordinary practice in the county of Stafford:—Held, that the practice was quite wrong, and the Judge at the assizes directed the money to be restored to the defendant. *Regina v. Buss*, 2 Car. & K. 822.

MORTGAGE.

[See CHARGE.]

- (A) CONSTITUTION AND EXTENT.
- (B) EQUITABLE MORTGAGE.
- (C) RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM.
- (D) PRIORITY.
- (E) TACKING.
- (F) REDEMPTION AND RECONVEYANCE.
- (G) FORECLOSURE.
- (H) ACCOUNTS.
- (I) MERGER.
- (K) COSTS.
- (L) PRACTICE.
- (M) MORTGAGEE ACTS.

(A) CONSTITUTION AND EXTENT.

[See TRUST AND TRUSTEE, Trustee and Mortgagee Acts.]

By indentures, dated in December 1826, an estate was conveyed to C by way of mortgage for the term of 2,000 years, and, subject thereto, to such uses as A and B should jointly appoint, with remainder in default of such appointment to A for life, with remainder to B in fee. By indentures, dated in December 1839, A, B and C conveyed the estate to D, (who had paid off the mortgage debt created by the deeds of 1826), in fee, by way of mortgage, with a proviso, that if A and B or either of them, their or either of their heirs, should pay the mortgage debt, D would convey the estate to A and B and their heirs; and a declaration that, as between A and B, the mortgage debt should be considered as a charge on the estate, and that A should pay the interest in his lifetime. B died in the lifetime of A:—Held, that notwithstanding the proviso for redemption contained in the deed of December 1839, the estate, subject to A's life estate, was vested in B absolutely. *Hipkin v. Wilson*, 19 Law J. Rep. (N.S.) Chanc. 305.

(B) EQUITABLE MORTGAGE.

[*Wilmut v. Pike*, 5 Law J. Dig. 452; 5 Hare, 14.]

A deposited the title deeds of two estates with W & Co., as a security for past and future advances, and accompanied the same with a memorandum. Subsequently to the date of the deposit, B and C recovered judgment against A, and obtained possession of the estates by writ of *elegit*. Upon a bill by W & Co. praying relief as equitable mortgagees,

—Held, that W & Co. were entitled to payment of their debt, in preference and priority to the subsequent *elegit* creditors, notwithstanding the 1 & 2 Vict. c. 110. ss. 11, 13. *Whitworth v. Gaugain*, 15 Law J. Rep. (N.S.) Chanc. 433; 1 Ph. 728.

A deposit of title-deeds *prima facie* creates an equitable mortgage upon the whole property comprised in them.

A debtor deposited title-deeds with his creditor until his account should not exceed 100*l.*, when they were to be restored to him. He died indebted to the creditor in 274*l.*:—Held, that the creditor's lien extended to the whole 274*l.*

Quare—Whether the deposit of title-deeds without a legal security will make a debt bear interest which does not in its nature bear interest. *Ashton v. Dalton*, 2 Coll. C.C. 565.

A made a lease of land to B. B made an equitable mortgage of the lease to C, and C was for some time in possession of the property, and paid some rent to A. C subsequently gave back the possession to B. A has no equity to compel C to take a legal assignment of the property. *Moore v. Greg*, 18 Law J. Rep. (N.S.) Chanc. 15.

A lessee of a factory deposited the lease by way of equitable mortgage and, upon the landlords' distraining for rent in arrear, the depositors of the lease paid the rent in arrear to the landlords, entered into possession of the factory, sold some of the machinery including some fixed to the freehold, and otherwise acted as owner of the lease, and were accepted by the landlords as such owners:—Held, on demurrer, that the landlords had no equity to compel them to take a legal assignment of the lease. *Moore v. Greg*, 2 De Gex & S. 304.

(C) RIGHTS OF THE MORTGAGEE AND OTHERS CLAIMING UNDER HIM.

[*Wiltshire v. Rabbitts*, 5 Law J. Dig. 452; 14 Sim. 76.]

Certain stock, of which A, B, C, and D were trustees, was sold out, and the proceeds lent to C and D, upon the security of the title-deeds of property belonging to C and D, as tenants in common, the deposit being accompanied with a memorandum of agreement to execute a legal mortgage. C having obtained the deeds from B, in whose custody they were deposited, made a second equitable mortgage of his moiety to S, who, at the time of taking his security, had no notice of the prior charge. C became bankrupt, and the security being insufficient, S (who had then notice of the prior charge) took a conveyance, under the bankruptcy, of C's moiety in satisfaction of his charge. On bill by A against B, D (C being dead), the *cestui que trust* of the stock, and the second mortgagee, claiming to have his charge satisfied in priority to S,—Held, that the acquisition by S of the legal estate would not alter the relative position of the incumbancers, the conveyance being taken from the assignees of C after notice of the express trusts with which it was affected in his hands; secondly, that the allowing the mortgagor to have possession of the title-deeds was not of itself fraudulent, so as to postpone the first mortgagee; and, no fraudulent intent being charged, the Court declined to direct an inquiry, and made the usual foreclosure decree, but without costs. *Allen v.*

Knight, 5 Hare, 272; 15 Law J. Rep. (N.S.) Chanc. 430; affirmed 16 Law J. Rep. (N.S.) Chanc. 370.

A few weeks after the death of a mortgagor and before probate of his will had been obtained, the mortgagee proceeded to exercise a power of sale of a reversionary interest. Several communications were taking place at the time between the solicitors of the mortgagee and the solicitors who acted on behalf of the family of the mortgagor, and who protested against the sale as unnecessary and oppressive, and offered to pay all the principal money, interest, and costs as soon as an assignment could be prepared. It was not shewn that there was any fraud in the transaction, or that the reversionary interest was sold at an undervalue. A bill, filed by the executrix of the mortgagor, to set aside the sale, was dismissed, with costs, reversing the decision of the Court below. *Matthie v. Edwards*, 16 Law J. Rep. (N.S.) Chanc. 405; reversing *Jones v. Matthie*, Coll. C.C. 465.

A suit was instituted to ascertain the rights of the plaintiff and others to certain property: the plaintiff pending the suit made three mortgages of his share to different persons who were brought before the Court by supplemental bill. A decree was made declaring the plaintiff entitled to one-fifth of the estate, and directing the costs to be paid as between party and party out of the aggregate fund. The first mortgagee now presented a petition for payment of his principal, interest, and costs. The plaintiff claimed the extra costs as a prior charge; this was resisted by the second mortgagee:—Held, that the plaintiff was not entitled to the extra costs, but that the second mortgagee was entitled to take the fund, leaving the plaintiff's costs in that respect unpaid. *Smith v. Plummer*, 18 Law J. Rep. (N.S.) Chanc. 456.

The circumstance that a mortgagee, with power of sale, has entered into a contract to sell a portion of the property comprised in the security for a sum greater than the amount due on the mortgage, held, not a sufficient ground for restraining him from suing on the covenant for payment contained in the mortgage deed. *Willes v. Levett*, 1 De Gex & S. 392.

The statute 1 & 2 Vict. c. 110. s. 68. does not make it the duty of a mortgagee as against the provisional assignee of an insolvent mortgagor, to obtain an order from the Insolvent Court for a conveyance of the equity of redemption, and an offer by the provisional assignee to facilitate proceedings in such an application does not entitle him to his costs in a subsequent suit against him for foreclosure. *Grigg v. Sturgis*, 5 Hare, 93.

A, who took an estate by conveyance from his father, afterwards mortgaged it with a power of sale in default of payment within three months after notice in writing given to A, or left at his last or usual place of abode. The conveyance to A was subsequently declared void as against creditors. The mortgagee afterwards affixed a notice demanding payment on the door of the last known place of abode of A, and a short time before the expiration of the three months, entered into a contract to sell the property:—Held, that the right of the mortgagee was paramount to that of the creditors, and that the notice to A was well served; and that the contract for sale was not invalid, though made before

the expiration of the three months. *Major v. Ward*, 5 Hare, 598.

A mortgagor covenanted with the mortgagees to insure the mortgaged premises against fire in their joint names. After his decease the mortgagees entered into possession, and insured the premises:—Held, that they were not entitled, as a matter of course, to add the amount of the premiums for such insurance to the mortgage debt, and charge it against the mortgaged premises. *Dobson v. Land*, 19 Law J. Rep. (N.S.) Chanc. 484.

A mortgaged three houses to B, and afterwards contracted to sell one of them to C, who paid the purchase-money, but did not obtain a conveyance, and had constructive notice of the mortgage. C afterwards paid off B and took a transfer of his mortgage, and filed a bill against the devisee of A, and several mortgagees under subsequent mortgages by A. A decree was made for specific performance by the devisee of A of the contract of sale as to the one house, and for the successive foreclosure of all the subsequent mortgagees and the devisee of A, in default of their redemption of the other houses. *Sober v. Kemp*, 6 Hare, 155.

In trespass *quare clausum fregit*, the plaintiff made title under a mortgage deed of the 6th of March 1840, by which the mortgagor, H, demised premises to the plaintiff from thenceforth for a certain term, subject to a proviso that the demise should cease and be void if H paid principal and interest by the 6th of March 1841, and interest at stated periods in the mean time; and to another proviso, empowering plaintiff to sell (after three months' notice), if default should be made in payment of principal and interest at the times named. Then followed covenants (among others) by H to plaintiff, for principal and interest at the days appointed, and that, at any time after default made in such payment, it should be lawful for plaintiff peaceably and quietly to enter upon the premises, and from thenceforth, for the residue of the term, to hold the same and take the rents and profits without lawful interruption from H or any other person, &c. On pleadings in trespass, setting forth the deed, and shewing that plaintiff had entered upon the mortgaged premises after the execution of the deed but before the 6th of March 1841, and before default in payment, and raising the question whether or not he had a right so to enter,—Held, that the deed gave power to the mortgagee to enter before default and before the day named for any payment. *Rogers v. Grazebrook*, 8 Q.B. Rep. 895.

A lease made by a mortgagor held not to be binding on a purchaser of the legal estate from the mortgagee and of the equitable estate from a party deriving it from the mortgagor, though he had received rent, but that he might recover in ejectment after notice, or sue for use and occupation. *Doe d. Downe v. Thompson*, *Downe v. Thompson*, 9 Q.B. Rep. 1037.

Where a mortgage deed contained a power for the mortgagee to enter and distrain upon the mortgaged premises for interest, if unpaid for twenty-one days, in like manner as for rent reserved on a lease, and the mortgagee had entered and distrained at a period later than the day of the demise laid in the declaration, but for interest accruing due before the

day of the demise, it was held to be no recognition of the defendant as tenant, and that ejectment might be maintained. *Doe d. Wilkinson v. Goodier*, 16 Law J. Rep. (N.S.) Q.B. 485; 10 Q.B. Rep. 957.

A declaration in covenant for rent set out an indenture of the year 1820, by which, after the recital of a mortgage deed of 1818, containing an assignment by Y of certain premises to J E S, for the residue of a term of 5,000 years, subject to redemption on payment by Y to J E S of 1,200*l.*, with interest, J E S demised the premises to R L for a term at the request of Y, he, the said R L covenanting for himself, his assigns, &c., to pay the rent during the term demised, and the continuance of the recited mortgage to J E S, and after payment and satisfaction of the mortgage to Y, his executors, &c. It was then stated that in 1821 J E S assigned to G H S, subject to R L's lease; and that G H S assigned one moiety to the plaintiff on the 15th of December 1843, and the other on the 18th of February 1845; that R L's term became vested in the defendant, and that after the defendant became possessed of the residue of such term (to wit), on the 25th of March 1844, two years' rent became in arrear to the plaintiff. Plea, that before the rent became due J E S was paid and satisfied the principal and interest due on the mortgage out of monies arising from the sale of part of the premises; and that J E S by indenture acknowledged the payment out of such monies, and released Y from all claims, &c.:—On special demurrer, the Court of Queen's Bench held the plea bad for duplicity, and the declaration good.

The Court of Exchequer Chamber affirmed the judgment, and held that the plea was bad for duplicity, and also for not sufficiently shewing that the mortgage debt was discharged and the estate exonerated.

Also that the covenant in the declaration to pay Y, &c. until payment and satisfaction of the mortgage ran with the land, and did not become a covenant in gross till the happening of the event. That the payment of the mortgage money was a condition in defeazance, which ought to have been pleaded by the defendant; that it sufficiently appeared in the declaration that the rent became due after the assignments to the plaintiff, because on demurrer the dates of the assignments must be taken to be true, and that on the 25th of March 1844 the plaintiff was entitled to half a year's entire rent, and a moiety of the other year and a half year's rent; and that the Court below having power to assess the damages, the declaration was good. *Whitaker v. Harrold*, 17 Law J. Rep. (N.S.) Q.B. 343; 11 Q.B. Rep. 163.

(D) PRIORITY.

A having a mortgage for 1,150*l.*, agreed to join with the mortgagor in assigning the mortgaged tenements to another person, who was to advance 750*l.*, which was to be paid to A, and the mortgagor was to execute to A another mortgage for the residue of her debt, so as to make A second incumbrancer. A deed of assignment was accordingly executed, but the mortgagor afterwards refused to execute a further mortgage to A. The mortgagor afterwards procured S to pay off the mortgage debt of 750*l.*, and the mortgagee signed an undertaking to execute

a re-assignment. A filed a bill to enforce her lien:—Held, that having proved the agreement between herself and the mortgagor by parol evidence, she was entitled to a lien for the residue of her debt, but that the 750*l.* was the first charge upon the estate. *Banks v. Whittall*, 17 Law J. Rep. (N.S.) Chanc. 14; 1 De Gex & S. 536; affirmed 17 Law J. Rep. (N.S.) Chanc. 352.

A mortgagor and mortgagee joined in assigning the mortgaged lands to A. The deed recited that the former mortgage deed had been deposited by the first mortgagee with J as security for 1,000*l.* No such deposit had at that time been made, but the deed remained in the possession of the first mortgagee, and was afterwards deposited by him with J as a security for 200*l.*:—Held, that A's mortgage was the prior charge upon the mortgaged lands, in preference to the claim of J; and the Court being of opinion that J had notice of A's mortgage prior to his advance, although J had denied that fact, he was also ordered, in default of payment of A's mortgage debt, to deliver up to A the former mortgage deed.

Whether the delivery up of the deed would have been ordered if J had not had notice of A's mortgage—*quære*. *Fraser v. Jones*, 17 Law J. Rep. (N.S.) Chanc. 353; 5 Hare, 475.

A deposited a lease of a public-house with B, by way of security for a debt, and subsequently obtained it from B, on a representation that it was required to be produced before the Justices for the purpose of obtaining a licence, and signing an undertaking to restore it. A then deposited this lease with C as a security for money advanced by C:—Held, that B's equity was prior to that of C. *Ex parte Reid re Buckland*, 17 Law J. Rep. (N.S.) Bankr. 19.

A having a reversionary interest in personality which he had mortgaged first to B, and next to C, agreed to sell it to D for 1,500*l.*, and D having at his request paid off B out of the 1,500*l.*, he agreed that until the sale should be completed, D should stand in the place of B, and have the full benefit of her security:—Held, that B's debt was extinguished by the payment made to her by D, and that D had no priority over C. *Watts v. Symes*, 16 Sim. 640.

By a charter-party, dated in April 1845, made between B and Co. the owners, and M & Co., it was agreed that M & Co. should charter the ship F at a certain rate, the freight to be payable by certain instalments at fixed periods, and the remainder at the termination of the voyage. By a separate, but contemporaneous instrument, it was agreed between the same parties that the speculation should be at their joint risk. The charter-party remained in the hands of B & Co., who, in December following, deposited it with their bankers, as a security for money advanced. The bankers in March 1846 gave notice to M & Co. of the deposit, and claimed the freight due and to become due thereunder. Several payments were then so made by M & Co. to the bankers in accordance with the charter-party. B & Co. afterwards became bankrupt. In August 1846 the ship returned, and the adventure proving a losing one, M & Co. then first informed the bankers that it was at the joint risk of themselves and B & Co.:—Held, that M & Co. by their conduct had precluded themselves from insisting

as against the bankers on their prior equity, and the order for an injunction to restrain the bankers from proceeding upon an action at law for the whole of the unpaid freight, was dissolved. *Mangles v. Dixon*, 19 Law J. Rep. (N.S.) Chanc. 240; 1 Mac. & G. 437; 1 Hall & Tw. 542.

A testatrix bequeathed a sum of 1,000*l.* to trustees, in trust to invest the same, and to pay the annual produce during the life of M F H into her proper hands, or to her order for her separate use. The testatrix died in 1838, and, by deed, dated the 24th of October 1840, M F H, in consideration of 300*l.*, granted an annuity of 30*l.* to J H, payable half-yearly during M F H's lifetime, out of the dividends and interest to accrue on the legacy of 1,000*l.*, or the securities for the same. This annuity was afterwards assigned to trustees for J H. By another deed of like date, and made between C H and the several parties to the other deed, C H covenanted with J H to pay to her the annuity of 30*l.* as often as default should be made in payment thereof by M F H until the legacy should be invested by the testatrix's executor, and it was by the same deed agreed that C H should stand in the place of J H, as regarded the interest and dividends to accrue due to the extent of any sums that might be paid by him to J H previously to the investment of the legacy. C H paid divers sums to J H under his covenant, and in November 1840 the executor received notice of J H's security, and in 1846 he received notice of a subsequent mortgage executed by M F H of her interest in the same dividends and interest to S, but no express notice was given to the executor of the deed to which C H was a party until May 1848. In July 1848 the legacy of 1,000*l.*, less the duty, and the interest thereon, amounting to 339*l.* 10*s.*, were paid into court by the executor under the statute 10 & 11 Vict. c. 96, to an account entitled "The account of M F H and her incumbrancers":—Held, that C H was entitled to priority over S to the extent of the payments made by him to J H. Held, also, that the expenses attending the payment into court under the statute 10 & 11 Vict. c. 96, must be paid by his executor out of his testatrix's estate. *In re Cawthorne*, 18 Law J. Rep. (N.S.) Chanc. 116; 12 Beav. 56.

Stock stood in the names of D and L in trust for K for life, with remainder to A absolutely. A by will bequeathed the stock to B, and appointed D, one of the trustees, her sole executor. After A's death B assigned all his estate and effects to L and another upon trusts for the benefit of his creditors, but no notice of this assignment was given to D; and afterwards B assigned the particular stock to C by way of mortgage, and notice of the last assignment was forthwith given to D. Upon bill by C, it was held that the legacy not having been assented to, notice to the executor was necessary, and that notice to the trustees alone was not sufficient, and that consequently C was entitled to priority. *Holt v. Dewell*, 15 Law J. Rep. (N.S.) Chanc. 14; 4 Hare, 446.

(E) TACKING.

A having mortgaged an estate to B and C in succession, agreed to sell it to D free from incumbrances; part of the purchase-money was to be paid down and the rest on the completion of the purchase. During the investigation of the title A

induced D, who was ignorant of the mortgages, to make further payments on account of the purchase-money, and having also raised a further sum from E on the security of his contract, without giving him notice of C's mortgage, became insolvent and absconded. D thereupon, with notice of all that had happened, paid off C's mortgage out of the balance of the purchase-money remaining due, and E, to secure himself, took an assignment of B's mortgage; but the balance of purchase-money not being sufficient to pay both E's charge and what E had paid to B,—Held, that E was not entitled to tack his security to B's mortgage, first, because his security was on the purchase-money, not on the estate, and secondly, because, though E, when he advanced the money, had no notice of any particular incumbrance except B's, he knew that he was dealing for a supposed balance out of which D, having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be subject, and therefore the equities of D and E were not equal. *Lacey v. Ingle*, 2 Ph. 413.

H C mortgaged the entirety of freehold, and part of copyhold, hereditaments to secure payment of 6,500*l.* M C, who was the owner of two-thirds of the freeholds, received two-thirds of the 6,500*l.*, and he and his wife joined in collateral securities for payment of the whole sum. H C afterwards paid 500*l.* of the mortgage debt, and, subject thereto, conveyed his one-third of the freeholds to secure payment of 12,000*l.* M C subsequently mortgaged his two-thirds of the freehold hereditaments to secure payment of 2,106*l.* The first and last mortgages were assigned to G B T, who filed his bill for redemption or foreclosure:—Held,—affirming the decree of the Vice Chancellor of England—

First, that G B T was not entitled to tack the last mortgage to the first.

Secondly, that the accounts of the rents and profits of the mortgaged premises possessed by G B T should be taken against him, with annual rests, if they should be found to have exceeded the interest on the mortgages.

For form of a decree directing successive redemptions or foreclosures, and also splitting the equity of redemption, see p. 245, *infra*.

The separate estate of M C's wife was not affected by her joining in the securities. *Thornercroft v. Crockett*, 2 H.L. Cas. 239.

(F) REDEMPTION AND RECONVEYANCE.

[See INSOLVENT DEBTOR.]

[*Brown v. Cole*, 5 Law J. Dig. 455; 14 Sim. 427.]

A mortgaged an estate and delivered the title-deeds to B. Some years after A gave notice of his intention to pay off the mortgage at the end of six months, but did not pay the money till after that time, owing to B not having offered any satisfactory indemnity in respect of having lost some of the title-deeds. B then brought ejectment for the estate, whereupon A filed a bill to redeem. The Court decreed a redemption, and ordered that a sum which A had paid for interest on the mortgage money after the expiration of the six months should be repaid to him; that B should give him an indemnity to be approved by the Master, and pay the

costs of the ejectment and suit. *Midleton v. Elliot*, 15 Sim. 531.

In 1843 A mortgaged freeholds and leaseholds to B for 200l. In 1845, reciting that mortgage, he charged the property with the further sum of 400l., which he then owed B, and assigned other property to B as a security for that sum, and empowered B to sell the property and to retain the 400l. out of the proceeds:—Held, that the property assigned in 1845 was redeemable on payment of the 400l. only. *Watts v. Symes*, 16 Sim. 647.

In a suit to redeem against a devisee of a mortgage, an account of the rents received by the deviser may be obtained without his being represented on the record. *Trulock v. Robey*, 15 Sim. 277.

In a suit to redeem against a mortgagee in possession, the Court will not direct the Master to fix and charge the defendant with an occupation rent, unless the plaintiff alleges and shews not only that defendant has been in possession of the mortgaged estate, and in receipt of the rents and profits of it, but also that he has been in the actual occupation of it, or of part of it, *semble*. *Trulock v. Robey*, 15 Sim. 265.

A husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums on insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Act:—Held, in a suit for redemption instituted by the assignee in insolvency against the mortgagee, that the latter was chargeable with the surplus rents which he permitted to be received by the insolvent's wife for her maintenance. But there being ground for supposing that the Court would have made such a provision for the wife, the Court, although the balance was found against the mortgagee, decreed payment without costs. *Clark v. Cook*, 3 De Gex & S. 333.

A notice by a mortgagee to a mortgagor under the 3rd section of the 7 Geo. 2. c. 20. to deprive the latter of the benefit of an application to redeem, made to a court of common law, under the provisions of that statute, should state enough to enable the Court to form an opinion as to the nature of the ground upon which the right to redeem is disputed, and to judge whether or not a case for the exercise of its jurisdiction properly arises. A mere general statement in such a notice that the mortgagee insisted that the mortgagor had no right to redeem, and that the mortgaged premises were chargeable with other principal sums than appeared on the face of the mortgage-deed or were admitted by the mortgagor, is not sufficient. *Doe d. Harrison v. Louch*, 18 Law J. Rep. (N.S.) Q.B. 278.

The statute 7 Geo. 2. c. 20. s. 1, which enables a mortgagor to obtain a reconveyance of the mortgaged property on payment of the interest, principal, and costs of suit, applies to those cases only in which the mortgagee is not in possession, and in which he has not attempted to exercise the right of sale.

Where therefore the defendant had mortgaged certain premises to the plaintiff, with a power of sale on default of payment, in pursuance whereof

the plaintiff, with the defendant's concurrence, advertised the property for sale, but failed to obtain a bidder, and afterwards brought an action on the defendant's covenant to pay; the Court refused to compel the plaintiff to reconvey the mortgaged premises, and deliver up the defendant's title deeds, except on the terms of the latter paying the costs of the abortive sale, of the reconveyance, and of shewing cause against the rule. *Sutton v. Rawlings*, 18 Law J. Rep. (N.S.) Exch. 249; 3 Exch. Rep. 407.

(G) FORECLOSURE.

Form of decree of foreclosure where the mortgagee held two mortgages; by one of which, property, belonging partly to A and partly to B, was conveyed to secure money advanced to A and B in different proportions, with a proviso for redemption, on payment of the money by them, or either of them; and, by the other, property belonging to A, and partly comprised in the first mortgage, was covenanted to be conveyed to secure the debt of A. *Higgins v. Frankis*, 15 Law J. Rep. (N.S.) Chanc. 329.

In the case of a mortgage of an estate, accompanied by the mortgagor's bond and covenant to pay the amount advanced, the mortgagee, after absolute foreclosure and subsequent sale by him of the estate for less than the amount due to him, will not be permitted to go in under a decree for administering the deceased mortgagor's estate, and prove for the deficiency. *Lockhart v. Hardy*, 15 Law J. Rep. (N.S.) Chanc. 347; 9 Beav. 349.

A mortgaged to B, who filed a bill of foreclosure, and B, pending the suit, assigned to C, who mortgaged to D, and became insolvent. D filed a supplemental bill to have the benefit of the suit for foreclosure:—Held, that he was entitled to such relief. *Coles v. Forrest*, 10 Beav. 552.

A B mortgaged leaseholds, and afterwards specifically bequeathed them to trustees in trust for C, D, and E:—Held, that C, D, and E were proper parties to a bill to foreclose. *Coles v. Forrest*, 10 Beav. 552.

Where a mortgage is made to two for money lent partly by each, one of the mortgagees may file a bill of foreclosure, making the other mortgagee a defendant, and the plaintiff is in such case entitled to the usual decree of foreclosure, on default of payment of the whole mortgage debt in the proportions due to the plaintiff and defendant respectively, together with their respective costs. *Davenport v. James*, 7 Hare. 249.

The plaintiff obtained the common decree for foreclosure, and afterwards the order absolute, which last-mentioned order was enrolled. Upon motion by the defendant for the enlargement of the time fixed by the order absolute for the payment of the mortgage debt, it was held, that the enrolment of the order need not be vacated, and that the Court was not precluded from enlarging the time. *Ford v. Wastell*, 17 Law J. Rep. (N.S.) Chanc. 368; reversing s. c. 16 Law J. Rep. (N.S.) Chanc. 372; 6 Hare. 229.

A suit having been instituted to foreclose a mortgage, it was ascertained that the mortgagee had destroyed the mortgage deed and attested copies of other documents relating to the title. The Court held that the expenses of procuring fresh deeds and

attested copies must be paid by the representatives of the mortgagee, and directed a reference to the Master to ascertain what further damage had been caused by reason of such destruction of the documents, and that such amount was to be set off against the mortgage money. *Hornby v. Matcham*, 17 Law J. Rep. (N.S.) Chanc. 471; 16 Sim. 325.

An estate was mortgaged to A for a term of 500 years. A filed a bill of foreclosure against the persons entitled to the equity of redemption and the reversion, some of whom were infants. By consent it was ordered that the Master should inquire whether a sale in fee would be for the benefit of the infants, and if he should so find, that the property should be so sold. The property was sold under the decree; but realized less than the mortgage debt:—Held, that the defendants were entitled to the difference in value between the term and the fee. *Poster v. Eddy*, 18 Law J. Rep. (N.S.) Chanc. 151.

The mortgagor of an estate devised it to trustees upon trust to sell, with a power to give receipts to purchasers. A bill of foreclosure being filed by the mortgagee against the trustees only,—Held, that a decree in this suit would not bind the *cestuis que trust* under the will of the mortgagor. *Chamberlain v. Thacker*, 18 Law J. Rep. (N.S.) Chanc. 489.

[See *ante* (E) Tacking.]

(H) ACCOUNTS.

By the decree, made in a suit to redeem a mortgage, the Master was directed to take an account of what was due to the defendant (the mortgagee), and also of the rents and profits received by him. The father of the mortgagee had, for several years before his death, been in possession of the mortgaged estate:—Held, that, under the terms of the decree, the Master ought to calculate the amount due to the defendant without deducting any of the rents and profits received by the mortgagee's father. *Trulock v. Roby*, 15 Law J. Rep. (N.S.) Chanc. 343.

Where a mortgagee receives rents between the report and day of payment, it is not the practice, on directing the accounts to be continued and the time to be extended, to order the mortgagor forthwith to pay the arrears of interest and costs. *Buchanan v. Greenway*, 12 Beav. 355.

A judgment creditor, in possession under an *elegit* of lands belonging to the debtor, instituted a suit for the sale of the property:—Held, that such creditor was bound to account as mortgagee in possession. *Bull v. Faulkner*, 17 Law J. Rep. (N.S.) Chanc. 23; 1 De Gex & S. 685.

Mortgagee in possession who has opened and worked mines charged with receipts, but disallowed his expenses. *Thorneycroft v. Crockett*, 16 Sim. 445.

[See *ante* (C), Tacking.]

(I) MERGER.

A, on her father's death, became seised of real estates as his heir, and entitled under his marriage settlement to a sum lent to him on the mortgage of the estates by the trustees of the settlement. A, by a deed, executed shortly before her will, charged the estates, and the sum secured on them, with an annuity, and otherwise shewed that she intended the mortgage to be kept on foot for the purpose at least of securing the annuity. By her will, she devised the estates after payment of her own debts,

and after her father's affairs should have been settled, to B, and died intestate as to her residuary personal estate:—Held, that as against her next-of-kin, the incumbrance created on the estate by her father must be considered to have merged in it. *Swabey v. Swabey*, 15 Sim. 106.

(K) COSTS.

[See Costs, Mortgages.]

The costs of the petition and order under the 1 Will. 4. c. 60. for the reconveyance of a mortgaged estate to the mortgagor or his representatives, on payment of the mortgage money, must be borne by the mortgagor or his estate, although such proceedings are rendered necessary by the mortgagee having devised a legal estate in the mortgaged premises to three trustees, one of whom could not be found. *King v. Smith*, 6 Hare, 473.

Upon a motion to restrain a mortgagee from selling the mortgaged property, an order was made by consent to refer it to the Master to take an account of what was due to the mortgagee for principal, interest, and taxed costs, then properly incurred; but reserving the costs of the suit. The mortgagee was found to be entitled to a much smaller sum than was mentioned in the mortgage; and by the order made on further directions, the mortgagee was ordered to transfer the mortgage debt, as well as the mortgaged premises, and to pay the costs of the suit:—Held, upon appeal, that the mortgagor was not entitled to have a transfer of the mortgage debt; and that, after the course adopted by the parties upon the making of the first order, the costs of the suit must follow the ordinary practice, and be paid by the mortgagor. *Dunston v. Paterson*, 16 Law J. Rep. (N.S.) Chanc. 404; 2 Ph. 341.

The mortgage of a mesne incumbrancer extended over the whole of certain estates, parts of which had been previously mortgaged to other persons, and parts of which were also subsequently mortgaged. The mesne incumbrancer filed his bill for an account, and for redemption of the prior and foreclosure of the subsequent mortgages, and a decree was made by consent of all parties interested that the whole of the estates should be sold; that the proceeds of the sale should be paid into court, and apportioned according to the value of the parts of the estates comprised in the several mortgages: and that the priorities of the incumbrances should be ascertained on further directions. No question was raised as to the incumbrances or their priorities, but only as to the costs:—Held, that each of the prior mortgagees was to be paid his principal, interest, and costs out of the sum in court apportioned in respect of his mortgage, and not out of the general fund. *Lee v. Lockhart*, *Wild v. Lockhart*, 16 Law J. Rep. (N.S.) Chanc. 519; 10 Beav. 320.

(L) PRACTICE.

A judgment creditor cannot sustain a bill, for a general administration and account, against a prior incumbrancer, unless the bill contains an offer to redeem; as redemption is the only relief, in equity, to which a subsequent incumbrancer is entitled, as against a prior mortgagee.

Semble—If the bill is not for redemption, but for a totally different object, and is quite incapable of

being used as a bill of redemption, an offer at the bar, to redeem, will not sustain it as such.

The practice of the Chancery Courts in Jamaica, is to decree a sale, instead of a foreclosure.

Bill by A, the mortgagee of real estates, in Jamaica, against the executors of B, the mortgagor, and other persons claiming under B's will. The bill stated that there were judgments to a large amount against the mortgaged estate, but did not make the judgment creditors parties, and prayed for an account, and payment of what should be found due upon the mortgage, or, in default, that a competent part of the estate might be sold, and payment made thereout. C, a judgment creditor, subsequent to A's mortgage, then filed a bill against the executors of B, and those claiming under his will, and also against A, the prior mortgagee, on behalf of herself and all other creditors of B. By the bill, she insisted that her judgment gave her a prior lien to A, as against part of the mortgaged estate alleging that the judgment was given in respect of the purchase-money of such part of the estate, still remaining unpaid; she charged collusion between A and the executors of B in respect of their management of the mortgaged estates and in the accounts, and prayed for a declaration of the priority of her lien over A's mortgage, as to part of the estate, and a due administration of the personal estate; and that, if the personal estate should prove insufficient, she should be first paid out of the proceeds of the estate on which she claimed a lien, and that in case A should consent to join in the sale of the other real estates, he should be paid what, on taking the accounts, should be found due to him. A filed a general demurrer for want of equity, on the ground that there was no offer to redeem; which the Court overruled. A's suit being set down for hearing, C filed a petition, entitled in both causes, praying that the hearing of A's suit might be postponed until her cause was ready for hearing, and that they might be both heard together, or that she might be at liberty to intervene in A's suit. The Court made an order, granting her leave to intervene, and to object to the mortgagee's accounts. By the decree, made in A's suit, it was referred to the Master to take the accounts, and further directions were reserved. C opposed the accounts, and afterwards took exceptions to the Master's report. The Court, upon the argument upon the exceptions, refused to make an order, until it should be determined, at the hearing of C's suit, whether she had a valid claim on the mortgaged premises. At the hearing of C's suit, she failed to establish her priority over A's mortgage, or to prove collusion between him and the executors of B, and the bill was dismissed, as against A, with costs, but a decree was made in that suit, directing certain general administration accounts. A's suit was subsequently heard upon further directions, in the absence of C, and the Master's report was confirmed, and a decree was made for payment of what was thereby found due to A.—Held, on appeal,—

1st. That as C had proved her judgment debt, she was entitled to a decree for relief against B, the obligor's executors; but that, as she had not offered to redeem, the bill was properly dismissed as against A, the prior incumbrancer.—But,

2ndly. That the dismissal of the bill, as against A, because she had not asked for proper relief, did not necessarily draw after it the disallowance of C's exceptions; that having established her debt, and the order for leave to intervene being in existence, she had a right to have her exceptions disposed of, and the orders confirming the Master's report, and on further directions, made in her absence, were reversed.

Quare—Whether a judgment creditor is a necessary party to a bill filed by a mortgagee, where the practice of the Court is to decree a sale instead of a foreclosure. *Gordon v. Horsfall*, 5 Moore, P.C. 393.

The 7 Geo. 2. c. 20. enacts, that "where any action shall be brought on any bond for payment of the money secured by such mortgage or performance of the covenants therein contained," the persons entitled to redeem may pay to the mortgagee the principal, interest, and costs, and the Court may, by rules of the same court, compel such mortgagee to deliver up all deeds, &c. to the mortgagor:—Held, that the statute was applicable to an action of *covenant* on a mortgage deed, and that a Judge at chambers, as well as the Court, had power to order the delivering up of the deeds.

All powers possessed by the superior courts at common law, as well as those given by statute to the Court in general terms, without any special limitation, may be exercised by a single Judge, as the delegate of the Court. *Smeeton v. Collier*, 17 Law J. Rep. (N.S.) Exch. 57; 1 Exch. Rep. 457; 5 Dowl. & L. P.C. 184.

On a bill by first mortgagee against mortgagor and second mortgagee, the plaintiff should prove the second mortgage, otherwise he can only take an inquiry at the first hearing. *Guardner v. Boucher*, 13 Beav. 68.

(M) MORTGAGEE ACTS.

[See TRUST AND TRUSTEE, Trustee and Mortgagee Acts.]

MORTMAIN.

[See CHARITY.]

A testator devised houses to trustees to sell the same, and to apply the proceeds in payment of legacies to religious and charitable societies. He also gave legacies to various parties, and made his brother residuary legatee:—Held, that the trust estate was not void under the Statute of Mortmain, 9 Geo. 2. c. 36. *Doe d. Chidgey v. Harris*, 16 Law J. Rep. (N.S.) Exch. 190; 16 Mee. & W. 517.

A testator bequeathed the residue of his personal property and effects to trustees, for the establishment of a charitable receptacle for old men, if the same could be done, but if no such institution could be conveniently established, then to be disposed of for certain other charitable purposes:—Held, that the primary object of the testator was the acquisition of land for charitable purposes, and the bequest was, therefore, void under the Statute of Mortmain. *Attorney General v. Hodgson*, 15 Law J. Rep. (N.S.) Chanc. 290; 15 Sim. 146.

Shares in the London Dock Company and the

West India Dock Company are not within the statute, 9 Geo. 2. c. 36. s. 3. *Hilton v. Giraud*, 16 Law J. Rep. (N.S.) Chanc. 285.

Dock and canal companies were seized of very considerable real estates, yielding a large net income, which was divisible among the proprietors of the respective companies. The shares were, by the several acts of incorporation, declared to be personal estate, and transmissible and distributable as such, and not of the nature of real property:—Held, that such shares were not within the Mortmain Act.

Held, also, that bonds of the companies, given for money borrowed under the powers of the acts by way of mortgage of the undertaking, and to secure payment of an annual sum, were not within the Mortmain Act. *Walker v. Milne*, 18 Law J. Rep. (N.S.) Chanc. 288; 11 Beav. 507.

A testator gave his shares in the Northumberland and Durham Bank, and money due upon railway debentures of the Newcastle and Carlisle Railway Company, to trustees, for the benefit of certain charities:—Held, that the bank shares were within the Statute of Mortmain; but the railway debentures, being merely a promise to pay money upon the credit of the undertaking, were not a charge upon land, and therefore not within the Mortmain Acts. *Myers v. Perrigall*, 18 Law J. Rep. (N.S.) Chanc. 185; 16 Sim. 533.

The Court will make a decree for the appointment of new trustees of lands for a charitable use, although the deed originally declaring the use be not enrolled under the Mortmain Act, if the trustees in whom the legal estate is vested admit the trust, and do not object that the deed is void under the statute, but submit to act under the direction of the Court. *Attorney General v. Ward*, 6 Hare, 477.

Shares in the London Dock Company and in the East and West India Dock Company, held not to be interests in land within the Statute of Mortmain, 9 Geo. 2. c. 36. *Hilton v. Giraud*, 1 De Gex & S. 183.

MORTUARY.

A mortuary is not an "oblation" or "obvention" within the 7 & 8 Will. 3. c. 6, and is, therefore, not recoverable before two Justices of the Peace.

An information before two Justices stated that A and B, as executors of C, "the oblations, obventions, and other customary dues and payments," arising within the parish of W and due from them as such executors to J T, J M W and W W, had not paid, &c. By an order of the same Justices, reciting the above information, and a summons and hearing of the said A and B, the said Justices determined that there was justly due from the said A and B, as such executors as aforesaid, to the said J T, J M W and W W, the sum of 10s. for and in respect of, and being the amount of the "oblations, obventions, and other customary dues and payments," and ordered the payment by the said A and B, as executors, of the said sum of 10s.:—Held, first, that evidence was properly admitted to shew that under the general words "oblations, obventions, and other customary payments," the

order really was made in respect of a mortuary and, therefore, secondly, that the two Justices had no jurisdiction; and that a warrant of distress, founded on the order, was illegal. *Ayrton v. Abbott*, 18 Law J. Rep. (N.S.) Q.B. 314.

MUNICIPAL CORPORATION.

[See ACTION—BRIDGE—CHARITY—PENALTIES—PERJURY—PRINCIPAL AND SURETY—RATE—QUO WARRANTO.]

- (A) GENERAL POINTS.
- (B) QUALIFICATION OF MAYOR.
- (C) ELECTION OF COUNCILLORS AND CORPORATE OFFICERS.
- (D) COMPENSATION FOR LOSS OF OFFICE.
- (E) BOROUGH JUSTICES—JURISDICTION.
- (F) BOROUGH FUND.
- (G) GAOL.
 - (a) Appointment of Keeper.
 - (b) Maintenance of Prisoners in.
- (H) QUARTER SESSIONS, GRANT OF.
- (I) BOND BY, FOR MONEY LENT.

A police superannuation fund authorized in boroughs by the 11 Vict. c. 14; 26 Law J. Stat. 29.

Boroughs in certain cases relieved from contribution to county expenditure by the 12 & 13 Vict. c. 82; 27 Law J. Stat. 158.

Town councils enabled to establish public libraries and museums by the 13 & 14 Vict. c. 65; 28 Law J. Stat. 128.

(A) GENERAL POINTS.

New municipal corporations succeed to the debts and duties of the old corporations, and may be liable for former breaches of trust and costs of obtaining redress. *Attorney General v. Leicester*, 9 Beav. 546.

The proper appellation of the corporation of a city, since the Municipal Corporation Act, is, "the mayor, aldermen, and citizens of the city." *Attorney General v. Worcester (Corporation of)*, 15 Law J. Rep. (N.S.) Chanc. 398; 2 Ph. 3.

(B) QUALIFICATION OF MAYOR.

It is no objection to the qualification of a person elected to fill the office of mayor of a city under the 5 & 6 Will. 4. c. 76, that his name has been omitted from the citizen list for the municipal year in which he was so elected, it appearing that he had been duly chosen a councillor of the city on the 9th of November in the preceding year, his name being enrolled in the burgess list of the then current municipal year, and that he had continued to hold the office of councillor, and to be entitled to be upon the citizen roll, up to the time of his election as mayor. *Regina v. Dixon*, 19 Law J. Rep. (N.S.) Q.B. 363; 15 Q.B. Rep. 33.

(C) ELECTION OF COUNCILLORS AND CORPORATE OFFICERS.

Where certain acts of a corporation are to be performed at a special meeting of the members of that

corporation, all the persons entitled to be present thereat must be summoned, if they are within a reasonable summoning distance.

The omission to summon any one so entitled, renders the acts done at such meeting, in his absence, invalid.

A finding in a special verdict that a person entitled to be present at a special meeting of a corporate body was not summoned, and that he was at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting the onus of shewing a sufficient cause for his not being summoned.

The election of treasurer for the county of the city of Dublin was vested by the 49 Geo. 3. c. xx. in the "board of magistrates of the county of the said city," and was directed to take place at the Sessions Court of the city, by vote of the magistrates there present:—Held, that the Recorder of Dublin was a member of that board, and ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid. *Smyth v. Darley*, 2 H.L. Cas. 789.

Upon an election of four councillors, on the 1st of November 1841, to fill three ordinary vacancies, and one extraordinary vacancy for a shorter period than three years, the voting papers contained the names of four candidates, without distinguishing which was intended to fill the extraordinary vacancy. Upon the trial of a *quo warranto* the Judge told the jury that the alderman and assessor ought to have obtained the information which enabled them to declare whether a candidate was elected to fill an ordinary or the extraordinary vacancy from the voting papers alone:—Held, upon bill of exceptions, that this direction was right.

Where an election was held to fill three ordinary vacancies and one extraordinary vacancy, and the voting papers contained the names of four candidates, but did not specify the person intended to fill the latter vacancy, such voting papers were held to be void.

Semble—that under the 5 & 6 Will. 4. c. 76, the election of councillors to fill ordinary vacancies and to fill extraordinary vacancies are perfectly distinct, and one election cannot be held to fill vacancies of both descriptions. *Rowley v. Regina*, 14 Law J. Rep. (N.S.) Q.B. 62; 6 Q.B. Rep. 668.

[See *post*, (H) QUARTER SESSIONS.]

(D) COMPENSATION FOR LOSS OF OFFICE.

Where the Lords of the Treasury had awarded an annuity of 107*l.* as compensation for the loss of the office of town clerk, the Court refused to order a peremptory mandamus to the town council to secure that sum by bond under the corporate seal, where it did not appear, from the writ or return, that the corporation had had any opportunity of questioning the amount awarded.

Where the removal, by the town council, is for misconduct, the Lords of the Treasury have no power to inquire whether there was a sufficient ground for the removal, under section 66. of the 5 & 6 Will. 4. c. 76.

The misconduct must be strictly shewn to have taken place in respect of the office from which the

party is dismissed. *Regina v. Mayor, &c. of Newbury*, 10 Law J. Rep. (N.S.) Q.B. 250; 1 G. & D. 388.

In order to entitle a person to claim compensation under the 5 & 6 Vict. c. 111, as an officer of a division of a county, in which a borough, to which a charter of incorporation has been granted, is situated, he should be clearly shewn to be an officer of the entire division. And, therefore, where it was proved that the Manchester division of the county of L. consisted of forty-three townships, and that O M had for many years acted as clerk to the Justices of that division, attending at the New Bailey; at Salford (one of those townships), where the greater part of the business was transacted; but that, among the forty-three townships, there were others at which Justices attended and held petty sessions, at which they employed other persons as clerks,—Held, that O M was not entitled to compensation as an officer of a division of a county.

Held, also, that the clerk to the stipendiary magistrates appointed under the statute 53 Geo. 3. c. 72, is not an officer of a borough, county, or division of a county within the 5 & 6 Vict. c. 111. *Regina v. Council of Manchester*, 16 Law J. Rep. (N.S.) Q.B. 27; 9 Q.B. Rep. 458.

The Lords Commissioners of the Treasury, upon an appeal to them, under the 6 & 7 Will. 4. c. 76. s. 66, by C S, who under the provisions of that act, had been first re-appointed and continued in the office of town clerk of the city of Lichfield, and afterwards, on the 20th of January 1844, removed from such office, made an order directing compensation to be paid to the said C S for the loss of such office by way of a certain annuity, to commence from the 9th of September 1835. This order the Lords Commissioners subsequently declared had been made by mistake, and amended, by altering the date of the commencement of the annuity to the time from which C S ceased to hold the office of town clerk:—Held, that the Lords Commissioners had power only to direct that the annuity should commence from the time when C S ceased to hold the office, and therefore that the order as it originally stood was bad, and could not be enforced.

Semble, also, that supposing the first order could have been made, the mistake was one which the Lords Commissioners might afterwards properly amend. *Regina v. Mayor, &c. of Lichfield*, 19 Law J. Rep. (N.S.) Q.B. 337.

(E) BOROUGH JUSTICES—JURISDICTION.

By a local paving act, 41 Geo. 3. c. cxxvi., relating to the parish of B (which parish became part of the borough of Bath, by the 5 & 6 Will. 4. c. 76), the rate assessed is directed to be paid by the occupiers of houses, who are thereby required to pay them to the collectors appointed under the act, and the rate is to be enforced by distress warrant of a Justice of the county of Somerset. The ancient charter of the borough of Bath had a non-intromittant clause; and under the 5 & 6 Will. 4. c. 76. s. 111. a separate Court of Quarter Sessions was granted to the borough:—Held, that all jurisdiction of the county Justices within the parish of B was taken away.

Held, also, that the non-payment of paving rates, assessed on an occupier of a house in the parish of

B, is "an offence committed within the borough against the provisions of the local act;" and that, under the 7 Will. 4. & 1 Vict. c. 78. s. 31, it is cognizable by the borough Justices. *In re Bathwick Paving Act*, 18 Law J. Rep. (N.S.) Q.B. 301.

(F) BOROUGH FUND.

Where the town council made an order for payment out of the borough fund of 100*l.* on account of costs incurred with the sanction of the town council in petitioning the Court of Chancery with respect to the appointment of the charity trustees, under the Municipal Corporation Act, 5 & 6 Will. 4. c. 76,—Held, that such an order was illegal.

The town council cannot make an order for payment of interest due on a bond given under the 67th section of the act, as the act makes no provision for payment of interest, and does not contemplate the payments which it is given to secure being deferred.

Where the members of a corporation have, as such, occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund. *Regina v. Mayor, &c. of Warwick*, 15 Law J. Rep. (N.S.) Q.B. 306; 8 Q.B. Rep. 926.

The town council of a borough dismissed a corporate officer, and afterwards disallowed him any compensation for his office, on the ground that he had been guilty of such misconduct as would have justified his dismissal. A mandamus was subsequently granted to assess compensation; and, on the return, issues were raised, involving the question of misconduct; on all these traverses a verdict was found for the Crown:—Held, that the town council were, nevertheless, well justified in ordering the payment of the costs out of the borough fund, it appearing that the belief of such misconduct was *bona fide* entertained by them.

Held, secondly, that a resolution by the corporation to retain the attorney to take steps in opposition to the rule *nisi* for a mandamus, coupled with an order that the return should be filed, was a sufficient authority to him to try the issues.

Held, lastly, that it was no objection to the order that it appeared by the affidavits to have been made for a sum on account, before the delivery of a bill. *Regina v. Town Council of Lichfield*, 16 Law J. Rep. (N.S.) Q.B. 333; 10 Q.B. Rep. 534.

Three persons were indicted at the assizes for the county of S for forging the will of C D. It appeared that C D died in the borough of O, and that one of the prisoners took away the deeds, &c. of the deceased to his own house, which was in the county of S, but not in the borough of O; that the forged signatures of the testatrix and of one of the witnesses were written in the borough of O, and that the offence was completed in the county of D, where the forged signature of the second witness was written. The borough of O did not contribute to the county rate, but had a borough fund of its own:—Held, that the order for payment of all costs and expenses of the prosecution was properly made on the treasurer of the borough of O.

Secondly, that a mandamus would lie to the treasurer to compel payment. *Regina v. Hayward*, 17 Law J. Rep. (N.S.) Q.B. 223; *nom. Regina v. Treasurer of Oswestry*, 12 Q.B. Rep. 239.

(G) GAOL.

(a) Appointment of Keeper.

The borough of Leeds was incorporated by charter of Car. 2, which granted a gaol, and appointed the mayor for the time being or his deputy-keeper of the said gaol. There was formerly a lock up, for temporary confinement only of offenders, within the borough, the keeper of which was appointed by the corporation. In 1815, a prison, with a residence for a gaoler, was erected under local acts of 49 and 55 Geo. 3, which vested the prison and all matters appertaining thereto in the Justices of the borough, who were empowered to make rules for its regulation, and to appoint the gaoler. This prison was only used for temporary confinement, felons and others committed for punishment having always been sent to York Castle or the Wakefield House of Correction, which have always been used as the common gaols of the borough, and to the expense of which the borough has always contributed. These local acts saved all rights, &c. of the corporation. A new gaol for the borough was subsequently built under the provisions of the gaol acts, from the 4 Geo. 4. c. 64. to the 2 & 3 Vict. c. 56, and of the 7 Will. 4. & 1 Vict. c. 78. s. 37, by the town council of the borough:—Held, that the right of appointing the gaoler to this new gaol was vested in the Justices of the borough, in whom the powers as to regulation of gaols (which includes the appointment of gaoler) are vested by the 7 Will. 4. & 1 Vict. c. 78. s. 38.

The appointment of a keeper of a borough gaol is a matter "relating to the business of a court of criminal judicature," within the 6 & 7 Will. 4. c. 105. s. 8. *Regina v. Lancaster*, 16 Law J. Rep. (N.S.) M.C. 139; 10 Q.B. Rep. 962.

(b) Maintenance of Prisoners in.

In April 1839, prior to the grant of a separate Court of Quarter Sessions to the borough of Birmingham, situate within the county of Warwick, a resolution was come to, and duly entered in the minutes of the town council, for paying the sum of 11*d.* per head per day for one year, for the maintenance of the borough prisoners in the county gaol and house of correction, there being no gaol or house of correction in the borough, and this resolution was agreed to by the county Justices. In September 1839, after the grant of the Court of Quarter Sessions, an account was made out and allowed on the above principle. In January 1841 the county Justices resolved that the borough Justices had no power to commit to the county house of correction, and such prisoners were detained at expense and inconvenience to the borough, till county Justices could attend to commit them.

In consequence of doubts as to the validity of the charter of the borough of B, and other circumstances, no other accounts were sent in, in reference to the above charges, till September 1842, when an account was sent in to the council charging for prisoners confined in the gaol and house of correction, at the rate of 11*d.* per head up to the 30th of June 1842. The statute 5 & 6 Vict. c. 98. passed on the 10th of August 1842:—Held, that in pursuance of that statute such accounts were rightly altered, so as to charge the actual expense

of the borough prisoners instead of the 11*d.* per head per day—the statute rendering the borough liable to such charge of the actual expenses, both prospectively and retrospectively, and that no deduction could be made in respect of the prisoners committed by the borough Justices to the county house of correction, subsequently to January 1841.

The statute 5 & 6 Vict. c. 110. provided that the gaol of the city of Coventry should be a gaol of the county of Warwick, to be purchased and paid for by the county out of the monies in the hands of the treasurer:—Held, that the borough of Birmingham, which had a separate Court of Quarter Sessions, was liable to pay its proportion of the county rate for the purchase of the gaol. *Regina v. Mayor, &c. of Birmingham*, 17 Law J. Rep. (N.S.) M.C. 56; 10 Q.B. Rep. 116.

(H) QUARTER SESSIONS, GRANT OF.

The borough of W having petitioned for a grant of a separate Court of Quarter Sessions, under the 5 & 6 Will. 4. c. 76. s. 103, received a letter from the Secretary of State informing them that the Crown had made the grant, and within ten days from the receipt of this letter (but before the actual grant had passed the great seal), the town council appointed R coroner of the borough, not under seal, who exercised the office, and was recognized as coroner by the town council repeatedly, and within ten days after the actual grant of the Quarter Sessions had been received by the council.

A general quarterly meeting was held on the 9th of November, when a mayor was elected, and other general business transacted, and the meeting was, by a resolution then passed, adjourned to the 16th of November, on which day a resolution was passed by the council, removing R from the office of coroner and appointing G in his stead. No notice was given of this meeting, except the ordinary three days' notice required by section 69, which did not specify the business to be transacted at the meeting:—Held, that the office was full, as, even if the council had no right to appoint until after the actual grant of the Court of Quarter Sessions, the recognition of R as coroner by them, within ten days after the actual grant, was a good ratification of the prior appointment.

Held, also, that the election of G was invalid.

Held, also, that under the 5 & 6 Will. 4. c. 76. s. 69. no notice need be given of such business transacted at the adjourned meeting of the 16th of November as had been entered upon on the 9th of November, but that notice ought to be given of any other business transacted at the adjourned meeting.

Quære—Whether a coroner of a borough is a "corporate officer" within the 6 & 7 Vict. c. 89. s. 1. *Regina v. Grimshaw*, 16 Law J. Rep. (N.S.) Q.B. 385; 10 Q.B. Rep. 747.

(I) BOND BY, FOR MONEY LENT.

A bond given after the 5 & 6 Will. 4. c. 76, and before the 6 & 7 Will. 4. c. 104. and the 7 Will. 4. & 1 Vict. c. 78, by a municipal corporation for money borrowed is good at law, although under the 92nd section of the first act it cannot be enforced against the borough fund.

To a count for money had and received, the defendants pleaded that they were a corporation under

the 5 & 6 Will. 4. c. 76, and that after that act and before the 6 & 7 Will. 4. c. 104. and the 7 Will. 4. & 1 Vict. c. 78. it was illegally agreed that the plaintiff should lend the defendants money, and the defendants should give a bond; that the money was lent and the bond given, and the money had and received in pursuance of this illegal contract:—Held, that the plea was bad on special demurrer, as amounting to the general issue.

Semble—that it would be a good plea in bar, that no execution could issue on a judgment for the plaintiff in an action. *Pallister v. Mayor, &c. of Gravesend*, 19 Law J. Rep. (N.S.) C.P. 358.

MURDER AND MANSLAUGHTER.

[See POISONING.]

- (A) WHAT IS MURDER.
- (B) WHAT IS MANSLAUGHTER.
- (C) TRIAL WHEN OFFENCE COMMITTED ABROAD.
- (D) INDICTMENT.
 - (a) Cause of Death.
 - (b) Finding on.
- (E) EVIDENCE.

(A) WHAT IS MURDER.

On the 26th of February 1845, the *Felicidade*, a Brazilian schooner, fitted up as a slaver, surrendered to the armed boats of H.M.S. *Wasp*. She had no slaves on board. The captain and all his crew, except Majavel, and three others, were taken out of her and put on board the *Wasp*. On the 27th of February, the three others were taken out and put on board also. Cerqueira, the captain, was sent back to the *Felicidade*, which was then manned with sixteen British seamen, and placed under the command of Lieut. Stupart. The lieutenant was directed to steer in pursuit of a vessel seen from the *Wasp*, which eventually turned out to be the *Echo*, a Brazilian brigantine, having slaves on board, and commanded by *Serva*, one of the prisoners. After a chase of two days and nights, the *Echo* surrendered, and was then taken possession of by Mr. Palmer, a midshipman, who went on board her, and sent *Serva* and eleven of the crew of the *Echo* to the *Felicidade*. The next morning Lieut. Stupart took command of the *Echo*, and placed Mr. Palmer, and nine British seamen, on board the *Felicidade* in charge of her and of the prisoners (charged in the indictment). The prisoners shortly after rose on Mr. Palmer and his crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners brought to this country to take their trial for murder. The jury found them guilty. On a case reserved for the opinion of the Judges, several points were taken by the counsel for the prisoners; the conviction was held wrong. *Regina v. Serva*, 1 Den. C.C. 104; 2 Car. & K. 53.

If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies, in consequence of its exposure to the external world, the person who, by this misconduct, so brings the

child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. *Regina v. West*, 2 Car. & K. 784.

If a man finds his wife in the act of committing adultery, and kill her, this will be manslaughter only; but if a man takes away the life of a woman even his own wife, because he suspects, however strongly, that she has been engaged in some illicit intrigue, this will be murder. *Regina v. Kelly*, 2 Car. & K. 814.

(B) WHAT IS MANSLAUGHTER.

If each of two persons be driving a cart at a dangerous and furious rate, and they be inciting each other to drive at a dangerous and furious rate along a turnpike road, and one of the carts run over a man and kill him, each of the two persons is guilty of manslaughter, and it is no ground of defence, that the death was partly caused by the negligence of the deceased himself, or that he was either deaf or drunk at the time.

Generally, it may be laid down, that, where one by his negligence has contributed to the death of another, he is guilty of manslaughter. *Regina v. Swindall*, 2 Car. & K. 230.

Where an engineer, who had charge of an engine which was worked for the purpose of keeping up a supply of pure air in a mine, neglected his duty, so that the engine stopped and the mine thereby became charged with foul air, which afterwards exploded and caused the death of one of the miners,—Held, that in such a case the engineer could not be convicted of manslaughter on an indictment which did not allege a duty in him which he had neglected to perform. *Regina v. Barrett*, 2 Car. & K. 343.

If it be the duty of a person as ground bailiff of a mine to cause the mine to be properly ventilated by causing air-headings to be put up where necessary, and by reason of his omission in this respect another be killed by an explosion of fire-damp, such person is guilty of manslaughter, if, by such his omission, he was guilty of a want of ordinary and reasonable precaution, and if it was his plain and ordinary duty to have caused an air-heading to have been made, and a man using reasonable diligence would have done it. It is no defence in a case of manslaughter that the death of the deceased was caused by the negligence of others, as well as by that of the prisoner; for, if the death of a deceased be caused partly by the negligence of the prisoner, and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter. *Regina v. Haines*, 2 Car. & K. 368.

(C) TRIAL WHEN OFFENCE COMMITTED ABROAD.

Under the statute 33 Hen. 8. c. 23, a British subject was triable in this country for the murder of another British subject, committed on land within the territory of a foreign independent kingdom. In such a case, the indictment sufficiently shewed the parties to be British subjects, by stating, in the usual manner, that the deceased was in the peace of the king, and concluding against the peace of the king.

Such an indictment need not conclude *contra formam statuti*. *Rex v. Sawyer*, 2 Car. & K. 101.

(D) INDICTMENT.

(a) Cause of Death.

An indictment for murder stated that the prisoner M S, "a certain musket, then and there charged and loaded with gunpowder and one leaden bullet, &c., to, against and upon M G, &c., did shoot, discharge, and send forth, and hurt the said M G with the leaden bullet aforesaid, out of the musket aforesaid then and there by the force of the gunpowder so shot, discharged, and sent forth as aforesaid, the said M G, in and upon, &c., giving to the said M G, then and there, with the leaden bullet aforesaid, so as aforesaid shot, discharged, and sent forth out of the musket aforesaid, by the said M S, one mortal wound," &c.:—Held, that the cause of death was sufficiently shewn. *Regina v. Stokes*, 17 Law J. Rep. (N.S.) M.C. 116; 1 Den. C.C. 307; 2 Car. & K. 536.

Second count of indictment charged J O'B that he on the 27th of May feloniously and of his malice aforethought, struck deceased with a stick, of which said mortal blow deceased died on the 29th of May; that T R, D D, &c., on the day and year first aforesaid, at the parish aforesaid, feloniously and of their malice aforethought, were present aiding and abetting the said J O'B the felony last aforesaid to do and commit; and the jurors, &c., say that the said J O'B, T R, D D, &c., him the deceased in manner and form last aforesaid, feloniously and of their malice aforethought, did kill and murder.

Third count charged T R, that he, on the 27th of May, a certain stone feloniously and of his malice aforethought, cast and threw, and with the said stone so cast and thrown struck deceased, of which said mortal blow deceased died on the 29th of May; that J O'B, D D, &c. &c. (same as above).

Objection, first, that the indictment was inconsistent in charging the principals in the second degree with committing the felony at the time of the stroke, whereas it was no felony till the time of the death. Second, that the general verdict of guilty left it uncertain which was the cause of the death, the stick or the stone; and that therefore no judgment could be entered on either.

Held, first, the form of the indictment good; second, the alleged generality of the verdict immaterial, the mode of death being substantially the same. *Regina v. O'Brian*, 1 Den. C.C. 9.

In a case of manslaughter, the cause of the death and the death occurred in the county of S, and the body after death was removed to the city of L; the coroner of L held the inquest, and J E was tried for the manslaughter on the inquisition. *Semble*, that the inquest was properly held under the statute 6 & 7 Vict. c. 12, although that statute is a little obscurely worded.

An indictment against a medical practitioner charged that he made divers assaults on the deceased (a patient), and applied wet cloths to his body, and caused him to be put into baths:—Held, that this was a proper mode of laying the offence, although all that was done was by the consent of the deceased; and that the indictment need not charge an undertaking to perform a cure, and a felonious breach of duty.

An indictment for manslaughter charged that J E caused R D to become mortally sick, of which mortal sickness, especially of a mortal congestion of the lungs and heart, occasioned by the means aforesaid, he died:—Held, that this properly charged a death from a mortal congestion caused by those means. *Regina v. Ellis*, 2 Car. & K. 470.

(b) *Finding.*

A and B were indicted for the murder of C, by shooting him with a gun. In the first count A was charged as principal in the first degree, B as present, aiding and abetting him; in the second count, B as principal in the first degree, A as aiding and abetting. The jury convicted both, but said that they were not satisfied as to which fired the gun:—Held, first, that the jury were not bound to find the prisoners guilty of one or other of the counts only.

Secondly, *Maule, J. dissentiente*, that, notwithstanding the word "afterwards" in the second count both the counts related substantially to the same person killed and to one killing, and might have been transposed without any alteration of time or meaning. *Regina v. Downing*, 1 Den. C.C. 52.

(E) EVIDENCE.

An indictment for murder, by inflicting a mortal wound, is supported by proof of a blow, which caused an internal breach of the skin, though externally there were only the appearances of a bruise.

Quere—Whether such an allegation would have been sufficient in an indictment on the statute for cutting or wounding, with intent to murder, &c. *Regina v. Warman*, 1 Den. C.C. 183; 2 Car. & K. 195.

MUTINY.

Section 22. of the 5 & 6 Vict. c. 12. (the Mutiny Act) enacts "That it shall be lawful for the constable of any place, where any person reasonably suspected to be a deserter shall be found, or if no constable can be met with, for any officer or soldier in Her Majesty's service, to apprehend such suspected person, and cause him to be brought before any Justice living in or near such place, and acting for the same or any adjoining county, who hath thereby power to examine such suspected person; and if by his confession, or by testimony, &c., it shall appear that such suspected person is a soldier, and ought to be with the corps to which he belongs, such Justice shall cause him to be conveyed to some public prison," &c. To a writ of *habeas corpus*, the return set out the following warrant:—"Metropolitan Police District, to wit. To the Governor of Tothill Fields Bridewell or his Deputy. Receive the body of Archibald Douglas herewith sent you, brought before me, J H, Esq., one of Her Majesty's Justices of the Peace in and for the said district, and charged upon the oath of J E B and others, with being a deserter from the Honourable East India Company's 49th Regiment of Infantry, contrary to the statute, &c. Him therefore safely keep in your said custody, until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant. Given under my hand, &c.: Signed," &c.:—Held, that the warrant was

insufficient, for not stating the party to be a soldier, and a person who ought to be with his regiment; and the prisoner was discharged.

An information, at the suit of the Attorney General, under section 62. of the 33 Geo. 3. c. 52. is in the nature of a criminal charge, and a *capias* under section 141. in respect of it, is criminal process; no privilege, therefore, from arrest on such a charge exists, to a person *reduendo*, on his discharge upon *habeas corpus* from an illegal custody, as such privilege only exists in the case of civil process.

Whether affidavits will be received, not to contradict the return to a *habeas corpus*, but in explanation of the circumstances and situation of the party in custody—*quere*. In *re Douglas*, 12 Law J. Rep. (N.S.) Q.B. 49.

NEGLIGENCE.

[See ACTION—SHERIFF—WHARFINGER.]

(A) CAUSE OF ACTION GENERALLY.

- (a) *Negligence in Execution of Public Works where Plaintiff knowingly incurs Danger.*
- (b) *Breach of Duty to fence off Area.*
- (c) *Ability to avoid Injury.*
- (d) *Where Plaintiff contributes to the Injury.*
- (e) *Prima facie Evidence of Negligence.*

(B) LIABILITY OF EMPLOYERS.

- (a) *For Acts of Contractors and their Workmen.*
- (b) *To their Servants for Negligence of fellow Servants.*

(C) LIABILITY TO REPRESENTATIVES OF DECEASED PERSONS.

(A) CAUSE OF ACTION GENERALLY.

- (a) *Negligence in Execution of Public Works where Plaintiff knowingly incurs Danger.*

Where the Commissioners of Sewers made a trench in the outlet from a mews, putting up no fence, and a cabman attempted to lead his horse over some rubbish piled up by them on the side and the horse fell and was killed,—Held, that the plaintiff was entitled to recover, although he had at some hazard brought his horse out of the stable, and that it was properly left to the jury whether or not the plaintiff had persisted, after warning, in running upon a great danger. *Clayards v. Dethick*, 12 Q.B. Rep. 439.

(b) *Breach of Duty to fence off Area.*

The declaration alleged that the defendant was possessed of a message with the appurtenances near to a public footway, in front of which said message and part of the appurtenances thereof, and close to and by the side of the said footway and abutting upon the same, there was a large hole or area, which hole, &c. by reason of the possession of the said message with the appurtenances, the defendant ought to have fenced off, so as to prevent damage to passengers, &c.:—Held, that the obligation of the defendant to fence off the area was properly described in the declaration.

A trespasser may have a right of action for an injury sustained whilst in the act of trespassing. *Barnes v. Ward*, 19 Law J. Rep. (N.S.) C.P. 195.
[See post (C).]

(c) *Ability to avoid Injury.*

Case for so negligently and unskillfully navigating a vessel on the river Thames, of which the defendant had the care and management, that she struck against and damaged a wharf and jetty belonging to the plaintiff. Plea, amongst others, that the wharf and jetty were a construction within the flow of the tide and below low-water mark, and obstructed part of the bed and course of the river, which was a common and public navigable river and highway for all the Queen's subjects to navigate over and along at their free will and pleasure; that the said wharf and jetty had been constructed by the plaintiff, and unlawfully and wrongfully obstructed the navigation over the said part of the river to the common nuisance of the Queen's subjects, and that they could not pass, &c. without damaging the said wharf and jetty, as in the declaration mentioned; that the plaintiff had notice of the premises, but wilfully continued the said nuisance; that the defendant had occasion to pass with the said vessel over the said part of the river, and in so passing did the alleged damage, and that he managed and navigated the said vessel with all the skill and care which would have been due and proper, had not the said part of the river been obstructed as aforesaid, and that he did no unnecessary damage. Replication *de injuriâ*, and a verdict for the defendant:—Held, that the plea, though in substance sufficiently proved at the trial, was bad for not alleging a necessity to navigate the vessel over the part of the river where the nuisance existed, nor even that the defendant's right course was over such part of the river, and that he could not have avoided the nuisance by taking any other course with reasonable convenience, and, therefore, that the plaintiff was entitled to judgment *non obstante veredicto*. *Dimes v. Petley*, 19 Law J. Rep. (N.S.) Q.B. 449; 15 Q.B. Rep. 276.

A passenger in a public conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury. *Thorogood v. Bryan*, 18 Law J. Rep. (N.S.) C.P. 336; 8 Com. B. Rep. 115.

(d) *Where Plaintiff contributes to the Injury.*

A gas company supplied a house with gas by means of a short pipe from their main, communicating with fittings within the house belonging to the owner during his occupation, and also during the subsequent occupation of his tenant. There was a meter and a stop-cock, of which the key was hung by its side within the house, but there was no stop-cock between the outside of the house and the main. Upon the tenant quitting, he sent notice to the company that he would no longer be liable for gas-rate. Ten days after he quitted, an explosion took place, in consequence of the escape of the gas within the house, by which it was much injured, and a person going into the house found the

gas issuing from the pipe above the meter and the stop-cock, which had not been turned so as to prevent the passage of the gas. There was ground to believe that the upper part of the pipe had been removed by some dishonest person:—Held, that the owner could not, on these facts, recover compensation for the damage done from the company in an action on the case for negligence, as the plaintiff was, by his omission to close the stop-cock within the house, contributory to the mischief, and as there was no obligation imposed on the company by their act of parliament or the law to place a stop-cock on the outside of the house.

Held, also, that this defence was admissible under the plea of not guilty. *Holden v. Liverpool New Gaslight Co.*, 15 Law J. Rep. (N.S.) C.P. 301; 3 Com. B. Rep. 1.

In an action brought by a passenger upon an omnibus against the owner of another omnibus for injuries sustained by the negligent management of the last-mentioned omnibus, it appeared that the two omnibuses were racing at the time, and that the defendant's omnibus struck that upon which the plaintiff was riding, and caused it to swing against a lamp-post, by which the plaintiff was injured. Had the omnibus, which was struck, not been proceeding at so great a speed, it might have been pulled up after the collision, and the accident have been prevented:—Held, that the Judge was not bound to direct the jury that, if the mischief was in part occasioned by the misconduct of the person driving the omnibus upon which the plaintiff was, he was not entitled to recover. *Rigby v. Hewitt*, 19 Law J. Rep. (N.S.) Exch. 291; 5 Exch. Rep. 240.

It is no answer to an action for negligence, that part of the injurious consequences would not have occurred had the plaintiff not been guilty of some negligence.

The plaintiff, a passenger on board a steamer, was injured by the falling of its anchor in consequence of a collision with a steamer belonging to the defendant. There was conflicting evidence as to the propriety of the mode in which the anchor was carried, and also whether the plaintiff had not placed himself in a dangerous position:—Held, to be a misdirection to direct the jury that the plaintiff was not entitled to recover if there was negligence in the stowage of the anchor, or in placing himself in the position he did, although the collision occurred from the negligence of the defendant's steamer.

Quære—per *Pollock, C.B.*, whether a man who is guilty of negligence is responsible for all the consequences of that negligence although such consequences could not have been reasonably foreseen or expected. *Greenland v. Chaplin*, 19 Law J. Rep. (N.S.) Exch. 293; 5 Exch. Rep. 243.

(e) *Prima facie Evidence of Negligence.*

In an action for negligently setting fire to a barn by a spark from a locomotive engine, evidence is admissible that other engines of the company emitted sparks which flew to a distance, in order to shew the possibility of the fire having been caused by such a spark.

The fact of a fire having been caused by a spark from a steam-engine is *prima facie* evidence of

negligence in the owner of the engine. *Piggot v. Eastern Counties Rail. Co.*, 15 Law J. Rep. (N.S.) C.P. 235; 3 Com. B. Rep. 229.

(B) LIABILITY OF EMPLOYERS.

(a) *For Acts of Contractors and their Workmen.*

By the statute 3 Vict. c. 55. s. 5. no act of the Commissioners of the Dartford Creeks shall be valid, unless made or done at a meeting under the act; and all the powers of the act shall be executed by the majority of the commissioners present at a meeting, not less than three being present. By section 12. the commissioners shall and may be sued in the name of their clerk. The commissioners passed resolutions that their engineer should prepare specifications with a view to the performance of a contract for certain works, and that tenders should be invited for the same. At a meeting, at which seven commissioners were present, they unanimously agreed to accept a tender sent in by B. Three commissioners only were named in the contract with B, which was prepared by their secretary, and by none of them was it signed. B did the works specified in the contract, (*inter alia*) a bank, which he erected of insufficient materials. Water was prematurely admitted, which sunk the bank and damaged the plaintiff's land:—Held, first, that the contract was made in execution of the office of the commissioners, and that work done under that contract was work done by them as commissioners, for which they might properly be sued in the name of their clerk. But, secondly, that the bank which failed being a part of the works specified and described in the contract, B, the contractor, and not the commissioners, was liable for the damage done to the plaintiff. *Allen v. Hayward*, 15 Law J. Rep. (N.S.) Q.B. 99; 7 Q.B. Rep. 960.

A company held not liable for injuries caused by the negligence of their contractor's workmen in constructing a bridge. *Reedie v. London and North-Western Rail. Co.*, *Hobbit v. London and North-Western Rail. Co.*, 4 Exch. Rep. 244.

(b) *To their Servants for Negligence of fellow Servants.*

A master is not in general liable to an action at the suit of his servant for injuries sustained in consequence of the negligence of a fellow-servant acting in his master's service; but the master would be liable if the servant guilty of negligence was not a person of ordinary skill and care.

In an action by the administratrix of J H, under Lord Campbell's Act, 9 & 10 Vict. c. 93, the declaration stated that one J H was in the employ and service of the defendants, and while he was such servant, and in the discharge of his duty as such servant, he became a passenger upon a railway of the defendants, in a carriage belonging to the defendants, drawn by an engine under the guidance, government and direction of the defendants, to wit, by their servants, and that there was then upon the same railway another engine and carriage of the defendants, under the guidance, government, and direction of the defendants, to wit, by their servants, yet the defendants behaved and conducted themselves so negligently, carelessly, and improperly in

and about the guidance, government, and direction of the first-mentioned engine and carriage, and also in and about the guidance, government, and direction of the other engine and carriage, that the last-mentioned engine and carriage came into collision with the carriage first mentioned, and J H was thereby killed. Plea, that the collision took place solely by the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the declaration mentioned, and that the said engines and carriages were at the time when, &c. respectively under the guidance, &c. of the said servants, who were then severally fit and competent persons, and the said negligence was wholly unauthorized by the defendants, and without the leave, licence or knowledge of the defendants:—Held, on special demurrer, first, that the plea was not bad as being only an argumentative denial of the alleged cause of action; and, secondly, that no cause of action was shewn upon the record. *Hutchinson v. York, Newcastle and Berwick Rail. Co.*, 19 Law J. Rep. (N.S.) Exch. 296; 5 Exch. Rep. 343.

A servant injured by the negligence of a fellow servant in the course of their common employment, is not entitled to sue his master for compensation if such fellow servant was a person of skill and care.

Therefore, where an action was brought under Lord Campbell's Act, the 9 & 10 Vict. c. 93, to recover damages, the deceased having been killed by the fall of some scaffolding which had been erected by persons of competent skill in the employment of his master who was not guilty on that occasion of negligence,—Held, that the action was not maintainable. *Wigmore v. Jay*, 19 Law J. Rep. (N.S.) Exch. 300; 5 Exch. Rep. 354.

(C) LIABILITY TO REPRESENTATIVES OF DECEASED PERSONS.

The defendant, who was in possession of land which abutted on an immemorial public highway, built a house thereon, and excavated an area in front of the house, and left it open adjoining the highway. A, to whom the plaintiff was administrator, walking with ordinary care along the highway, fell down the area and was killed:—Held, that the defendant was liable to an action for damages by the plaintiff as administrator of A under Lord Campbell's Act, the 9 & 10 Vict. c. 93. *Barnes v. Ward*, 19 Law J. Rep. (N.S.) C.P. 195.

An action on the statute 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents, can only be maintained in cases where the deceased could have maintained the action, if alive; therefore, if in an action where the death is alleged to have been caused by the negligence of the defendant's servants, it be shewn that deceased by his own negligence or carelessness contributed to the accident, the defendant would be entitled to a verdict.

The rule as to this, in actions on this statute, is the same as if the injured party himself had brought the action. *Tucker v. Chaplin*, 2 Car. & K. 730.

[See *ante*, (B) (b).]

NEWCASTLE-UPON-TYNE.

[See PORT DUTIES.]

NEWSPAPER.

L, the proprietor of a newspaper, had engaged the plaintiff to write articles for it. The defendants had been proprietors, but had ceased to be so before the contract was entered into, but their names appeared as proprietors in the declaration required to be filed by the 6 & 7 Will. 4. c. 76, which makes a copy of such declaration conclusive evidence of the truth of the matter set forth, and of their continuance to the time in question. The jury having found that the contract was made by L on his own behalf, without authority from the defendants, and that the plaintiff did not at the time know the defendants to be proprietors,—Held, that the defendants were not liable on the contract. *Holcroft v. Hoggins*, 15 Law J. Rep. (N.S.) C.P. 129; 2 Com. B. Rep. 488.

NEW TRIAL.

[See PRACTICE.]

NEXT-OF-KIN.

A testatrix having three daughters, gave one third to each for life, with remainder to their children respectively, with cross-remainders between them, with an ultimate limitation to her own next-of-kin and legal personal representatives:—Held, that the class of next-of-kin was to be ascertained at the death of the testatrix, and that they took as joint tenants. *Baker v. Gibson*, 12 Beav. 101.

NOTICE.

[See ACTION—CHARGE—CONTRACT—SESSIONS.]

R U, under the will of her late husband being seized of certain real estates, subject to a legacy of 2,000*l.* to E S, upon her subsequent marriage with J W in 1843 settled these estates to certain uses, whereby they became ultimately vested in J W in fee. To a bill by the husband of E S, claiming under an alleged agreement in writing, in 1835, between R U and E S, whereby E S before her marriage agreed to release her legacy, and R U, in lieu thereof, agreed to assure or devise to her certain parts of the same real estates, J W by his answer admitted that, before his marriage with R U, he was informed by her that by agreement between her and E S, E S had given up her right to the legacy, and in lieu thereof R U had left her part of the said estates; but he denied all knowledge of the alleged agreement of 1835, or of any other binding agreement, and insisted that he was a purchaser for value without notice:—Held, that J W had that knowledge which should have led him to further inquiry; and was affected with constructive notice of the plaintiff's equitable title under the agreement, if such existed; and the Court directed issues to ascertain the facts. *Penny v.*

Watts, 19 Law J. Rep. (N.S.) Chanc. 212; 1 Mac. & G. 150; 1 Hall & Tw. 266.

Notice of a charge to an indefinite amount, though inaccurate as to the particulars or extent of the charge, is sufficient to put upon inquiry a party dealing with the property charged, and to give priority to the true amount of the charge as against the party who received the incorrect notice, but made no inquiry. *Gibson v. Ingo*, 6 Hare, 124.

The lease contained a covenant against assignment without the licence of the lessors; the purchaser inspected the lease and an indorsement upon it, from which it appeared that a licence was necessary, but he alleged that he did not observe the covenant, and only looked at the term and rent:—Held, that he had notice of the covenant. *Smith v. Capron*, 19 Law J. Rep. (N.S.) Chanc. 322.

NUISANCE.

[See COMMON—NEGLIGENCE.]

(A) REMEDY BY ACTION.

(B) RIGHTS AND LIABILITIES OF OWNERS OF REAL PROPERTY.

Provisions for the removal of nuisances made by the 9 & 10 Vict. c. 96; 24 Law J. Stat. 242.

The act for the removal of nuisances and the prevention of contagious diseases renewed and amended by the 11 & 12 Vict. c. 123; 26 Law J. Stat. 327.

The Nuisances Removal and Diseases Prevention Act 1848 amended by the 12 & 13 Vict. c. 111; 27 Law J. Stat. 259.

(A) REMEDY BY ACTION.

A count in the declaration which states the plaintiff's possession of a messuage adjoining to and abutting on a public navigable river, and that by reason thereof the plaintiff was entitled to the full and free use of the navigation of the said river, for the purpose of passing, &c. and of conveying their servants, goods, &c., from the said messuage, and that the defendant wrongfully placed planks and logs, &c. upon the said river, and upon that part of it which was near to the said messuage, and thereby prevented the plaintiff from having the full use of the navigation of the river, *per quod* the plaintiffs had been put to expense in the conveyance of their servants, goods, &c. by a longer and less convenient route, discloses a sufficient ground of action at the suit of an individual. But a count which states that certain messuages were in the possession of tenants of the plaintiffs, and alleges a similar obstruction, and that the plaintiffs were injured thereby in their reversionary interest, is bad as shewing no act which *per se* imported any damage to their reversionary interest; and a verdict having been entered generally for the plaintiffs on a declaration containing both counts, and the jury having found no damages on the count alleging their possession of the messuages,—Held, that the judgment ought to be arrested generally. *Dobson v. Blackmore*, 16 Law J. Rep. (N.S.) Q.B. 233; 9 Q.B. Rep. 991.

In an action on the case for a nuisance arising from the smoke issuing from buildings in the

occupation of the weekly tenants,—Held, that the action was rightly brought against the lessor; and, secondly, that the entering of smoke discharged from defendant's chimnies into plaintiff's house amounted in contemplation of law to a nuisance; but that the fact of all buildings erected on the locality on which defendants were being declared common nuisances by statute was not *per se* sufficient to entitle the plaintiff to a verdict in a civil action, in which the nuisance complained of arose from the smoke. *Rich v. Basterfield*, 2 Car. & K. 257.

In an action for a nuisance, an architect acquainted with the locality may be asked if the nuisance depreciated the value of the houses in the neighbourhood. *Gauntlett v. Whitworth*, 2 Car. & K. 720.

(B) RIGHTS AND LIABILITIES OF OWNERS OF REAL PROPERTY.

If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder; and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. *Burling v. Read*, 19 Law J. Rep. (n.s.) Q.B. 291; 11 Q.B. Rep. 904.

A, the owner of a house, with a fire-place and chimney, demised it to a tenant from week to week. The tenant lighted fires, and from the position of the chimney the emission of the smoke was a nuisance to B, the occupier of an adjoining house. More than one week elapsed, during which this nuisance continued, and A did not determine the tenancy. B brought an action against A for causing and continuing this nuisance, to which A pleaded not guilty, and not possessed:—Held, that on both issues A was entitled to the verdict.

1. The owner of real property is not responsible for a nuisance committed and continued thereon by the tenant in possession.

2. If the owner of land demise it with an existing nuisance thereon, he is responsible for the continuance of that nuisance during the term; so if he be a party to the creation of a nuisance after the demise; but he is not responsible for a nuisance so created, though such nuisance be a probable consequence of the user of the land as demised.

3. An omission on the part of the owner of land to determine the tenancy after the creation by the tenant of a continuing nuisance thereon, is not equivalent to a fresh demise of the premises so as to make him responsible for such nuisance. *Rich v. Basterfield*, 16 Law J. Rep. (n.s.) C.P. 273; 4 Com. B. Rep. 783.

NUL TIEL RECORD.

[See JUDGMENT, (I) Judgment recovered.]

OATHS.

[See PERJURY.]

Certain officers of the Court of Chancery authorized to administer oaths and take declarations and affirmations by the 11 Vict. c. 10; 26 Law J. Stat. 23.

OFFENDERS.

The law as to the custody of offenders amended by the 10 & 11 Vict. c. 67; 25 Law J. Stat. 216.

The trial and punishment of juvenile offenders provided for by the 10 & 11 Vict. c. 82; 25 Law J. Stat. 237.

Provisions made for offences against the person of the sovereign or the government by the 11 Vict. c. 12; 26 Law J. Stat. 26.

ORDNANCE ACT.

The 5 & 6 Vict. c. 94, for the vesting and purchase of lands for the Ordnance services, and for the defence and security of the realm, enacts, in section 19, that in the event of owners of lands refusing, &c. to treat with the Ordnance officers for the purchase of lands, two Justices may put the latter into immediate possession of the lands; and a jury being summoned, shall "find the compensation to be paid, either for the absolute purchase of such lands, or for the possession or use thereof;"—Held, that under this act the jury were not authorized to award the expenses of witnesses, counsel, &c. to a party whose lands had been taken for the purposes of the act. *In re the Principal Officers of the Ordnance and Laws*, 17 Law J. Rep. (n.s.) Exch. 126; 1 Exch. Rep. 441.

OUTLAWRY.

- (A) PROCEEDINGS TO.
- (B) TESTE.
- (C) RIGHT OF OUTLAW TO TAX ATTORNEY'S BILL.
- (D) REVERSAL OF.

(A) PROCEEDINGS TO.

A *ca. sa.* issued on the 7th of July 1846, returnable "immediately after the execution thereof," under the statute 3 & 4 Will. 4. c. 67. s. 2. This writ was returned *non est inventus* on the 21st of January 1847:—Held, that such writ could not be considered as returnable for the purpose of proceeding to outlawry, and that a writ of *exigi facias*, which issued on such *ca. sa.*, returnable the 8th of May, was irregular. *Lewis v. Holmes*, 16 Law J. Rep. (n.s.) Q.B. 430; 10 Q.B. Rep. 896.

Proceedings to outlawry cannot be founded on a writ of *ca. sa.* made returnable immediately after execution, pursuant to the 3 & 4 Will. 4. c. 67. s. 2. *Levy v. Hamer*, 19 Law J. Rep. (n.s.) Exch. 304; 5 Exch. Rep. 518.

An affidavit for a distringas to outlawry, stating that the answers to the attempts made to serve the defendant with the writ of summons at his last known residence here were, that the defendant is abroad, that all reasonable means and diligence have been ineffectually used to serve the defendant personally, and that the deponent believes the defendant keeps out of the way to avoid service, is sufficient; a less degree of particularity being required on such an application than on moving for a distringas to compel appearance.

forcibly to the workhouse, where he was detained a week, and then discharged by a magistrate. He then brought actions against the parish officers, in one of which damages were recovered. The trustees of the parish under a local act, charged the damages and costs in these actions against the poor-rates. The rates so charged were afterwards allowed in open vestry, and the charges paid. Upon an information against the trustees for the purpose of compelling them personally to refund the money so paid as for a breach of trust, the Court dismissed the information, holding that the parish officers had not participated in the forcible removal, and that having acted reasonably in the discharge of their duty they were entitled to be allowed the payment so made by them.

The 32nd Order of August 1841 applies to informations filed against individual members of a body of public trustees, charging such individuals with a breach of trust. *Attorney General v. Pearson*, 2 Coll. C.C. 581.

PARLIAMENT.

1. POWERS AND PRIVILEGES.
2. RETURNING OFFICER.
3. REGISTRATION CASES.

- (A) LIST OF VOTERS.
 - (a) *Particulars.*
 - (b) *Amendment.*
- (B) NOTICE OF CLAIM.
 - (a) *Form and Contents.*
 - (b) *Service.*
 - (c) *Duplicate.*
 - (d) *Amendment.*
- (C) NOTICE OF OBJECTION.
 - (a) *Form and Contents.*
 - (b) *Service.*
- (D) QUALIFICATION.
 - (a) *In Counties.*
 - (b) *In Cities and Boroughs.*
- (E) PRACTICE.
 - (a) *Notice of Appeal.*
 - (b) *Entry of Appeal.*
 - (c) *Delivery of Paper Books.*
 - (d) *Appearance of Parties.*
 - (e) *Form of Case in Consolidated Appeals.*
 - (f) *Inferences drawn from Case.*

Doubts as to the law for the trial of controverted elections removed by the 11 Vict. c. 18; 26 Law J. Stat. 34.

The times of payment of rates and taxes by electors regulated by the 11 & 12 Vict. c. 90; 26 Law J. Stat. App. v.

The law for the trial of election petitions amended by the 11 & 12 Vict. c. 98; 26 Law J. Stat. 241.

1. POWERS AND PRIVILEGES.

Trespass for assault and false imprisonment. Plea—that before and at the time when, &c., and during all the time in the declaration and plea mentioned, a parliament was sitting at Westminster;

that certain matters came on to be discussed in the House of Commons, in respect of which it was considered necessary by the said House that the plaintiff should be examined at the bar of the House touching those matters; that it was ordered by the House, in pursuance of and according to the ancient usages and privileges of the House of Commons and the law and custom of parliament, that the plaintiff should attend the House forthwith, of which he had notice; that the plaintiff wilfully and contemptuously refused to obey the said order, and concealed himself, for the purpose of avoiding attendance on the House, of which the said House had notice, and, thereupon, in order to compel the attendance of the plaintiff at the bar of the said House, to be examined on those matters, it was ordered and resolved by the said House, according to the ancient usages and privileges of the said House, and the law and custom of parliament, that the plaintiff should be sent for, and brought before the said House, in custody of the serjeant-at-arms attending the said House, and that the Speaker of the said House should issue his warrant accordingly; whereupon the said Speaker, in pursuance of the order and resolution last mentioned, and in pursuance of and according to the ancient usages and privileges of the said House, and the law and custom of parliament, issued his warrant accordingly, whereby, after reciting that the House of Commons had that day ordered that the plaintiff should be sent for in the custody of the serjeant-at-arms attending the said House, he required and authorized the serjeant-at-arms then attending the said House to take into custody the body of the plaintiff; that the defendant was then serjeant-at-arms attending the said House, and that the said warrant was duly delivered by the Speaker to the defendant to be by him executed in due form of law, by virtue and in execution of which said warrant the defendant arrested the plaintiff, and did, in order to bring him before the said House, in execution of and obedience to the said warrant, force and compel him, &c. (justifying the trespasses complained of).

On demurrer to this plea, it was held by the Court of Exchequer Chamber (reversing the judgment of the Court below), That the warrant of the Speaker of the House of Commons, having issued in a matter over which the House had jurisdiction, was to be construed on the same principles as a mandate or writ issued out of a superior court, acting according to the course of common law, and was, therefore, valid as a defence to the action, without assigning any specific cause on the face of it.

Another plea merely justified under an order for the plaintiff to attend the House, without assigning the cause of the order, and alleged a disobedience of this order, and that a warrant issued, as in the former plea:—Held, that as this plea did not shew affirmatively that the warrant issued in a matter over which the House had no jurisdiction, it was good.

Held, also, that the recitals in the warrant must be read in connexion with the mandatory part, and that it therefore authorized the defendant not only to take the plaintiff, but also to bring him to the bar of the House.

The House of Commons has power to institute inquiries, and order the attendance of witnesses,

and, in case of disobedience, to bring them in custody to the bar, for the purpose of examination.

If there is a charge of contempt and breach of privilege, and an order for the party charged to attend the House and answer, and a wilful disobedience of that order, the House has power to cause such party to be taken into custody, and brought to the bar to answer the charge.

The House of Commons alone is the proper judge when these powers, or either of them, ought to be exercised. *Gosset v. Howard*, 16 Law J. Rep. (n.s.) Q.B. 345; 10 Q.B. Rep. 411.

2. RETURNING OFFICER.

In an action against the returning officer of a borough, the declaration stated, that the plaintiff was a burgess, and that his name was on the register of voters for the borough, and that he was entitled to give his vote at an election then holden, and tendered his vote, yet the defendant refused to permit him to give his vote, and would not receive or allow it:—Held, that a plea that the plaintiff was not a burgess *duly qualified* or entitled to vote at the election, concluding to the country, was bad.

Semble—that a count stating that the defendant, nevertheless, well knowing the premises, “but contriving, and wrongfully, fraudulently, and wilfully and maliciously intending to injure the plaintiff,” did wholly refuse to receive the vote of the plaintiff, or to admit and allow the same to be entered and recorded; but, on the contrary thereof, caused the plaintiff’s vote to be entered in the column of the poll-books for votes received as tendered only; and when he cast up the votes at the final close of the poll, and declared its state, wholly refused, neglected, and omitted to reckon and include the plaintiff’s vote, sufficiently stated, that the defendant acted maliciously, even on special demurrer.

Quære—Whether, at such an election, the returning officer is not acting merely ministerially; and, consequently, whether it is necessary, in order to support the action, that the defendant should have acted maliciously.

By the 6 & 7 Vict. c. 18. s. 82. no scrutiny shall be allowed by or before any returning officer. A declaration alleged that plaintiff offered his vote for choosing a burgess, but that the defendant, a returning officer, ordered and allowed a scrutiny, and adjudged and determined after such scrutiny that the plaintiff was not then entitled to give his vote; *whereby* the plaintiff was not only delayed in the exercise of the privilege, but was then wholly deprived of his privilege, and a burgess was elected without any vote of the plaintiff:—Held, first, that the words after the “*whereby*” were a sufficient averment of matter of fact, and were not merely an inference drawn from preceding allegations; secondly, that the matter of fact so averred shewed a sufficient injury and damage, and which might have resulted from holding the scrutiny. *Pryce v. Belcher*, 15 Law J. Rep. (n.s.) C.P. 305; 4 Dowl. & L. P.C. 238; 3 Com. B. Rep. 58.

The plaintiff was on the register of voters for the borough of A, and tendered his vote for one of the candidates at a contested election for a member to serve in parliament for that borough; the returning officer, mistaking the duty required of him by section 81. of the 6 & 7 Vict. c. 18, allowed a

scrutiny upon, and finally refused to receive and record the plaintiff’s vote. The plaintiff had ceased to reside at A, or within seven miles thereof, for some time before the election, and was, therefore, not entitled to vote under the 79th section of the same act. In an action on the case against the returning officer,—Held, that a person on the register of voters, but having lost his right to vote by the provisions of the 6 & 7 Vict. c. 18. s. 79, cannot recover damages against a returning officer (no malice existing) for refusing to receive his vote at the poll.

Semble—In such case the returning officer might be prosecuted for the breach of a public duty. *Pryce v. Belcher*, 16 Law J. Rep. (n.s.) C.P. 264; 4 Com. B. Rep. 866.

3. REGISTRATION CASES.

(A) LIST OF VOTERS.

(a) Particulars.

Upon a list of voters for a county, a party was described in the register under the head “place of abode” as “travelling abroad:”—Held, that the description was sufficient. *Walker v. Payne*, 15 Law J. Rep. (n.s.) C.P. 38; 1 Barr. & Ar. 541; 2 Com. B. Rep. 12.

Where a party was upon the register for a county, and it was objected, before the revising barrister, that the situation of the property was insufficiently described upon the register for the purpose of being identified,—Held, that under section 40. of the 6 Vict. c. 18. this was a question for the barrister, and he having found that the description was sufficient, the Court refused to interfere with his decision. *Wood v. Overseers of Willesden*, 15 Law J. Rep. (n.s.) C.P. 41; 1 Barr. & Ar. 527; 2 Com. B. Rep. 15.

(b) Amendment.

The abode of a party claiming a city vote, was described as “Greenwich” instead of “Queen Square,” both places being within seven miles of the city. The qualification of the claimant was rightly described:—Held, that this was such “an insufficient description” as was amendable by the revising barrister under section 40. of the 6 Vict. c. 18, upon the matter being supplied to his satisfaction. *Luckett v. Knowles*, 15 Law J. Rep. (n.s.) C.P. 87; 1 Barr. & Ar. 730; 2 Com. B. Rep. 187.

The qualification of a voter for a borough, who was duly objected to, was described in the overseers’ list in the third column as “House in succession,” in the fourth column as “Butcher Row.” It was proved before the revising barrister that the voter had occupied two houses during the twelve months next previous to the 31st of July, one in Coleham, the other in Butcher Row, and he then applied to the barrister to amend the description of his qualification by altering the word “house” in the third column to “houses,” and by adding “Coleham” in the fourth column, which the revising barrister refused to do:—Held, that the revising barrister has no power under the 40th section of the 6 & 7 Vict. c. 18. to amend in such manner as to add to the subject-matter of the qualification

described in the list. *Onions v. Bowdler*, 17 Law J. Rep. (N.S.) C.P. 70; 5 Com. B. Rep. 65.
[See the next case.]

(B) NOTICE OF CLAIM.

(a) Form and Contents.

A party claiming a borough vote in respect of the occupation of two houses in immediate succession, in his notice to the overseers (sent in pursuant to the 6 Vict. c. 18, Schedule B. No. 6.) described under column three his "nature of qualification," as "house," and under column four, "street, &c. where property is situate," specified the two houses in respect of which he claimed:—Held, that this was a sufficient description, as column three was intended to point out the general nature of the qualification, which was to be more particularly described in column four; and *per Coltman, J.*, the barrister had the power to amend in case it had been necessary. *Hitchins or Hutchins v. Brown*, 15 Law J. Rep. (N.S.) C.P. 38; 1 Barr. & Ar. 545; 2 Com. B. Rep. 25.

(b) Service of.

The statute 6 Vict. c. 18, s. 4, enacts, "That persons desirous of being put upon the register of voters shall give or send to the overseers, on or before the 20th of July, a notice in writing;" the 20th of July happening to be a Sunday,—Held, that the notice might legally be given on that day.

By section 64, where respondents do not appear, the appellant must prove a service of a notice of appeal:—Held, that an objection to the sufficiency of the service was waived by the respondent's appearance. *Rawlins v. Overseers of West Derby*, 15 Law J. Rep. (N.S.) C.P. 70; 1 Barr. & Ar. 599; 2 Com. B. Rep. 72.

(c) Duplicate.

Where a notice of claim addressed to the overseer was duly posted, so that by due course of post it would have arrived at the place to which it was addressed on the 20th of July, but by an accident it did not arrive until the 22nd,—Held, that the duplicate notice properly stamped was sufficient evidence of the claim being in time.

Held, also, that there is no difference in this respect between a notice of objection, posted under the 6 Vict. c. 18, s. 100, and a notice of claim, posted under section 101. *Bayley v. Overseers of Nantwich*, 1 Barr. & Ar. 642; 2 Com. B. Rep. 118.

(d) Amendment.

A notice of claim to be placed upon the register of voters for a county was directed to and served upon the overseers of the "township of S." There was, in fact, no such township, but the overseers, who acted for the district called the township of S, and on whom the notice was duly served, had, by notice duly published, required all claimants to send their notices of claim to them. S was situate in the parish of M, and the overseers acting for the (so-called) township of S were overseers of the parish of M. The revising barrister altered the words "township of S," in the direction of the notice, to the "parish of M," and inserted the claimant's name

in the register:—Held, that the notice of claim was sufficient, was properly served, and that the revising barrister had properly exercised his power of amendment. *Elliott v. St. Mary's Within*, 16 Law J. Rep. (N.S.) C.P. 101; 4 Com. B. Rep. 76.

(C) NOTICE OF OBJECTION.

(a) Form and Contents.

A person giving notice of objection, described himself as of No. 398, High Street, Cheltenham, which was his place of abode. On the register he was described as of "Cheltenham," only:—Held, that the notice of objection was valid. *Pruen v. Cox*, 15 Law J. Rep. (N.S.) C.P. 17; 2 Com. B. Rep. 1; 1 Barr. & Ar. 514.

The statute 6 Vict. c. 18, sched. B, s. 10, gives a form to be served on an overseer of a notice of objection to a person on the list of voters for a city, claiming in respect of property. To this form, this note is attached: "If more than one list of voters, the notice of objection should specify the list to which the objection refers:—Held, that where there was more than one list made out by the overseers, if the list was not specified, the notice of objection was void. *Barton v. Ashley*, 15 Law J. Rep. (N.S.) C.P. 36; 1 Barr. & Ar. 518; 2 Com. B. Rep. 4.

The notice of objection to a borough voter, in the statute 6 Vict. c. 18, sched. B. Nos. 10, 11, gives the following form of signature to the notice: "A B, of [place of abode], on the list of voters for the parish of —." An objector's place of abode being wrongly described on the list of voters, he, in the signature to his notice of objection, gave his true place of abode, and not the abode mentioned in the register:—Held, (*Maule, J. dissentiente.*) that the notice was correctly signed. *Knowles v. Brooking*, 15 Law J. Rep. (N.S.) C.P. 197; 1 Barr. & Ar. 755; 2 Com. B. Rep. 226.

A person giving notice of objection was described on the list of voters for the parish of Fisherton Anger, as "C A. Place of abode, Fisherton Street; Nature of qualification, House and garden; Street, lane, or other like place in the parish where the property is situate, Fisherton Street." The notice of objection was signed "C A, of the parish of Fisherton Anger, in the said borough, on the list of voters for the parish of Fisherton Anger:—Held, that the notice of objection was sufficient. *Wills v. Adey*, 15 Law J. Rep. (N.S.) C.P. 205; 1 Barr. & Ar. 782; 2 Com. B. Rep. 246.

The notice of objection to a borough vote should state on which of the lists of voters, where there is a list of freemen, the objector happens to be; and a notice, therefore, signed by a person on the freemen's list in a borough, describing himself as R F "on the list of voters for the borough of L,"—Held bad.

The defect in such a notice is not an "inaccurate description," and aided by section 101, of the 6 Vict. c. 18. *Farrer v. Edsforth*, 16 Law J. Rep. (N.S.) C.P. 132; *nom. Edsforth v. Farrer*, 4 Com. B. Rep. 9.

The objector in a notice of objection to a county voter, described himself as of "The Oaks, on the register of voters for the parish of St. Woolos." The objector's name was on that list, as having his place of abode in that parish, and his qualification was described as "The Oaks":—Held, that the descrip-

tion in the notice of objection, in the absence of the mention of any parish and county, or other recognized division, was insufficient, and that the revising barrister could not couple the list of voters with the notice, for the purpose of rendering certain the objector's place of abode. *Woollett v. Davis*, 16 Law J. Rep. (N.S.) C.P. 185; 4 Com. B. Rep. 115.

A notice of objection to a voter for a borough was in the following form:—"To Mr. C S, 1 Olney Place. Take notice, I object to your name being retained on the list of voters for the borough of Cheltenham. (Signed) J F of No. 5, Sherborne Street, on the list of voters for the parish of Cheltenham":—Held, that the description of the objector's place of abode, No. 5, Sherborne Street, meant Sherborne Street, Cheltenham, and was a compliance with the requirements of the 17th section of the Registration Act.

Whether a notice of objection designates on the face of it an objector's place of abode, is a question of law. Whether such designation is sufficiently particular, is a question of fact. *Sheldon v. Fletcher*, 17 Law J. Rep. (N.S.) C.P. 34; 5 Com. B. Rep. 14.

(b) Service of.

Under the statute 6 & 7 Vict. c. 18. ss. 7, 100, and 101, it is sufficient for the party sending a notice of objection either to a voter or overseers, to post it with a postmaster, and with the formalities and address prescribed by section 100, in such time that, in the ordinary course of post, it would be delivered at the place to which it is directed within the period limited by the act; and the effect of such notice will not be avoided by the circumstance that, in consequence of a delay on the part of the post-office, it is not delivered until after the day mentioned in section 7. for the delivery of such notices. Under section 101. the duplicate stamped by the postmaster is conclusive evidence of the due service of the notice, if properly directed, on the overseers. *Bishop v. Helps*, 15 Law J. Rep. (N.S.) C.P. 43; 2 Com. B. Rep. 45; 1 Barr. & Ar. 572: s. p. *Hickton v. Antrobus*, 1 Barr. & Ar. 586, n.

In the date of the notices of objection served on the overseers, and the party objected to, pursuant to the 17th section of the 6 & 7 Vict. c. 18, the year must be inserted, otherwise they will be insufficient.

A notice of objection, under that section, was served on one churchwarden of a parish. The list of voters had been made out by the overseers and signed by them and his fellow churchwarden only:—Held, that the service of the notice was sufficient. *Beelen v. Hockin*, 16 Law J. Rep. (N.S.) C.P. 49; 4 Com. B. Rep. 19.

In the list of voters for a borough, made out by the overseers, the place of abode of a voter was described as at "Lower Mitton," and his qualifying property to be an "office and wharf," in "Lichfield Street." A notice of objection, addressed to the voter at Lower Mitton, was left at the office and wharf, which are situate in Lower Mitton. The voter did not reside at the office and wharf, nor had he any residence in Lower Mitton:—Held, that the service of notice was insufficient. *Allen v. Greensill*, 16 Law J. Rep. (N.S.) C.P. 142; 4 Com. B. Rep. 100.

Where the notice sent by post had directions

both on the outside and in the inside, and the paper produced as a duplicate to prove the service, contained the direction in the inside but none on the outside, the Court held that the paper was not a duplicate, and that the service was not proved. *Birch v. Edwards*, 17 Law J. Rep. (N.S.) C.P. 32; 5 Com. B. Rep. 45.

The service of a notice of objection on a borough voter was stated by the revising barrister to have been made by putting the notice and leaving it within the entrance door of the voter's place of abode between nine and ten o'clock of the night of the 25th of August:—Held, that the time and mode of service were insufficient; and that whether a notice of objection had been properly served is a question of fact to be determined by the revising barrister. *Watson v. Pitt*, 17 Law J. Rep. (N.S.) C.P. 143; 5 Com. B. Rep. 77.

An assistant overseer appointed in general terms under the 59 Geo. 3. c. 12. is an overseer within the 6 & 7 Vict. c. 18. s. 17, and a notice of objection to a borough voter, served upon such an assistant overseer, on the 25th of August, is a good service of the notice of objection. *Points v. Attwood*, 18 Law J. Rep. (N.S.) C.P. 19; 6 Com. B. Rep. 38.

A notice of objection sent by post, and delivered in the ordinary course of the post upon a Sunday, is valid. *Colville v. Lewis*, 1 Barr. & Ar. 608; 2 Com. B. Rep. 60.

Sending a notice of objection to the party objected to by the post, pursuant to the directions of the 6 & 7 Vict. c. 18. s. 100, is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode, as required by section 7.

Where, therefore, a notice was posted, under section 100, in sufficient time to have reached the party according to the ordinary course of post, on the 25th of August,—Held, that such service was sufficient to call upon the party to prove his qualification, notwithstanding that the actual delivery was accidentally delayed until the 27th. And held, that the provisions of section 100. are equally applicable to notices to overseers, directed, as provided by section 101, to their usual places of abode. *Hickton v. Antrobus*, 2 Com. B. Rep. 82.

(D) QUALIFICATION.

(a) In Counties.

An hospital was founded in 1673, by the D of N, and real property was conveyed to trustees, for the benefit of poor pensioners residing in it. One of the ordinances regulating the hospital declared, that whenever more than 100*l.* remained in the treasury, the surplus should be equally distributable among the pensioners. A private act of parliament, regulating the hospital, enacted, that instead of having the surplus revenues divided among the original number of pensioners, additional pensioners were to be chosen; and the trustees, under the direction of the D of N, were directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow; and the trustees were to pay the pensioners such fixed stipends as they should think fit; and "to lessen, increase, vary, change, and alter such weekly stipends as they should find requisite, so that the stipend should at no time be reduced below 3*s.* 6*d.*

a week." The pensioners were also entitled to receive coals and certain clothing; but the case found that the 3s. 6d. a week and the coals and clothing would be insufficient to confer the franchise; the pensioners were actually in the receipt of 10s., besides the coals and clothing:—Held, that the pensioners were not absolutely entitled to more than 3s. 6d. a week, besides the coals and clothing, and, therefore, were not entitled to the franchise.

The rents of the hospital were derived from property in Nottinghamshire and Yorkshire, and were paid into the treasure-house, and each pensioner received his pension indiscriminately from the joint rents:—*Semble*—that each pensioner would be considered as receiving his pension rateably from each county, in proportion to the whole property in each county. *Ashmore v. Lees*, 15 Law J. Rep. (N.S.) C.P. 65; 1 Barr. & Ar. 554; 2 Com. B. Rep. 31.

A *bona fide* conveyance of freehold property by a father to two of his sons in consideration of natural love and affection, for the purpose of conferring on them votes for a county, under which possession was taken by them, is not void by reason of the statute 7 & 8 Will. 3. c. 25. s. 7. *Newton v. Hargreaves*, 15 Law J. Rep. (N.S.) C.P. 154; 1 Barr. & Ar. 690; 2 Com. B. Rep. 163.

A freehold rent-charge was granted by deed in January 1845, the first payment of which was to be made in January 1846:—Held, that until the receipt of the rent, or it had become due, the grantee had not a possession within the statute 2 & 3 Will. 4. c. 45. s. 26, and therefore was not entitled to be registered as a voter in respect thereof, in the year 1845. *Murray v. Thorniley*, 15 Law J. Rep. (N.S.) C.P. 155; 1 Barr. & Ar. 742; 2 Com. B. Rep. 217.

A *bona fide* purchase of freehold property by a number of persons as tenants in common, from one vendor, for an adequate pecuniary consideration, actually paid, the avowed and only object of which on both sides is, to multiply voices in the election of members of parliament for a county, if it be made without any secret reservation or trust, confers on the purchasers the right to be registered on the list of voters, and is not a transaction within the prohibition of the statute 7 & 8 Will. 3. c. 25. *Alexander v. Newman*, 15 Law J. Rep. (N.S.) C.P. 134; 1 Barr. & Ar. 657; 2 Com. B. Rep. 122; s. p. *Riley v. Crossley*, 15 Law J. Rep. (N.S.) C.P. 144; 1 Barr. & Ar. 682; 2 Com. B. Rep. 146.

Where certain parties purchased houses and land to acquire for themselves votes, for the purpose of multiplying voices for the election of members for a county, and to split and divide the interest in the houses and land so purchased, and such object was known to, and acquiesced in by the vendor's solicitor, in whose hands the property had been placed for sale, but it did not appear that the vendor was aware of the object of the purchasers, or that either he or his solicitor had any such purpose,—Held, that the purchasers were entitled to be registered, and the transaction did not fall within the prohibition of the statute 7 & 8 Will. 3. c. 25. *Hoyland v. Bremner*, 15 Law J. Rep. (N.S.) C.P. 133; 1 Barr. & Ar. 611; 2 Com. B. Rep. 84.

B had an interest of greater annual value than 40s. but under 10*l.*, in a tenement in an ancient borough, situated within a barony. The tenement

was held upon a burgage tenure, subject to the payment of rent; and by the custom of the burgh, tenements were conveyed by deed, without livery of seisin or enrolment, and, where the party was married, without the separate examination of the wife. No presentment or admittance upon alienation was necessary at any lord's court, though with respect to other tenements in the barony where the same custom prevailed as to conveyances, admittance was necessary:—Held, that the above facts did not shew that B was seised of tenements of copyhold, or of any other tenure, except freehold; that it must be presumed, therefore, that he was seised of the freehold, and was therefore, entitled to a vote for the county. *Busher v. Thompson*, 16 Law J. Rep. (N.S.) C.P. 57; 4 Com. B. Rep. 448.

A rent-charge which had originally been created in 1838, payable on the 29th of September and 24th of March, and had been paid up to the 29th of September 1845, was conveyed by the owner in January 1846, to A, in trust for B and others. The first payment was made to A in the month of May following:—Held, that under these circumstances B was not entitled to be registered in the list of voters in respect of it, not having had six months' possession of it within the meaning of the statute 2 & 3 Will. 4. c. 45. s. 26. *Hayden v. Overseers of Tiverton*, 16 Law J. Rep. (N.S.) C.P. 88; 4 Com. B. Rep. 1.

A voter's qualification in a county register was described in the third and fourth columns respectively, as "land above 50*l.*" "Own occupation." Within the twelve months next before the 31st of July, he changed his occupation, and took the adjoining land, which was sufficiently designated by the description in the old register, and he did not send in any new claim:—Held, that the name of the voter must be erased from the register.

When the right to vote depends upon the occupation of premises in immediate succession, the whole of the subject-matter composing the qualification must be fully described in the register.

A county voter who claims under section 73. of the 6 Vict. c. 18, must always send in a new claim to vote. *Burton v. Gery*, 17 Law J. Rep. C.P. 66; 5 Com. B. Rep. 7.

By letters patent, the whole management of a lunatic's property, both real and personal, was granted to a committee, who was directed to render a yearly account of the estate to the Court of Chancery. The committee occupied land of the lunatic worth 393*l.* per annum. He described himself as tenant, and debited himself with that sum as rent, in the yearly account rendered to and allowed by the Court of Chancery:—Held, that the committee did not occupy as tenant lands or tenements, within the meaning of the 20th section of the Reform Act. *Burton v. Langham*, 17 Law J. Rep. (N.S.) C.P. 253; 5 Com. Rep. 92.

A mortgagor of freehold premises in possession of the rents and profits is not entitled to be registered as a county voter, under the 6 & 7 Vict. c. 18. s. 74, unless he receives therefrom 40s. by the year beyond all charges.

Monthly payments of interest made by a member of a building society, instituted under the Building Societies Act, the 6 & 7 Will. 4. c. 32, for money lent by the society, and for the repayment

of which the freehold premises of the member are pledged as a security, are a charge on the freehold, within the statute 8 Hen. 6. c. 7. *Copland v. Bartlett*, 18 Law J. Rep. (n.s.) C.P. 50; 6 Com. B. Rep. 18.

The occupier of a house, as tenant, within a borough of the clear yearly value of 10*l.*, who also occupies in a distinct part of the borough "land to the value of 40*s.* by the year above all charges" of which he is owner in fee, is entitled to be registered as a voter for the county as well as for the borough. *Capell v. Overseers of Aston*, 19 Law J. Rep. (n.s.) C.P. 28; 8 Com. B. Rep. 1.

A mortgagor in possession held not entitled to vote, under the 6 & 7 Vict. c. 18. s. 74, as his estate was not of the value of 40*s.* per annum beyond the interest payable; the mortgage was made to secure only the principal money, but it was found as a fact that interest had been regularly paid. *Lee v. Hutchinson*, 8 Com. B. Rep. 16.

(b) In Cities and Boroughs.

Section 30, of the Reform Act enacts, "that where an occupier, not upon the poor-rate, claims to be rated, he shall, upon so claiming, and actually paying or tendering to the overseers the full amount of the rates then due, be deemed to have been rated." An occupier, claiming to be rated under this section, asked the overseer whether any rates were due, who replied, he did not know; the occupier then said, "If there are, I am prepared to pay them," upon which the overseer said, "I will see to it;" and the occupier then went away. He had at the time sufficient money in his pocket to have paid the rates:—Held, that this was not a tender of the amount within the meaning of the above section.

Per Tindal, C.J.—An overseer has, in such a case, no power to dispense with a tender.

Semble, per Maule, J.—All the precision required under a plea of tender would not be necessary under this statute. *Bishop v. Smedley*, 15 Law J. Rep. (n.s.) C.P. 73; 1 Barr. & Ar. 614; 2 Com. B. Rep. 90.

It is enacted by the 2 Will. 4. c. 45. s. 32, "that every person who would have been entitled to vote in an election for any city or borough, either as a burgess or freeman, or, in the city of London, as a freeman and liveryman, if that act had not been passed, shall be entitled to vote, provided such person shall be duly registered;" and it then provides, "that no person who shall have been admitted a burgess or freeman, otherwise than in respect of birth or servitude, since 1831, shall be entitled to vote as such in any such election for any city or borough as aforesaid, or to be so registered as aforesaid:"—Held, that this proviso does not apply to the city of London, where the voters must be both freemen and liverymen, and where, therefore, they do not vote as burgesses or freemen, nor are so registered. *Croucher v. Browne*, 15 Law J. Rep. (n.s.) C.P. 74; 1 Barr. & Ar. 621; 2 Com. B. Rep. 97.

The name of a tenant occupying a house No. 3, was inserted in a rate as for No. 4, by mistake:—Held, that this was a misdescription, within the meaning of section 75. of the 6 Vict. c. 18, and that the insertion of the tenant's name upon the rate was

a sufficient calling upon him to pay, within the meaning of that section.

By agreement between the landlord and tenant, the landlord paid the rates, and the tenant paid an increased rent:—Held, that the payment of the rates by the landlord was a payment by the tenant.

Semble—that this was a sufficient rating of the tenant, and payment of the rate by him, within the meaning of section 27. of the Reform Act. *Cook v. Luckett*, 15 Law J. Rep. (n.s.) C.P. 78; 1 Barr. & Ar. 647; 2 Com. B. Rep. 168.

A party, whose qualification was houses in succession, was on the list of voters for a borough, but the list omitted to mention the number of the first house which he had occupied: the revising barrister having decided that the number ought to have been stated, and having expunged the voter's name,—Held, that his decision was right.

It did not appear that the number had been supplied to the barrister; and, *per Erle, J.*—If the number had been supplied before the barrister had completed the revision of the list, he ought to have added the number, and retained the voter on the list. *Flounders v. Donner*, 15 Law J. Rep. (n.s.) C.P. 81; 1 Barr. & Ar. 588; 2 Com. B. Rep. 63.

"Part of a house" is a sufficient description of the nature of a party's qualification as a borough voter.

The landlord occupied one part of the house, and the appellant the other part: the landlord's name was upon the rate with "house" opposite to it. The appellant's name followed immediately afterwards, but unconnected by bracket with the landlord's name, and nothing was carried out opposite to it in the other columns of the rate:—Held, that this was a sufficient rating. *Judson v. Luckett*, 15 Law J. Rep. (n.s.) C.P. 163; 1 Barr. & Ar. 707; 2 Com. B. Rep. 197.

By the 2 Will. 4. c. 45. s. 30. an occupier may claim to be put on the rate, and the overseer is thereupon required to put his name on the rate "for the time being." A rate made under a private statute was headed "A rate for thirteen weeks from the 16th of September to the 16th of December:" a party, after the 16th of December, having made claim to be put on the rate, held, that the above rate was the rate "for the time being," until a new rate was made and allowed and published. *Bushell v. Luckett*, 15 Law J. Rep. (n.s.) C.P. 89; 1 Barr. & Ar. 635; 2 Com. B. Rep. 111.

Section 27. of the 2 Will. 4. c. 45. gives the right of voting for boroughs to the occupiers of houses of the "clear yearly value of not less than 10*l.*"—Held, that the meaning of these words was "clear yearly value to the tenant of 10*l.*," and held, that "the fair annual rent," without deducting therefrom either the landlord's insurance or the landlord's repairs, was the proper criterion of the "clear yearly value." *Colvill v. Wood*, 15 Law J. Rep. (n.s.) C.P. 160; 1 Barr. & Ar. 721; 2 Com. B. Rep. 210.

A revising barrister found that a house was let to a tenant for 12*l.* 7*s.* per annum, that the landlord paid the rates by composition, and that if these rates were deducted from the rent, they would leave a clear annual amount of more than 10*l.*, but that if the tenant paid the rates, the assessment would be higher, and would reduce the clear amount below 10*l.*, and upon these facts decided that the tenant

was not entitled to vote as a 10*l*. householder:—Held, that this was a question of fact, of which the barrister was the sole judge, and with which this Court could not interfere.

Per Erle, J.—The “clear yearly value” is the amount for which the tenement would fairly let, deducting what a tenant would fairly have to pay. *Coogan v. Luckett*, 15 Law J. Rep. (n.s.) C.P. 159; 1 Barr. & Ar. 716; 2 Com. B. Rep. 182.

Where an occupier had claimed to be rated under section 30. of the 2 Will. 4. c. 45, in respect of a house to which the owner was rated, the overseers placed his name on the rate immediately under that of the owner without a connecting bracket, and left a blank opposite his name in the other columns of the rate, without (as the overseer stated) any intention of rating him for anything:—Held, that this was a sufficient rating; that the blank shewed that the party was rated in respect of the premises previously mentioned, and that the overseer’s intention was immaterial. *Pariente v. Luckett*, 15 Law J. Rep. (n.s.) C.P. 83; 1 Barr. & Ar. 700; 2 Com. B. Rep. 177.

A house was let to the respondent and five others, and was of sufficient value to confer upon them the franchise. It appeared, in evidence, that the house was used for the purpose of the Anti-Corn Law League, and that the rent and servants’ wages were paid out of the funds of that association, various members of which transacted the business of the association upon the premises. The six lessees, also, who were members of the association, and contributed towards the funds, when in London, transacted there partly their own business and partly that of the association. There was no evidence that the other members of the association had any right to come upon the premises without the consent of the six lessees:—Held, first, that this was a sufficient occupation by the six lessees to confer the franchise; secondly, that this was not a joint occupation with the other members of the association. *Luckett v. Bright*, 15 Law J. Rep. (n.s.) C.P. 85; 1 Barr. & Ar. 737; 2 Com. B. Rep. 193.

It is enacted, by section 32. of the Reform Act, that “no person who shall thereafter be elected, made or admitted a burgess or freeman otherwise than in respect of birth or servitude, shall be entitled to vote as such,” &c. The burgesses of a borough consisted of four classes. They were entitled to be admitted into the fourth class in respect of birth (and also for other causes), and into the third class from the fourth class by seniority, but into the second and first classes by election by the members of those classes from the third and second classes respectively. Before the Reform Act the right of voting for members was in the first class only:—Held, that the members of the first class who had been admitted into it since the Reform Act, and who had obtained admission into the fourth class by birth, were not “elected otherwise than in respect of birth,” and were, therefore, entitled to vote in the election for a member for the borough. *Gale v. Chubb*, 16 Law J. Rep. (n.s.) C.P. 54; 4 Com. B. Rep. 41.

A voter occupied a house and shop on the opposite sides of a yard, inclosed all round, except for a passage, which was open to the street. Two persons resided in the yard besides the voter, and had a

right to the use of part of the yard:—Held, that the house and shop could not be joined, to give a qualification to vote. *Powell v. Price*, 16 Law J. Rep. (n.s.) C.P. 139; 4 Com. B. Rep. 105.

A party who was entitled to vote for a borough previous to the 2 Will. 4. c. 45, by residing within the borough, and being rated and paying scot and lot any time before an election, omitted to pay his rates for the year 1845, and had in consequence not been registered for that year; but had paid all rates before the 31st of July 1846:—Held, that the previous omission had not deprived him of his qualification. *Nicks v. Field*, 16 Law J. Rep. (n.s.) C.P. 61; 4 Com. B. Rep. 63.

A shed described by the revising barrister as standing against a wooden paling, but not fastened thereto; six posts put into the ground, support a tarpauling which forms the roof; one of the sides is boarded up with boards nailed to the posts; the shed is used to put barrows, posts, &c. into, and wharfage is paid for the use of it:—Held, that the shed so described is a “warehouse” or “other building” within the 27th section of the Reform Act. *Watson v. Cotton*, 17 Law J. Rep. (n.s.) C.P. 68; 5 Com. B. Rep. 51.

A party claiming to vote occupied a counting-house in a house in which the landlord and others had counting-houses. There were a wooden gate and a door at the outer entrance, which were open all day, but shut by night. A clerk of the landlord’s lived on the premises to protect them, and kept the keys of the gate and door, which could be locked and unlocked only on the inside. It was the clerk’s duty to open the gate and door to any of the occupiers, if required to do so, none of them having keys:—Held, that this was an occupation as tenant by the claimant, which entitled him to a vote. *Downing v. Luckett*, 17 Law J. Rep. (n.s.) C.P. 31; 5 Com. B. Rep. 40.

T occupied rooms in a house in which the landlord also occupied a shop and parlour, but did not sleep. Each party had a key to the outer door, which stood open all day, but was shut at night. T was held entitled to a vote for members of parliament as the tenant of “a building,” under the 2 Will. 4. c. 45. s. 27. *Toms v. Luckett*, 17 Law J. Rep. (n.s.) C.P. 27; 5 Com. B. Rep. 23.

A coachhouse and stable (of the yearly value of 10*l*.) under the same roof, with no internal communication except two grated windows looking from one into the other, and with separate outer doors, is a building within the 27th section of the Reform Act, and confers a vote for a borough. *Jolliffe v. Rice*, 18 Law J. Rep. (n.s.) C.P. 25; 6 Com. B. Rep. 1.

A voter for a borough had not paid a poor-rate unappealed against, but which had not been allowed by two Justices, and his name was thereupon erased from the list of voters:—Held, that a poor-rate not duly allowed is a nullity, and non-payment thereof does not disqualify a claimant from being registered as a voter for a borough. *Fox v. Davies*, 18 Law J. Rep. (n.s.) C.P. 48; 6 Com. B. Rep. 11.

Before 1832 the election of a member of parliament for the borough of Bewdley was vested in the bailiff, burgesses and twelve capital burgesses, who were required to be residents within the borough including the Far Forest, and who ap-

pointed the bailiff and burgesses. Far Forest is a detached part of the parish of R, and situate within the old borough. By the 2 & 3 Will. 4. c. 64. s. 37. "the detached part of a parish shall not be included within a borough if by reason of including it the boundary of such borough would not be continuous, unless such detached part heretofore formed part of the borough for the purpose of the election of members of parliament:"—Held, by *Williams, J.* and *Cresswell, J.*, that the proviso in section 37. of the 2 & 3 Will. 4. c. 64. was inserted to preserve existing personal rights of voting, none of which depended upon the retention of Far Forest, and therefore it was not included within the present borough. By *Maule, J.* and *Wilde, C.J.*, that as the capital burgesses (who appointed those who elected members of parliament) must have resided within the borough including Far Forest, Far Forest, although detached from, was included within the present borough. *Palmer v. Allen*, 18 Law J. Rep. (N.S.) C.P. 265; 6 Com. B. Rep. 51.

A freeman entitled to vote for a member of parliament, who has been excused by Justices from the payment of the poor-rate, on the ground of poverty, under the 54 Geo. 3. c. 170. s. 11, is not disqualified under the 2 Will. 4. c. 45. s. 36, as having received parochial relief or alms. — *Mashiter v. Dunn*, 18 Law J. Rep. (N.S.) C.P. 13; 6 Com. B. Rep. 30.

The occupier of a house, as tenant, within a borough of less than the yearly value of 10*l.*, who also occupies within the borough "land to the value of 40*s.* by the year above all charges" of which he is owner in fee (the value of the house and land taken together amounting to more than the clear yearly value of 10*l.*) is entitled to be registered as a voter for the county, but not as a voter for the borough.

Unity of title in the subject-matter of the qualification is essential to confer upon the occupier the right of being registered as a voter for a borough under the 2 Will. 4. c. 45. s. 27. *Barton or Burton v. Overseers of Aston*, 19 Law J. Rep. (N.S.) C.P. 28; 8 Com. B. Rep. 7.

(E) PRACTICE.

(a) Notice of Appeal.

The statute 6 Vict. c. 18. s. 64. enacts, that "no appeal shall be heard in any case where the respondent shall not appear, unless the appellant shall prove that due notice of his intention to prosecute such appeal was sent to the respondent." The same section enacts, that "if it shall appear to the Court that there has not been reasonable time to give notice, the Court may postpone the hearing of the appeal:"—Held, that under this statute, a waiver of notice by the respondent was insufficient, and that the appellant must prove an actual notice: but, under the above circumstances, the Court postponed the hearing. *Newton v. Overseers of Mobberley*, 15 Law J. Rep. (N.S.) C.P. 154; 2 Com. B. Rep. 203.

The first day appointed for hearing registration appeals was the 12th of November; the appellant served the notice of his intention to prosecute his appeal on the 2nd of November:—Held, that the respondent not appearing, the Court could not, on

the 16th of November, when it was called on, hear the appeal; and in the absence of any proof that the appellant had not had reasonable time to give such notice, the Court could not postpone the hearing. *Norton v. Town Clerk of Salisbury*, 16 Law J. Rep. (N.S.) C.P. 9; 4 Com. B. Rep. 32.

Where a respondent in a registration appeal does not appear, and the appellant has omitted to serve notice of appeal ten clear days before the day appointed for the hearing, the Court will not postpone the hearing to give time for a fresh service of notice, even where the illness and death of an attorney are alleged as a cause for the omission.

A motion by a respondent on a previous day in the term, for leave to deliver paper books, and a statement by his attorney of his intention to appear, is not a constructive appearance by the respondent. *Adey v. Hill; Grover v. Bontemps; Pring v. Estcourt*, 16 Law J. Rep. (N.S.) C.P. 63; 4 Com. B. Rep. 38.

When an appeal from the decision of a revising barrister is called on, and the respondent does not appear, the appellant must prove the service of a ten days' notice on the respondent, or shew a sufficient excuse for the omission; otherwise, the appeal must be struck out. *Alworth v. Dore*, 17 Law J. Rep. (N.S.) C.P. 142; 5 Com. B. Rep. 87.

The notice of appeal given to the master, must be signed by the appellant himself, and not by an agent; when, therefore, the appeal had been tendered in due time, but had been rejected for the defect, the Court, upon its being supplied, refused to receive it *nunc pro tunc*; the power to postpone, given by section 64, only applies to the notice to the respondent. *Petherbridge v. Ash*, 4 Com. B. Rep. 74.

The notice of intention to appeal must be given ten clear days before the first day appointed for hearing appeals; where not so given, although the respondent did not appear, the appeal was dismissed. *Clarke v. Beaton*, 5 Com. B. Rep. 76.

A revising barrister decided a case on Saturday the 30th of October, and allowed an appeal. This Court appointed the 11th of November for hearing appeals, and the appellant gave notice on Tuesday the 2nd of November of his intention to prosecute the appeal:—Held, that the appellant had not reasonable time to give notice ten days at least before the day of hearing, and that the notice given was sufficient to bring the appeal before the Court within the proviso to section 64. of the 6 & 7 Vict. c. 18. *Palmer v. Allen*, 18 Law J. Rep. (N.S.) C.P. 265; 6 Com. B. Rep. 51.

It is not necessary for an appellant, in an appeal against the decision of a revising barrister under the 6 Vict. c. 18, to give any notice of the day appointed by the Court for hearing appeals. The ten days' notice in section 64. of that statute is the only notice required from an appellant. *Powell v. Caswall*, 19 Law J. Rep. (N.S.) C.P. 27; 8 Com. B. Rep. 14.

Where the respondent does not appear, the appellant must produce an affidavit of notice of appeal, under the 6 Vict. c. 18. s. 64. *Colville v. Lewis*, 1 Barr. & Ar. 608; 2 Com. B. Rep. 60.

(b) Entry of Appeal.

A consolidated appeal from the decision of a revising barrister was presented to one of the Mas-

ters of the Court within the time prescribed by the 62nd section of the 6 Vict. c. 18. The appeal was not indorsed as required by the 42nd section of the act, which regulates the forms to be followed in single appeals, and in consequence thereof the Master refused to receive and enter the appeal:—Held, that the regulations of the act, in respect of single appeals, under the 42nd section, apply to consolidated appeals under the 44th section, and that the Master had acted rightly.

Semle—In stating cases of appeal, the form prescribed by the act should be strictly followed. *Wanklyn v. Woollett*, 16 Law J. Rep. (N.S.) C.P. 144; 4 Com. B. Rep. 86.

The case submitted to the Court under the statute 6 & 7 Vict. c. 18. s. 44, should be signed, on the back thereof, by the revising barrister, even though it be a consolidated appeal, and the Court cannot otherwise receive it. But held, that liberty might be given to enter the appeal *nunc pro tunc*, time being given to procure such signature, where it had been omitted by the barrister, and he was absent from town, no laches being imputable to the appellant; and the right of the respondent to object thereto on the hearing being reserved. *Pring v. Estcourt*, 16 Law J. Rep. (N.S.) C.P. 10; 4 Com. B. Rep. 73.

(c) *Delivery of Paper Books.*

An application was made to deliver the paper books *nunc pro tunc* in an appeal under the Registration Act. By the practice of the court the paper books should have been delivered four days before the hearing:—Held, that the Court will enforce the established practice, unless a sufficient reason be given in excuse of a departure therefrom. *Palmer v. Allen*, 17 Law J. Rep. (N.S.) C.P. 55; 5 Com. B. Rep. 1.

The Court under particular circumstances allowed the paper books to be delivered by the respondents *nunc pro tunc*. *Colville v. Wood, Colville v. Town Clerk of Rochester*, 1 Barr. & Ar. 517.

(d) *Appearance of Parties.*

Where the respondent appeared, but not the appellant, the decision was affirmed, with costs. *White v. Pring*, 8 Com. B. Rep. 13.

(e) *Form of Case in Consolidated Appeals.*

If cases are included in a consolidated appeal, under the 6 & 7 Vict. c. 18. s. 44, which do not depend upon a decision on the same points of law, the Court has no jurisdiction to hear the appeal.

A revising barrister granted appeals against his decisions in respect of five voters for a borough, and declared that such appeals ought to be consolidated. After stating the facts applicable to each voter, and the reasons upon which his decisions were founded, the case concluded, "If the Court should be of opinion that the occupation and residence of each or any of the appellants was sufficient, the names of all or such as the Court shall think fit are to be retained on the register, otherwise to be expunged:—"Held, that the appeals were improperly consolidated, as the decision on one would not govern the rest; that the Court had no jurisdiction to entertain any of the appeals, and that the case must be struck out. *Prior v. Waring*,

17 Law J. Rep. (N.S.) C.P. 73; 5 Com. B. Rep. 56.

(f) *Inferences from Case.*

The question whether there has been fraud in the making of a grant or conveyance, for the purpose of conferring on the grantee a qualification to vote, is one of fact for the revising barrister; and where it is not found by him the Court will not infer it. *Newton v. Overseers of Mobberley*, 1 Barr. & Ar. 695; s. p. *Newton v. Overseers of Crowley*, Ibid. 697; 2 Com. B. Rep. 207.

The decision of the revising barrister will be affirmed, if it do not appear from the facts stated in the case reserved, that his decision was wrong. *Watson v. Cotton*, 17 Law J. Rep. (N.S.) C.P. 68; 5 Com. B. Rep. 51.

PARTIES TO ACTIONS.

[See BILLS AND NOTES.]

A declaration in assumpsit alleged that in consideration that the plaintiff and W D would sell and assign to the defendant their copartnership business, the defendant promised the plaintiff to pay him all the money he had advanced in respect of the copartnership, and for which the co-partnership was accountable to the plaintiff. The declaration then averred performance by the plaintiff and W D, and that the plaintiff, at the time of the promise, had advanced a sum of money in respect of the copartnership, for which the co-partnership was, at the time of the promise, accountable to him, alleging as a breach, the non-payment of that sum by the defendant:—Held, that the declaration disclosed a sufficient consideration to entitle the plaintiff to sue alone. *Jones v. Robinson*, 17 Law J. Rep. (N.S.) Exch. 36; 1 Exch. Rep. 454.

PARTIES TO SUITS.

[See ADMINISTRATION—ARBITRATION, Award—COMPANY—FOREIGN PRINCE—PLEADING, IN EQUITY, Bill, Demurrer.]

(A) NECESSARY OR PROPER PARTIES.

- (a) *Generally.*
- (b) *Administration Suits.*
- (c) *Creditors' Suits.*
- (d) *Mortgage Suits.*
- (e) *Suits against Trustees.*

(B) JOINDER OF.

- (a) *Generally.*
- (b) *Plaintiff suing on behalf of himself and others.*
- (c) *Effect of Decree in improperly constituted Suit.*

(C) OBJECTIONS AS TO.

(A) NECESSARY OR PROPER PARTIES.

(a) *Generally.*

[See PARTNERS, Actions and Suits.

Several persons entered into an agreement for purchasing and selling a certain article on their

joint account, and the proportions in which the profits were to be divided, or the loss borne, were fixed by the agreement. The transactions were chiefly managed by one of the parties, and a loss was ultimately sustained. To a bill, filed by the party who had chiefly managed the transactions, to obtain payment from one of the other speculators, of his share of the loss, which bill alleged that all the other parties had settled the claims against them,—it was held, that all the persons who had entered into the agreement were necessary parties. *Hills v. Nash*, 15 Law J. Rep. (N.S.) Chanc. 107; 1 Ph. 594.

A judgment had been obtained against a party who afterwards took the benefit of the Insolvent Act:—Held, that the judgment creditor was a necessary party to the conveyance of his real estate to a purchaser, notwithstanding the 1 & 2 Vict. c. 110. s. 61. *Hotham v. Somerville*, 9 Beav. 63.

To a bill filed, by the alleged agent of a foreign country, in respect of property belonging to the government of that country, a demurrer was allowed on the ground that that government was not a party to the suit. *Schneider v. Lizardi*, 15 Law J. Rep. (N.S.) Chanc. 435; 9 Beav. 461.

In a suit by the trustees of a composition deed to compel the assignment or to perfect the transfer of a portion of the trust property, the *cestui que trusts* are not necessary parties; but a purchaser to whom the trustees had contracted to sell the property in question is a necessary party. *Alexander v. Cana*, 1 De Gex & S. 415.

A suit abated by the marriage of one of three female plaintiffs and a bill of revivor was filed by the other co-plaintiffs against her and her husband only:—Held, that all accounting parties should be made defendants. *Jones v. Powell*, 11 Beav. 398.

Shareholders in an incorporated navigation company filed a bill to restrain the committee of management from entering into or carrying into effect an agreement with the trustees of a projected railway company, for amalgamating the two undertakings. On the motion for the injunction, it appeared from the defendants' affidavits that the corporate seal of the navigation company had been affixed to the agreement:—Held, that the railway trustees were necessary parties to the suit; and the motion was ordered to stand over with leave to amend the bill by making them parties. On the motion being renewed on the amended record, the Court refused the injunction, the navigation company and the committee undertaking not to apply any further part of the funds in any manner not authorized by the navigation acts, unless under the authority of parliament, and all the defendants undertaking to consent to the plaintiffs being treated as persons entitled to oppose the railway bill in parliament.

Quare—Whether a *cestui que trust* can have an injunction to restrain his trustees from assenting to a bill in parliament. *Parker v. River Dunn Navigation Co.*, 1 De Gex & S. 192.

Bill against husband and wife for specific performance of an agreement made by the husband to sell an estate to the plaintiff. The ground alleged for making the wife a co-defendant was, that she claimed an interest in the purchase-money, and had taken forcible possession of the title-deeds,

which she refused to part with unless her claim was satisfied:—Held, that she was improperly made a defendant, and a demurrer for want of equity was allowed. *Muston v. Bradshaw*, 15 Sim. 192.

A defendant having died before appearing to the bill, his representative was brought before the Court by means of a bill to which none of the defendants in the first suit were made parties:—Held, upon an objection as to parties, that all the defendants in the first suit ought to have been made parties in the second suit. *Foster v. Foster*, 18 Law J. Rep. (N.S.) Chanc. 356; 16 Sim. 637.

The acceptor of a bill of exchange who had by the hands of the drawer, as his agent, paid the bill after it became due to an indorsee for value, without procuring it to be delivered up, filed his bill against such indorsee and a subsequent indorsee, charging that the bill had been indorsed to the latter without consideration and in order to recover the money from the plaintiff a second time, and praying that an action commenced against him for the amount might be restrained, and the bill delivered up to be cancelled. A demurrer for want of the drawer as a party to the suit was overruled. *Earle v. Holt*, 5 Hare, 180.

Husband and wife sued for (*inter alia*) an account of the rents of her copyhold estate. The wife died:—Held, on demurrer, that it was not necessary to make her personal representatives a party to a bill to revive the suit. *Jones v. Skipworth*, 9 Beav. 237.

By marriage articles any property of the wife accruing during the coverture was to be settled in trust, after the death of the husband and wife, and in certain events, for the next-of-kin of the wife. A bill was filed by the wife against her husband and the trustee for the execution of the articles:—Held, that the parties who would be the wife's next-of-kin if she was then dead, were not necessary parties. *Fowler v. James*, 16 Law J. Rep. (N.S.) Chanc. 266; 1 Ph. 803.

To a bill by a company against the holder of a cheque alleged to be fraudulently drawn by three directors seeking to have it delivered up and an injunction against an action,—Held, that the drawers ought to be parties. *Derbyshire, Staffordshire and Warwickshire Rail. Co. v. Serrell*, 2 De Gex & S. 353.

An equitable mortgage having been made by deposit of a lease, the mortgagee discovered that the mortgagor had assigned the lease by voluntary settlement in trust for his wife and children. On the death of the mortgagor, a bill was filed to have the settlement declared void as against the mortgagee, and the wife and children and trustee were made defendants:—Held, that the personal representatives of the settlor were not necessary parties to the suit. *Bostock v. Shaw*, 15 Law J. Rep. (N.S.) Chanc. 257.

A bill was filed by a shareholder on behalf, &c. to prevent directors from making a part only of the railway, abandoning the rest, and for an indemnity. There were several classes of shareholders:—Held, not necessary that the several classes should be separately represented on the record. *Dumville v. Birkenhead, Lancashire and Cheshire Junction Rail. Co.*, 12 Beav. 444.

A and B referred a matter in dispute between them to the arbitration of C, and C made his award.

Bill by A against B and C to set aside the award on equitable grounds, but without proving corruption, partiality, or fraudulent or unfair conduct on the part of C:—Held, that C was improperly made a party to the suit. *Hamilton v. Bankin*, 19 Law J. Rep. (N.S.) Chanc. 307.

It having been found necessary to wind up the affairs of a friendly society and distribute its funds, pursuant to the trusts of the deed constituting it, several of its members were appointed trustees for that purpose; the monies to be paid to the trustees, of whom the plaintiff was the survivor, were to be deposited with certain bankers and carried to the account of the society: the bankers were to pay such sums as the two solicitors, F and W, by their respective cheques on the bankers, countersigned by two members of the society named, should require to be paid. The principal part of the fund was distributed in that manner, and the balance in the bankers' hands was irregularly drawn out and invested in the names of F and W, and the two members appointed to countersign the cheques. On a bill being filed by the last survivor of the trustees of the fund against F and W, and the personal representatives of the two members appointed to countersign the cheques, praying the restoration of the fund by F and W, with a view to its future administration, but not seeking the administration of it by the Court, an objection for want of parties taken by F's answer, on the ground that all the members of the society ought to be before the Court, was disallowed. *Horsley v. Fawcett*, 16 Law J. Rep. (N.S.) Chanc. 457.

(b) *Administration Suits.*

A and B having been co-executors, and A having survived B, the representatives of A, many years after the testator's death, filed a bill against the representatives of B to recover assets of the testator alleged to have been possessed by B. The bill did not state that any debts or legacies of the testator were unpaid, or that there was any residuary legatee, or that the plaintiff or any other person was beneficially interested in the assets. There was, however, in fact, a residuary legatee, and the defendants, by their answer, objected that such legatee ought to have been made a party to the suit:—Held, that the objection was valid. *Adams v. Barry*, 2 Coll. C.C. 285.

A fund was alleged to have been carried in an administration suit to a separate account. In another suit to give effect to an assignment of a share of the fund,—Held, that the personal representative of the testator was a necessary party.

The ultimate limitation of a legacy was to a party's "personal representatives or next-of-kin":—Held, that both classes must be made parties to a suit affecting the fund. *Salmon v. Anderson*, 9 Beav. 445.

Where the suit involves the administration of the estate and distribution of the residue, the devisees in trust do not, under the 30th Order of August 1841, sufficiently represent the persons beneficially interested. *Jones v. How*, 7 Hare, 270.

As a general rule, a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate; but having regard to the nature of the questions which are raised by the bill, the

position of the parties and the particular circumstances of the case, a residuary legatee and devisee of the testator's estate charged with the payment of one of the legacies may make the pecuniary and specific legatee a party to a bill filed against the executors, praying a declaration that subsequent payments of the testator to the legatee were in the nature of an ademption of legacies given by will or codicil of prior date. Demurrer by the legatee, for want of equity, overruled. *Marquis of Hertford v. Zichy*, 15 Law J. Rep. (N.S.) Chanc. 58; 9 Beav. 11.

W M, by his will, gave all his personal estate to Sarah M for life, remainder as she should by will appoint. Sarah died in 1820, and by her will, without noticing the power, bequeathed the property in question, and her executors distributed the same under her will. The plaintiffs, as sole next-of-kin of W M, filed their bill against Sarah's executors for an account of W M's estate. Preliminary inquiries being directed, the Master found that the plaintiffs and A B were the next-of-kin. The cause being at issue, A B was brought before the Court, by a supplemental bill, to which she was sole defendant:—Held, that as a material question arose between co-defendants, Sarah's executors ought to have been parties to the supplemental suit. *Jones v. Howells*, 15 Law J. Rep. (N.S.) Chanc. 115.

The plaintiff, under a will, claimed a fund over which the testatrix had a power of appointment with a gift over in default of appointment. The defendants (who were trustees of the fund) did not admit that the will was an effectual appointment:—Held, that although the plaintiff's title was not admitted, the persons entitled in default of appointment were necessary parties, and the Court, under Order V. of the 9th of May 1839, directed preliminary inquiries to ascertain who were such persons. *Johns v. Dickinson*, 5 Hare, 130.

The Attorney General does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate, so as to enable the Court to dispense with a legal personal representative of such person, duly constituted in the ecclesiastical court as a party. *Bell v. Alexander*, 6 Hare, 543.

Where a bill was filed by a party claiming to be entitled to three-fourths of an ascertained sum, it was held that the representative of the person entitled to the remaining one-fourth was a necessary party. *Hunt v. Peacock*, 16 Law J. Rep. (N.S.) Chanc. 497.

Three persons carried on business in partnership. Two of them died, and the executors of one of them (R) entered into an agreement to purchase the shares of the other two. A bill was afterwards filed by some of the residuary legatees of R for an account of his personal estate, against the other residuary legatees and his executors, and also against the surviving partner and the executors of the other deceased partner:—Held, that under the special circumstances of the case, both the last-named parties were properly made parties to the cause. *Law v. Law*, 16 Law J. Rep. (N.S.) Chanc. 375.

To a suit by three out of four residuary legatees to recover three-fourths of a sum of stock which had been transferred to the Commissioners for the reduction of the National Debt, under the 56 Geo.

3. c. 60. the fourth legatee is a necessary party. *Hunt v. Peacock*, 17 Law J. Rep. (N.S.) Chanc. 163; 6 Hare, 361.

The husband of one of the next-of-kin of an intestate had, previously to the death of the intestate, taken the benefit of the act for the relief of insolvent debtors. A suit was instituted for the administration of the estate of the intestate:—Held, that the assignee of the husband was a necessary party to the suit. *Whatford v. Moore*, 17 Law J. Rep. (N.S.) Chanc. 129.

A testator bequeathed a legacy to A, and gave all the residue of his estate to his wife. She became the sole executrix, and afterwards married again and died; and her second husband possessed himself of all the testator's residuary estate. A bill was filed by the representative of the legatee against the second husband, stating that all the other legacies of the testator and all his debts were paid; that the defendant had a considerable amount of assets in his hands, and that he refused to take out administration either to the testator or to his late wife. A demurrer to the bill, upon the ground that a personal representative of the testator and of his executrix was necessary, was allowed. *Penny v. Watts*, 16 Law J. Rep. (N.S.) Chanc. 146; 2 Ph. 149.

Upon the question of admission of assets, the circumstances under which the payment of a legacy was made are material.

The testator, by deed, conveyed property to trustees, upon trust for the testator for life, and after his death to sell and apply the proceeds in payment of all his debts, so as to relieve and discharge all his other estate; the surplus proceeds to go to volunteers:—Held, that the parties entitled under the ultimate trusts of this deed, being interested in the general accounts, were necessary parties to a creditors' suit for administering the testator's estate; but that the Court might in its discretion make a decree for administration in their absence. *Savage v. Lane*, 17 Law J. Rep. (N.S.) Chanc. 89; 6 Hare, 32.

A testator, on the marriage of his daughter A, covenanted with the trustees of the settlement to leave by will to A an aliquot share of the real and personal estate of which he should die possessed. The testator, having survived A, died, and by will left all his real and personal estate to trustees, upon trust to convert and collect and stand possessed of the proceeds for benefit of all his children, exclusively of A, and empowered his trustees to give effectual receipts for any money payable under his will. To a bill by the husband, administrator of A, against the trustees and executors, praying an account of the testator's estate, and that A's share be conveyed and assigned to plaintiff, the *cestui que trusts* under the will were held to be necessary parties. *Jones v. How*, 17 Law J. Rep. (N.S.) Chanc. 369; 7 Hare, 267.

A testator, by his will, gave an annuity to his wife A, and gave all the residue of his real and personal property to his son B; but directed that, in the event of the death of B under twenty-five, his real and personal property should go to his own right heirs, executors, and administrators. B, who was an infant, was the testator's heir-at-law, and B and A would have been entitled to his per-

sonal property under the Statutes of Distribution, if he had died intestate. A bill was filed by B against A, and against C, D, and E, who were the persons who would have been entitled to the testator's real and personal property, if he had died intestate and without issue, for the administration of his estate:—Held, first, that the Court would, at the hearing of the cause, decide the question whether C, D and E ought to remain parties to the suit; and, secondly, that, from want of interest, they ought not so to remain; and the bill was dismissed against them accordingly. *Wilkinson v. Garrett*, 15 Law J. Rep. (N.S.) Chanc. 416; 2 Coll. C.C. 643.

In a suit by persons interested under the will of a testator, to administer his real and personal estate, it is not necessary to make the heir-at-law a party, or to prove the will. *Marriott v. Marriott*, 15 Law J. Rep. (N.S.) Chanc. 422.

Where testator devised all his real estate to his widow, his heir is not a necessary party to a suit to administer his real estates under the 3 & 4 Will. 4. c. 104. *Bridges v. Hinzmam*, 16 Sim. 71.

A suit was instituted by legatees whose interest might on a contingency vest in the next-of-kin, against the executors alone. The next-of-kin were brought before the Court by supplemental bill:—Held, that the executors were not improper parties to the supplemental bill. *Parker v. Parker*, 9 Beav. 144.

Persons who claim specific portions of properties in the possession of another at the time of his death, are not necessary parties to a suit for the administration of his estate. *Barker v. Rogers*, 7 Hare, 19.

Trustees authorized to carry on a trade permitted it to be carried on by their agents:—Held, that the agents were not necessary parties to a bill for the administration of the estate. *Ling v. Colman*, 10 Beav. 370.

One of two executors who were stated to have possessed the assets jointly died before a suit was instituted for the administration of the testator's estate:—Held, that his representative was not a necessary party. *Clark v. Webb*, 16 Sim. 161.

Where a pecuniary legacy is given to a legatee in such terms as to leave the construction of the will in this respect doubtful, it is irregular to make the legatee a party to a suit for the administration of the estate of the testator. *Crackenthorp v. Jouning*, 19 Law J. Rep. (N.S.) Chanc. 133.

(c) Creditors' Suits.

In a suit since the 30th Order of August 1841, to establish the claims of creditors of a testator against his real estate devised, legatees, whose legacies are charged on such real estate, are not necessary parties where there are devisees in trust having the powers specified in the order. *Ward v. Bassett*, 5 Hare, 179.

Where property was conveyed to four trustees for such of the creditors of a firm as should execute the deed, and twenty-six creditors (including the four trustees) executed the deed, a suit, instituted seventeen years afterwards by some of the creditors on behalf of themselves and the others, was sustained against the trustees, they objecting that it was defective for want of the other creditors as parties.

In such a suit, where one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor and supplement, against the representatives of the deceased trustee.

The author of the trust or his personal representative is a necessary party to such a suit; and he is not regularly or properly a party thereto by being defendant to a bill of revivor or revivor and supplement against the representative of a trustee who died after the institution of the suit, even though all the trustees are (unnecessarily) parties to such bill of revivor or revivor and supplement; he must be made a party to the original bill or to a bill in which the trustees are all properly defendants. *Bateman v. Margerison*, 6 Hare, 496.

A, being embarrassed, conveyed by a deed his property to trustees to sell and pay his creditors, parties thereto, in proportion. He afterwards instituted a suit against one of the creditors for the purpose of taking the accounts of such creditor, and to cut down the amount of his debt. The other creditors were served with a copy of the bill:—Held, that as the other creditors were bound by the proceedings, the suit was not imperfect for want of parties, and a decree was made without prejudice to the right of the other creditors to any sum the plaintiff might recover on taking the accounts. *Clarke v. Tipping*, 9 Beav. 284.

(d) Mortgage Suits.

An equitable mortgagee having taken from the administratrix of the mortgagor a legal mortgage containing a power of sale, and having filed his bill to enforce specific performance of a sale under the power, the Court declined to entertain the suit in the absence of the administratrix and the parties beneficially interested under the mortgagor. *Sanders v. Richards*, 2 Coll. C.C. 568.

Under a local turnpike act, a mortgagee of the tolls, who took possession, was bound to pay the interest on all the mortgages *pari passu*, but the principal was only to be paid by means of a sinking fund. Under the general Turnpike Act, a mortgagee in possession was authorized to pay the principal as well as the interest. Some mortgagees took possession, and one of the trustees of the road filed a bill against them for an account:—Held, that the other mortgagees, being interested in the question as to the payment of the principal monies, were necessary parties to the suit. *Watts v. Lord Eglinton*, 15 Law J. Rep. (N.S.) Chanc. 412.

In a suit between a part owner and managing owner of a ship and the mortgagees of the shares of other part owners to determine the question of right to the freight and earnings of the ship, the same being claimed by the plaintiff towards the expenses of repairs and outfit preparatory to the voyage, and by the mortgagees as applicable in the first instance to the payment of their debt, the assignees of the mortgagors, the other part owners, were held to be necessary parties, and not to be entitled to their costs. *Green v. Briggs*, 6 Hare, 632.

A having a life estate with remainder over in strict settlement, subject to a mortgage of the settled property for 1,000 years, demised the property for a term of 200 years if he should so long

live. A purchaser of the term of 200 years filed his bill to redeem the term of 1,000 years, who was the first mortgagee of the estate:—Held, that A was a necessary party. *Hunter v. Macklaw*, 5 Hare, 238.

In a suit by the devisee of a mortgagor to redeem, where the defendant, the alleged mortgagee, claims an absolute title by virtue of the Statute of Limitations, legatees whose legacies are, under the will of the mortgagor, charged on the mortgaged premises, are necessary parties. *Batchelor v. Middleton*, 6 Hare, 78.

The plaintiff, in a bill to redeem, transferred the mortgaged property *pendente lite*:—Held, that the suit could not proceed in the absence of the transferee. *Johnson v. Thomas*, 11 Beav. 501.

The trustees of a dissenting chapel mortgaged it under their powers, and the deed contained a power of sale. The mortgagee conveyed it to A B, and in a suit by the trustees, insisting that A B was mortgagee and not a purchaser from the mortgagee, —Held, that some of the subscribers were necessary parties. *Minn v. Stant*, 12 Beav. 190.

(e) Suits against Trustees.

A testator appointed three persons his executors, who proved the will. One of them died, and a bill was filed by the residuary legatees of the testator against the survivors, alleging that the executors had committed a breach of trust, and praying that the two survivors might be held liable, and for the administration of the testator's estate. One of them by his answer submitted, that the representatives of the deceased executor ought to be made parties to the suit:—Held that, notwithstanding the 32nd Order of August 1841, the representatives of the deceased executor ought to be parties to the suit:—*Hall v. Austen*, 15 Law J. Rep. (N.S.) Chanc. 384; 2 Coll. C.C. 570.

A testator appointed his widow and two others trustees. The widow married and died, leaving her husband, and assets of her separate estate. In a suit for breaches of trust against the husband and the other trustees, it was held that the personal representative of the widow ought to be a party to the suit, and that this defect was not removed by waiver of any relief against the widow's assets or against all the trustees in respect of breaches of trust before her marriage. *Shipton v. Rawlins*, 4 Hare, 619.

In a suit to execute the trusts of a will devising real estate to trustees for certain persons for life, and after their decease for sale, with power to give discharges for the proceeds and the rents and profits, and with a direction to stand possessed of the monies to arise thereby, upon trust for the children of the tenants for life, the trustees and the tenants for life being defendants, but there being no power of sale until after the death of the tenants for life, the Court, notwithstanding the 30th Order of August 1841, directed that the children of the tenants for life should be made parties. *Cox v. Barnard*, 5 Hare, 253.

A trust fund, to which two parties were entitled in equal shares, had been improperly sold out. One of the parties was the legal personal representative of the testatrix, under whose will the trust was

created, and filed a bill against the defaulting parties and the other *cestui que trust*:—Held, upon demurrer, that the other *cestui que trust* was properly made a party. *Lenaghan v. Smith*, 16 Law J. Rep. (n.s.) Chanc. 376; 2 Ph. 301.

A widow concurred in a breach of trust, but her interest in the testator's estate had been separated:—Held, that she was not a necessary party to a suit by the *cestui que trust*, not seeking to charge her interest, and that the trustees seeking to charge her interest must make their equity effective by some proceeding of their own. *Ling v. Colman*, 10 Beav. 370.

Suit by surviving trustee to recover back trust funds wrongfully misappropriated by defendants:—Held, that the *cestui que trust* were not necessary parties. *Horsley v. Pawcett*, 11 Beav. 568.

In 1834 A, by deed, assigned certain leasehold farms, with the live and dead stock thereon, and certain debts and personal chattels, scheduled to the deed, to B and C in trust for the plaintiffs. A retained possession of the deed and the trust property till his death in 1838. In a suit for an account of the trust premises, the trustees by their answer stated, that they had taken the whole of the farming stock, &c. upon the premises at A's death, but that they were now advised that it was very doubtful whether, under the provisions of the deed, they were entitled to the whole, and they submitted that the executor of the settlor was a necessary party:—Held, that as the bill claimed no more than the property comprised in the trust deed, and the answer did not charge that the settlor had mixed up the settled property with his own, his executor was not a necessary party. *Gaunt v. Johnson*, 18 Law J. Rep. (n.s.) Chanc. 45; 7 Hare, 154.

A person, not a trustee, who is a party to a breach of trust committed by a trustee, may or may not, at the option of the plaintiff (a *cestui que trust*), be made a defendant to a suit against the trustee in respect of such breach. *Bateman v. Margerison*, 6 Hare, 499.

(B) JOINDER OF.

(a) Generally.

A testator bequeathed some articles of furniture to his wife for life, and after her decease to his daughter, and gave the residue of his estate for the separate use of his daughter for her life, and made her his executrix, who proved the will. The bill, which was filed by the daughter and her husband against the widow, stated that she had, as agent of the daughter, possessed herself of divers parts of the testator's estate, and prayed for an account against the widow, and that she might give security for the furniture:—Held, that there was not a misjoinder of plaintiffs. *Lazarus v. Colbeck*, 17 Law J. Rep. (n.s.) Chanc. 129.

A testator bequeathed the residue of his estate to trustees, upon trust for such of his three daughters as should attain twenty-one or marry under that age; and he declared that, if all his said three daughters should die under twenty-one and unmarried, the trust funds should go to the persons who, under the Statute of Distributions, would then be entitled thereto. The testator left his widow and his three

daughters, who were all infants and unmarried, and his only children, him surviving. A bill was filed by the widow and the three daughters against the trustees, for the administration of the estate. A demurrer for misjoinder of plaintiffs, the widow being co-plaintiff with the children, and also upon the ground that she was not a necessary party to the suit, was overruled. *Roberts v. Roberts*, 17 Law J. Rep. (n.s.) Chanc. 174; 2 Ph. 534; 2 De Gex & S. 29.

A married woman being entitled to a share of the produce of the estate of a testator, joined her husband in selling and assigning it to a purchaser. The assignors and assignee having joined in a suit for its recovery, it was dismissed at the hearing for misjoinder, but the objection not having been previously taken, no costs were given. *Padwick v. Platt*, 11 Beav. 503.

Parties having adverse or inconsistent rights in the subject-matter of a suit cannot be joined as co-plaintiffs.

Nor can a party who has no interest be joined as a plaintiff with one who has.

Therefore, where one of the next-of-kin of an intestate, after assigning her distributive share of his estate, is joined, as co-plaintiff with the assignees in a bill against the administrator and the other next-of-kin, for an account and payment, there is a misjoinder of plaintiffs, of which the defendant may take advantage at any stage of the cause, and such misjoinder will, even on the hearing, be sufficient to occasion a dismissal of the bill.

In a suit in which an assignor and the assignees of an equitable interest are made plaintiffs, an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-plaintiffs, and not between them and the defendant. *Fulham v. Mac Carthy*, 1 H.L. Cas. 703.

(b) Plaintiff suing on behalf of himself and others.

[See COMPANY (A).]

After a railway project had been abandoned, and the directors had returned some of the shareholders 1*l.* 8*s.* per share on their deposits, one of the shareholders who had received that sum filed a bill on behalf of himself and all the other shareholders except the defendants (the directors), praying an account of receipts and payments of the defendants as directors, that the balance which should be found due might be paid into court and applied, first, in paying 1*l.* 8*s.* per share to the shareholders who had not received that sum, and that the residue might be divided among the shareholders in proportion to their shares. Two of the defendants stated in their answer that the shareholders who received the 1*l.* 8*s.* did so in full satisfaction of their claims on the funds of the company:—Held, that the bill ought to have been filed on behalf of the shareholders who had received the payment, and that the others ought to have been made defendants. *Lovell v. Andrew*, 15 Sim. 581.

A bill by A on behalf of himself and all other shareholders of a company provisionally registered (except the defendants) against the provisional committee, and praying relief on the ground that the concern had been immaturely brought to an

end by reason of the fraud and mismanagement of the defendants, charged that the other shareholders were unknown to the plaintiff, and if known would be too numerous to be made parties to the suit. Demurrer for want of parties overruled. *Wilson v. Stanhope*, 2 Coll. C.C. 629.

Where there is a common object, and the interests of all are identical, a bill may be sustained by individual shareholders of a company, on behalf of themselves and all other shareholders.

The rule that a suit by individual shareholders complaining of an injury to the corporation cannot be maintained if the plaintiffs have the means of procuring a suit to be instituted in the name of the corporation, applies equally whether the matter complained of be absolutely illegal or merely voidable by a majority of the shareholders. *Moxley v. Alston*, 16 Law J. Rep. (N.S.) Chanc. 217; 1 Ph. 790.

The plaintiff filed a bill on behalf of himself and all other the shareholders in a company against the defendant, who was one of the committee of management, and stated that he had paid up his deposits, but that in consequence of other shareholders not having paid their deposits, the undertaking became abortive; that the company was dissolved, and the directors, the names of whom were unknown to the plaintiff, had handed over the funds to the defendant. The bill prayed an account generally, and a declaration that the plaintiff and all the other shareholders were only liable to pay so much of the expenses as they would have been justly liable to if all the deposits had been paid up. Demurrer allowed, on the ground that all the shareholders had not an interest identical with that of the plaintiff, and because the other directors were not made parties. Leave to amend refused. *Clarke v. Archibald*, 17 Law J. Rep. (N.S.) Chanc. 140.

Demurrer allowed to a bill filed by plaintiffs on behalf of themselves and other shareholders in a company, because it did not state that plaintiffs were shareholders. *Banks v. Parker*, 16 Sim. 176.

Semble—There is not sufficient precision in the class purported to be represented by a plaintiff who sues on behalf of himself, and all other shareholders in an incorporate company, "except such of the said shareholders as are respectively represented by those shareholders hereinafter named defendants." *Edwards v. Shrewsbury and Birmingham Rail. Co.*, 2 De Gex & S. 537.

(c) Effect of Decree in improperly constituted Suit.

A testator, in 1807, executed a deed of tailzie of his Scotch estates, limiting the same to various relatives, with clauses rendering the estates of the successive heirs substitute inalienable. In 1808, the testator devised his English estates to three trustees in strict settlement, and gave them his residuary personal estate in trust, to lay out the same in the purchase of estates in England or Scotland, and to settle the purchased English estates to the uses contained in his will, and the purchased Scotch estates to the uses expressed in the deed of tailzie. By the will, power was given to the person entitled to the actual possession of the devised estates to appoint new trustees, on any of the trustees dying or declining to act. The testator died in

1812. On the death of J D, the first party beneficially interested in the estates, there was a very large residuary personal estate, and he was succeeded in the estates by his son J D D, the heir substitute in possession under the deed, and tenant in tail under the will. A very considerable part of the residuary personal estate was invested by the trustees in the purchase of Scotch estates, and a small part only in the purchase of English estates, and these estates were respectively settled to the uses expressed in the deed and will. The trustees having died, and the representative of the last surviving trustee desiring to be discharged, a bill was filed in 1833 by the next friend of J D D, an infant, complaining that the trusts had not been properly executed, and amongst other things, seeking the appointment of new trustees, and a declaration of the Court that the residue of the personal estate ought to be invested in the purchase of real estates in England. The earliest of the heirs substitute after J D D interested in the estates were not parties to the suit, though others more remotely interested therein were, as also the representative of the last surviving trustee. A decree was made in 1833, whereby a reference was directed for the appointment of new trustees, and it was declared that the personal estate remaining uninvested ought to be invested in the purchase of real estates in England. J D D, having attained his majority in 1836, executed a disentailing deed, and shortly afterwards the uninvested personal estate was ordered to be transferred to him. He died in 1840 without issue. In 1841, a bill was filed by A D F, the next substitute heir in possession under the Scotch deed of tailzie, praying that the decrees and proceedings in the suit instituted on behalf of J D D might be declared irregular, and that the plaintiff might be relieved therefrom:—Held, that A D F was not bound by the decree in the suit of J D D, and that the heirs substitute under the deed of tailzie were not substantially represented in that suit, and that his present bill was a proper bill; that the new trustees had been irregularly appointed in the suit of J D D; and that the personal estate directed to be transferred in 1836 to J D D ought to be restored out of his assets, and that it ought to be invested in English and Scotch estates in equal moieties, although a much larger sum had already been invested in Scotch estates than in English. *Fordyce v. Bridges*, 16 Law J. Rep. (N.S.) Chanc. 81; 10 Beav. 90; affirmed, 17 Law J. Rep. (N.S.) Chanc. 185; 10 Ph. 497.

(C) OBJECTIONS AS TO.

[See ADMINISTRATION, Limited Grant of.]

Where a cause is set down upon an objection for want of parties, the defendant begins. *Attorney General v. Gardner*, 2 Coll. C.C. 564.

A submission whether certain persons ought not to be made parties to the suit, may be properly set down as the objection for want of parties under the 39th Order of August 1841. *Barker v. Rogers*, 7 Hare, 19.

The decision of the Court under the 39th Order of 1841 on an objection for want of parties, is not final. *Welham v. Welham*, 10 Beav. 247.

Where the question of parties depends on the determination of the question in the cause, the Court will not decide it under the 39th Order of August 1841, but will reserve it until the hearing. *Lewis v. Baldwin*, 11 Beav. 368.

A cause cannot be set down on an objection for want of parties under the 39th Order of August 1841, if the objection is founded on a fact stated in the answer but not in the bill. *Clark v. Webb*, 16 Sim. 161.

In a bill by a debtor who had conveyed property to a trustee for the benefit of his creditors to have the trusts of the deed administered, charging that one of the creditors had forfeited his debt by a breach of covenant, it was held that the creditors, parties to the deed, other than the trustee and the creditor charged with the breach of covenant, were sufficiently made parties by being served with copies of the bill under the 23rd Order of August 1841.

A court of equity will declare and give effect to a forfeiture where it is incidental to the administration of a trust. *Duncombe v. Levy*, 5 Hare, 232.

The surviving trustees and executors under a will filed their bill against M, the executor of a deceased trustee and executor O, named in the same will, seeking payment from the estate of O of a sum of money, consisting of rents of part of the testator's residuary estates, admitted by the answer of M to have been in O's possession at his death. O was also one of several residuary legatees and devisees named in the will; and the bill prayed payment to the plaintiffs of that sum, and that the defendant might admit assets for that purpose, or that the usual accounts might be taken against O's estate in respect of his receipts:—Held, that the plaintiffs were not entitled to any such relief or account as was prayed by the bill, except in a suit properly constituted for administering the estate and carrying into execution the trusts of the testator's will. *Chancellor v. Morecraft*, 17 Law J. Rep. (N.S.) Chanc. 11; 11 Beav. 262.

In 1823 the defendant granted an annuity to D, and the plaintiff guaranteed the due payment of the annuity; and in consideration of such guarantee, the defendant, who was tenant in tail in remainder of certain real estates expectant upon the death of his father, covenanted with the plaintiff that he would, on the decease of his father, suffer a recovery of the entailed estates in favour of the plaintiff, as a security against any loss he might sustain by reason of his guarantee. The plaintiff being compelled to pay the arrears of the annuity, filed his bill, after the death of the defendant's father, against the defendant alone, praying a specific performance of the covenant to suffer a recovery; the defendant, by his answer, objected that certain creditors upon judgments entered up against the defendant prior to the death of his father, but subsequently to the deed of covenant, had acquired by force of the statute 1 & 2 Vict. c. 110. charges upon the estates prior to the plaintiff's claim, and that such judgment creditors were necessary parties to the suit. The objection was disallowed, on the ground that it went to the merits, and was not an objection for want of parties. *Petre v. Duncombe*, 17 Law J. Rep. (N.S.) Chanc. 370; 7 Hare, 24.

A charity was founded some time in the 12th century, and was commonly called "The Master, Brethren and Sisters of the Hospital of St. John the Baptist." In the time of Charles II., the master-ship of the hospital and the lands, &c., belonging to it were granted to the corporation of Chester. The leases of the hospital lands had never been granted by the corporation under their common seal; but, in the leases, the corporation were described as being the master of the hospital, and the rents were reserved to the master, brethren and sisters. An information was filed against the corporation of Chester and the parties who had been appointed trustees of the charity estates under the Municipal Corporations Reform Act to ascertain the charity lands and to have a scheme for the due regulation of the charity; to which information the master, brethren and sisters of the hospital were not made parties as a corporate body. It was decided by the Court that they did not form a corporate body; and consequently an objection, that they ought to have been made parties to the information as a corporation, was not sustained.

The objection that the hospital ought to have been a party to the information as a corporate body, was not taken by the corporation of Chester until several years after the decree had been made. Whether such an objection, if valid, would be allowed to be taken by such a party after such a lapse of time—*quære*. *Attorney General v. Corporation of Chester*, 1 Hall & Tw. 46.

The execution of the deed of partnership of a company by one only of several co-plaintiffs, suing on behalf of themselves and the other partners, is not sufficient to sustain the suit if the objection is taken *in limine*; but the Court will give the other co-plaintiffs an opportunity of proving that they sustain the character in which they claim. *Clay v. Rufford*, 19 Law J. Rep. (N.S.) Chanc. 295.

Suit by plaintiffs for the administration of the estate of A, an intestate. The plaintiffs claimed to be the next-of-kin of A, as being the children of B, a sister of A, but stated that B had had other children, C and D, who, by reason of illegitimacy, had no interest. The administrator, by his answer, submitted that C and D ought to be made parties. The cause being set down on an objection for want of parties, the objection was ordered to stand for the hearing. *Pike v. Barber*, 19 Law J. Rep. (N.S.) Chanc. 373.

PARTITION.

Commissioners have no power to award sums to be paid for owelty of partition. *Mole v. Mansfield*, 15 Sim. 41.

In a suit for partition it appeared that the estate was vested as to one moiety in A in fee, and as to the other in B in fee, but in trust for infants:—Held, that a conveyance from B and the decree of the Court would give A a good title to the tenements allotted to him; and therefore that it was not necessary for the infants to convey when they came of age. *Cole v. Sewell*, 17 Sim. 40.

PARTNERS.

[See FRAUD, RELIEF AGAINST—FRAUDS, STATUTE OF, Note in Writing—COMPANY—PRACTICE—SPECIFIC PERFORMANCE.]

(A) PARTNERSHIP.

(a) *Constitution and Effect of.*

- (1) *In general.*
- (2) *Participation of Profits.*

(b) *Dissolution of.*

- (1) *What amounts to.*
- (2) *Notice to dissolve.*
- (3) *Cause of Dissolution.*
- (4) *Agreement to dissolve.*

(c) *Construction and Validity of Contracts creating it.*(d) *Accounts.*

(B) RIGHTS AND LIABILITIES.

(C) POWERS AND DISABILITIES.

(D) ACTIONS AND SUITS.

(A) PARTNERSHIP.

(a) *Constitution and Effect of.*(1) *In general.*

A, P and B, members of the provisional committee of a projected joint-stock company, hired some premises on the 11th of April 1846, as joint tenants, for the offices of the company, who took possession on the 7th of April following. On the 29th of September 1846, the deed of settlement was registered, having been executed by A and P, which recited that the company was indebted to P in 550*l.* for money advanced by him for the formation of the company, and *rent of offices*, and named A and P as two of the directors. The rent being in arrear, the lessors sued A, P and B on the demise, and, after verdict, levied 130*l.* for debt and costs, on A, the plaintiff. In an action by A against P for his proportion,—Held, that no partnership existed between the parties, and that A was entitled to recover contribution from P. *Boulter v. Peplow and Boulter v. Brooke*, 19 Law J. Rep. (N.S.) C.P. 190.

The plaintiff alleged that a partnership had been constituted between himself and the defendant, who was a general merchant, by a memorandum in which the defendant agreed to pay the plaintiff 100*l.* per annum in consideration of his general services in business; and in addition to this, the plaintiff was to receive one-fifth of the net profits on all new business entered into through the plaintiff, including all the net profits of insurance. The defendant denied the partnership, and alleged that the plaintiff was engaged as a clerk only:—Held, that this memorandum constituted a partnership, and that the plaintiff was entitled to a receiver. *Katsch v. Schenck*, 18 Law J. Rep. (N.S.) Chanc. 386.

An equal partnership implies not only an equal participation *de facto* in profit and loss, but a right in each partner to claim and insist on such participation. Thus, although in a case where parties had participated equally in profit and loss, the law would, in the absence of any contract, or any dealing from which a contract might be inferred, pre-

sume an equal partnership; yet the presumption would not arise if the books of the concern and the dealings of the parties shewed that such could not have been the terms on which the business was carried on. *Stewart v. Forbes*, 1 Mac. & G. 137; 1 Hall & Tw. 461.

In May 1843 A and B agreed by parol to become jointly interested in certain lands for the purpose of a building speculation. The lease of the lands was taken in B's name, and A and B continued in joint occupation of the lands till July 1843, when B assumed exclusive possession and ejected A. From July 1843, B, at his sole labour and expense, carried on operations upon the land by preparing it for building purposes and erecting houses thereon, A never asserting any title thereto until January 1845, when he claimed an equal interest with B. Upon B repudiating A's title, a bill was filed by A for specific performance of the parol agreement:—Held, that assuming A's title to have been good originally, he had debarred himself from asserting that title by making no claim for eighteen months after his exclusion, during all which time he had permitted B to carry on the undertaking at his own cost and risk; and the bill was dismissed, with costs, except so far as the same were increased by the defendant setting up the Statute of Frauds or denying the parol agreement or part performance thereof. *Cowell v. Watts, Watts v. Cowell*, 19 Law J. Rep. (N.S.) Chanc. 455; 2 Hall & Tw. 224.

(2) *Participation of Profits.*

E, one of the defendants, being concerned in a colliery, entered into an agreement with J for opening a tally shop near it, for the purpose principally of supplying goods to the workmen. E built the shop, and his name was placed over the door. J managed the shop. E received, in the first instance, 7*l.* per cent., and afterwards 5*l.* per cent. on the amount of all sales to his workmen, and J received all the rest of the profits. The plaintiffs were the assignees of bankers with whom J had opened an account, and who had advanced money to J for the purchase of goods for the shop. There was no evidence to shew that credit was in fact given to E. The jury having found that there was no sharing of profit and loss between E and J, and that credit was not given by the bankrupts to E,—Held, that the verdict was not against the evidence; that as credit was given to J alone, E could only be made liable on the ground of an actual partnership between him and J; and that E's taking 5*l.* per cent. on the sales to his workmen did not as a matter of legal inference render him liable as a partner to third persons, but was in the nature of a commission on certain sales supposed to be effected through his influence over his workmen. *Pott v. Eyton*, 15 Law J. Rep. (N.S.) C.P. 257; 3 Com. B. Rep. 32.

N agreed with L to sell him a newspaper of which he was the proprietor, for 1,500*l.*, to be paid by annual instalments, with interest, during a period of seven years, N guaranteeing to L the clear yearly profit of 150*l.* over and above the annual instalments. In consideration thereof, L agreed to pay all surplus profits over and above the 150*l.* per annum to N, until they should amount to 500*l.*, and if they amounted to more than the latter

sum, L agreed to pay besides the purchase-money and 500*l.* the then existing liabilities; but if they did not amount to 500*l.*, then N was to pay the liabilities. And it was agreed that N should receive the surplus profits till they amounted to 500*l.*, and that all additional surplus profits should belong to L:—Held, in an action for paper and other necessities, supplied subsequently to the date of this agreement, to L's order, for the purpose of conducting the newspaper, and which were used for it, that N was a partner, and was liable to satisfy the demand. *Barry v. Nesham*, 16 Law J. Rep. (N.S.) C.P. 21; 3 Com. B. Rep. 641.

A participator in the profits of a particular transaction is a partner *quoad* third parties, and must be taken to have authorized everything done by his partners in carrying out that particular transaction.

A document, by which F and F agreed to give the defendant a share of the profits in a particular adventure, though insufficient in itself to constitute a partnership for want of mutuality, was held good evidence, along with evidence of interference by the defendant, to prove that he was a partner. *Heyhoe v. Burge*, 19 Law J. Rep. (N.S.) C.P. 243.

(b) Dissolution.

(1) What amounts to.

By articles of partnership it was agreed that if the defendant should by illness be obliged to quit India for more than a year, the books should be made up to the end of the partnership year, and a valuation made of the stock. The defendant became an incurable lunatic on his way to India, and was sent back on his arrival there in 1841:—Held, that the articles contemplated a dissolution, and that the event having happened, there should be a dissolution from the end of the partnership year 1842, and not from the decree. *Bagshaw v. Parker*, 10 Beav. 532.

A partner having excluded his co-partner, an injunction was granted to restrain him from obstructing or interfering with his co-partner in the exercise and enjoyment of his rights under the partnership articles.

Upon a disagreement, one partner by letter proposed to the other either to retire or to refer to arbitration. The other partner in answer said he concurred in the retirement, but subject to a condition as to taking the accounts:—Held, that the partnership was not dissolved. *Hall v. Hall*, 12 Beav. 414.

The defendant had had dealings with A and B, as partners, and afterwards entered into a contract with one in the presence of the other, and received letters relating thereto signed in the name of the firm: in an action by B, A was called as a witness to prove that he had ceased to be a partner prior to the contract, and that he made it as agent for B:—Held, that the jury were warranted in finding that the contract was with B alone, although there was no direct evidence of the dissolution of the partnership. *Cox v. Hubbard*, 4 Com. B. Rep. 317.

(2) Notice to dissolve.

G was a shareholder and director of a joint-stock bank, and attended the weekly meetings of the

board, but his being a director gave him no management or interference in the banking accounts, which, together with the business of the bank, were managed by the manager; G was also a member of a co-partnership, which had opened an account with the bank, and of which the defendant was also at that time a member. The defendant having afterwards retired from the co-partnership, and having given no notice to the bank of his retirement, and the co-partnership having become indebted to the bank,—Held, that the defendant was liable to the bank for the debts of the co-partnership, and that G's knowledge of the defendant's retirement was not an actual or constructive notice of that fact to the bank. *Powles v. Page*, 15 Law J. Rep. (N.S.) C.P. 217; 3 Com. B. Rep. 16.

The plaintiff and the defendant entered into partnership, and an agreement was made that six months' notice should be given by either of the parties wishing to dissolve the partnership. The defendant became insane, and the plaintiff served him with notice for dissolving the partnership:—Held, that this notice was sufficient. *Robertson v. Lockie*, 15 Law J. Rep. (N.S.) Chanc. 379; 15 Sim. 285.

(3) Cause of Dissolution.

Decree for a dissolution of partnership on the ground of insanity, as from the date of the decree. *Sander v. Sander*, 2 Coll. C.C. 276.

(4) Agreement to dissolve.

By agreement, a partnership between two solicitors was to be dissolved, the accounts taken, and the continuing partner to pay an annuity quarterly, for three years, to the retiring partner. The latter died before the expiration of the third year, without having received any part of the annuity:—Held, on bill, filed within six years from his death, but after six years from the quarter-day preceding it, that the annuity was part of the agreement; and that his representative was entitled to specific performance of the whole of the agreement, irrespective of the question whether he was or not barred by the Statute of Limitations from recovering the annuity in a court of equity. *Murray v. Parker*, 19 Law J. Rep. (N.S.) Chanc. 530.

By the deed of dissolution of a firm of three partners one of whom retired, the two continuing partners covenanted for themselves, their heirs, executors, &c., that they or one of them would pay the outgoing partner certain specified sums:—Held, that this only constituted a joint liability at law, and could not be otherwise construed in equity, and a demurrer to a creditor's bill filed by the outgoing partner against the executrix of one of the covenantors who died before the other, was allowed. *Wilmer v. Currey*, 2 De Gex & S. 347.

(c) Construction and Validity of Contracts creating it.

A declaration stated, that by a certain indenture the defendant covenanted to pay the plaintiff 400*l.* in equal moieties on the 11th of November and the 11th of May, and that it was agreed that the drugs, stock-in-trade, utensils, and shop fixtures in certain premises should be valued by a person to be named by the plaintiff and the defendant, and one moiety of the amount paid immediately upon such valua-

tion, and the residue at the expiration of a year. Averment, that the said drugs, &c. were valued by one L, named by the plaintiff and the defendant, at 190*l*. Breach, that the defendant refused to pay the second moiety of the 400*l*. on the 11th of May, and also the residue of the 190*l*. at the expiration of the year. Pleas, set-off for money had and received, money paid, and on an account stated, and that the said drugs, &c. were not valued by a person named by the plaintiff and the defendant; on which issues were joined. It appeared in evidence that L was agreed upon by the plaintiff and the defendant to value the drugs, stock in trade, utensils, and shop fixtures, and that, after the valuation was complete, except as to the drugs, 70*l*. was agreed on by the parties as the value of the drugs, and 50*l*. as the value of a horse and gig belonging to the plaintiff, which sum, together with the rest of the valuation, amounted to 190*l*.:—Held, that the jury were rightly directed that if the horse and gig were part of the stock-in-trade, or were treated as such by the parties, the plaintiff was entitled to a verdict on the last plea.

The indenture was put in evidence, by which it appeared that the plaintiff agreed to sell the defendant his business for 900*l*., of which 500*l*. was to be paid immediately, and the residue by equal moieties on the 11th of November and the 11th of May; and, in consideration thereof, the plaintiff granted to the defendant all his interest, &c. in the business, subject, as to one twelvemonth from the date thereof, to the stipulation thereafter contained. The plaintiff then covenanted that he would not carry on his business within three miles of the present place of business: and then followed a stipulation that the plaintiff should introduce the defendant to the business, and during one year continue to reside in the place where it was carried on, and attend to the practice as he had theretofore done; and, in consideration of the premises, the defendant agreed to allow the plaintiff, during such period of one year, one moiety of the clear profits of the said concern, to be paid at the expiration thereof:—Held, that the effect of the deed was to assign all the interest in the business from the plaintiff to the defendant from its date, and that the above stipulation did not create a partnership during the year, between the parties, but was merely a mode of paying the plaintiff for his services, and that under the plea of set-off the defendant was entitled to give evidence of money received to his use, by the plaintiff, in the course of the business. *Rawlinson v. Clarke*, 15 Law J. Rep. (N.S.) Exch. 171; 15 Mee. & W. 292.

Where by the partnership deed the executors or administrators of a party dying were entitled to succeed to his share on giving notice within three months from his decease,—Held, that notice given by the widow within the time, but who did not take out letters of administration till some months after, was an effectual notice within the meaning of the deed. *Holland v. King*, 6 Com. B. Rep. 727.

W S, an attorney, held the office of clerk of the peace, clerk to magistrates, clerk to Commissioners of Land and Assessed Taxes, clerk to Commissioners of Sewers, clerk to Deputy-Lieutenants, steward of manors, coroner, secretary to Conservative Association, and clerk to a polling district. By articles of

partnership it was recited that W S held "many offices, clerkships and stewardships of manors," and it was agreed that the defendant should enter into partnership with W S, and that the emoluments of the offices, &c. should be distributed as partnership profits; and it was provided, that if W S died during the partnership, and no son of his should have been admitted, the defendant should be interested in the moiety of the partnership, and the executors of W S should be entitled to the profits of the other moiety as part of the personal estate:—Held, first, that the articles of partnership were not void at common law, as infringing the statutes 5 & 6 Edw. 6. c. 16. and the 49 Geo. 3. c. 126, which provide against the sale of offices.

Secondly, that the clause providing that the executors should be entitled to the moiety of the profits was not contrary to the Attornies Act, 22 Geo. 2. c. 46. s. 11, confirming *Candler v. Candler*, 6 Madd. 141. *Sterry v. Clifton*, 19 Law J. Rep. (N.S.) C.P. 237.

(d) Accounts.

A club consisting of numerous members, and having property, was dissolved; and eleven members were appointed to wind up the affairs of the club. Two of the most active of the eleven members, accordingly, sold the furniture and effects of the club, and out of the proceeds paid some of the debts of the club. A bill being filed by a member, on behalf of himself and all other members of the club, except the defendants, against the two directors, seeking an account of the receipts and payments by them, and payment of the balance to the plaintiff, or as the Court should direct, but not asking that the affairs of the club might be wound up,—it was held, that the plaintiff was entitled to a decree for an account; and that the Court would, in case a balance should be found due from the defendants after taking the accounts before the Master, devise a mode of distributing the same amongst the parties entitled. *Richardson v. Hastings*, 16 Law J. Rep. (N.S.) Chanc. 322; 11 Beav. 17.

The promoters of two competing railways agreed to consolidate, and appointed the plaintiff and defendant solicitors of the proposed company, who accepted the office without making any definite arrangement as to the division of the business, or the profits, and a much larger proportion of the work was done by the defendant than by the plaintiff. In a conversation between them, before the principal part of the work was done, the plaintiff stated as the result of his inquiries in like cases, that the allowance for office expenses and personal trouble in such limited partnerships between solicitors was made by each party retaining, besides his expenses and disbursements, from 10 to 25 per cent. on the amount of the net charges for the business done, and which principle he considered satisfactory: the defendant replied there could be no misunderstanding about it between honourable men. Upon a bill by plaintiff, claiming an account and division of profits of the business done by the company upon the footing of an equal co-partnership, and offering to allow 25 per cent. upon the work done separately, to the partner who did it, the Court under the circumstances decreed accordingly. *Webster v. Bray*, 7 Hare, 159.

Where the accounts of a partnership between two had been carelessly kept, and after the death of one, the other furnished to the executors of the deceased partner an account current of the partnership dealings, which afforded them the only evidence to charge the surviving partner,—Held, that they were entitled to use it for that purpose in a suit instituted by the surviving partner to have the accounts taken, without being bound by the entries on the credit side of the account current. *Morehouse v. Newton*, 3 De Gex & S. 307.

In 1828 A, B, C and three other persons became co-partners, as colliers, in equal sixth shares, and took a lease of certain mines for twenty-one years. In 1836 A died, and his widow and administratrix thenceforth to the end of the term continued to carry on the business of the partnership. In 1845 B & C, without the privity of the rest of the firm, obtained for themselves exclusively a reversionary lease of the same mines. On the expiration of the original lease in 1849, B & C, being in exclusive possession, gave notice of dissolution, and claimed a right to purchase the partnership stock. The administratrix of A then filed her bill for a dissolution, and the usual accounts, and for a declaration that the renewed lease formed part of the partnership assets, and for a receiver. On a motion for a receiver,—Held, affirming the decision of the Court below, that the plaintiff, as the representative of her husband, had a *prima facie* interest in the renewed lease; and a receiver was ordered of her one-sixth, including such renewed lease.

In 1839 the administratrix and her children, by deed, joined in assigning all the intestate's estate to arbitrators named for the purposes of partition, and in the same year the arbitrators allotted all the intestate's "colliery shares" to the children absolutely:—Held, that the plaintiff, as administratrix of her husband, was under liabilities and had duties to perform respecting the partnership, from which she could not discharge herself by the assignment; and that therefore she had, notwithstanding, sufficient interest to sustain the suit; and that the children were not necessary parties. *Clegg v. Fishwick*, 19 Law J. Rep. (N.S.) Chanc. 49; 1 Mac. & G. 294; 1 Hall & Tw. 390.

(B) RIGHTS AND LIABILITIES.

The plaintiff and the defendant carried on business as partners on the plaintiff's premises: the duration and terms of the partnership were not definitely settled. On the 26th of December, the plaintiff served the defendant with a notice of dissolution. On the 2nd of January, the defendant broke and entered the shop, &c. of the plaintiff, where the partnership concerns were carried on and the books kept, for which entry the plaintiff declared in trespass, and the defendant pleaded not possessed:—Held, that the plaintiff was entitled to recover.

A partnership at will exists between A & B, the business being carried on on the premises of A. Such partnership is put an end to by a notice of dissolution, and A can maintain trespass for a subsequent entry by B on that part of his premises where the partnership business had been transacted. *Benham v. Gray*, 17 Law J. Rep. (N.S.) C.P. 50; 5 Com. B. Rep. 138.

A, in 1847, agreed with B to supply him with bricks whenever he wanted them, for 28s. per 1,000, ready money. In 1828, B and C became partners; and after that, B from time to time ordered bricks of A, which were used for a partnership purpose:—Held, that C, as the partner of B, was liable to A for the price of these bricks, each order being a new contract; but if the contract of A and B had been for the supply of a certain number of bricks, at so much per 1,000, a subsequent partner would not have been liable.

If there be a partnership to carry on a work, that would give each partner authority to make such contracts as would be proper for the completion of the work; and whether a contract be so or not, is a question for the jury.

B and C entered into partnership by an unstamped agreement, which was in the hands of J S. A sued B and C as partners, for goods sold, and applied to J S to take or send the agreement to the Stamp Office that A might get it stamped; J S refused to do so, and a Judge at chambers would not order him to do so, as he held the agreement for B and C, and did not in any way hold it for A. *Dyke v. Brewer*, 2 Car. & K. 828.

One of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of assurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by one. At the time of the execution of the deed, one of the ships was lost; but this fact was not then known to the parties:—Held, that the security was binding on the firm notwithstanding the execution of the deed by one partner only, and passed the insurance money although the deed was not registered according to the shipping acts.

Quare—Whether insurance brokers have a lien on a policy effected by them for the general balance due from their principal. *Ex parte Bosanquet, re Boyd*, 1 De Gex, 432.

A trader, by his will, appointed his partner and other parties executors, and authorized his partner to purchase his share of the trade, premises and stock; and if he declined to do so, the trade was to be carried on for the benefit of the testator's wife and family. A valuation was made, and the surviving partner took possession of the whole partnership property under circumstances which induced the Court to set aside the sale as invalid. The surviving partner, and subsequently his son and legatee, carried on the business for several years, and the son ultimately became bankrupt. The partnership property was then sold, and the proceeds paid into court:—Held, that the representatives of the deceased partner were entitled to one moiety of the fund in court, and also to a lien on the other moiety for sums which were found by the Master to be due to them from the estate of William; and that their claim ought to be satisfied in preference to the debts of the creditors of the bankrupt, the case not being affected by the question, whether any of the partnership stock was or was not in the order or disposition of the bankrupt. *Stocken v. Dawson*, 17 Law J. Rep. (N.S.) Chanc. 282.

(C). POWERS AND DISABILITIES.

One partner cannot authorize an attorney to enter an appearance and submit to judgment for a co-partner.

The co-partner having been taken in execution upon the judgment, and never having been served with a summons, or been cognizant of the action, the Court set aside the appearance and other proceedings, with costs. *Hambridge v. De la Crouée*, 16 Law J. Rep. (N.S.) C.P. 85; 4 Dowl. & L. P.C. 466; 3 Com. B. Rep. 742.

After evidence has been given of a partnership between S & A, a printed circular issued by S in the name of the firm and from the place of business, is evidence against A.

Where Thomas Seymour and Sarah Ayres carried on business in the name of "Seymour & Ayres," and Seymour signed a promissory note, "Thomas Seymour, Sarah Ayres:"—Held, that this was a sufficient signature in the name of the firm, and was binding upon Ayres.

Seemle, per Maule, J., if A and B carry on business in the name of B & Co., a signature by A with the true names of the partners A and B, will be binding on B. *Norton v. Seymour*, 16 Law J. Rep. (N.S.) C.P. 100; 3 Com. B. Rep. 792.

(D). ACTIONS AND SUITS.

[*Deeks v. Stanhope*, 5 Law J. Dig. 506; 14 Sim. 57.]

To an action for money had and received, the defendants pleaded, as a set-off, that the plaintiffs were partners, and that before the money had been received by the defendants, G, one of the plaintiffs, applied to the defendants, who were auctioneers, to sell some property, and that the defendants, at the time of the application, and at the time of the selling, and at the time when the set-off accrued, believed G to be the sole owner of the property, and had no notice that the plaintiffs had any interest in it; that the money in question was received upon the sale of the property; and that after G had so employed the defendants, and before the defendants had notice that G was not the sole owner, G became indebted to the defendants for money lent, &c. Replication, that at the time of the selling of the property, the defendants knew that G was not the sole owner of it:—Held, on demurrer to the replication, that the plea was bad; that it did not shew that G appeared as sole owner, with the consent or by the default of the other plaintiffs; and that it amounted merely to a set-off of a debt due from one partner to a demand from several partners. *Gordon v. Ellis*, 15 Law J. Rep. (N.S.) C.P. 178; 3 Dowl. & L. P.C. 803; 2 Com. B. Rep. 821.

The answer in Chancery of one who has been a partner in a firm, but who had retired from the firm, and ceased to have any interest in it before the commencement of that suit, is not admissible in evidence against the continuing partners of the firm, although it relates to transactions which occurred with the firm at the time when the retired partner was a member of it. *Parker v. Morrell*, 2 Car. & K. 599.

A joint fiat in bankruptcy issued against two partners, pending a suit by one of them against the other and a third person who had previously retired

from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for repayment of the monies which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee and the retired partner defendants:—Held, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner, who was an original defendant against whom relief was sought, could not sustain the suit against the retired partner.

Seemle—that the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit.

Quare—whether, if it had appeared in evidence in the suit that the defendant, the retired partner, was alone or otherwise answerable for the fraud, the Court could have made a conditional decree imposing terms upon the plaintiffs as representing the bankrupt who was originally charged as defendant. *Robertson v. Southgate*, 6 Hare, 536.

A trader directed his trustees with all convenient speed to convert into money his residuary estate, but he provided that three or (in case of any substantial reason) seven years might be allowed for withdrawing his capital from the business in which he was a partner. Parties beneficially interested in the will filed a bill against the surviving partners and the legal personal representatives, insisting that the administratrix had improperly allowed the capital to remain in the business beyond the prescribed period, and asking for a share of the profits made while it so remained. The defendants pleaded that before the testator's death a valuation was made, when his share appeared to be 63,000*l.*; and that a year after his death it was agreed that the new firm should take to the stock on payment to the administratrix of 63,000*l.*, for which sum they should purchase the testator's share. They gave a bond for 40,000*l.* and placed the residue at her disposal, which was drawn out from time to time at her pleasure. The surviving partners insisted by their plea that they had become purchasers of the share for a valuable consideration and without notice of the trusts of the will:—Held, that this was a valid defence to the claim to participate in the profits. *Chambers v. Howell*, 11 Beav. 6.

Articles of partnership between two persons for twenty-one years made various provisions for carrying on the firm in case of the death of either of the partners, but none for the case of the representatives of a deceased partner refusing to be concerned in the business with the surviving partner. In a suit by the executors of a deceased partner against the survivor for a dissolution, it was held that specific performance could not be decreed against the executors, and the partnership was dissolved, subject to any legal right which the surviving partner had for breach of covenants in the articles. *Douns v. Collins*, 6 Hare, 418.

Effect in equity of an execution against the share of one of two partners in the partnership stock. *Habershon v. Blurton*, 1 De Gex & S. 121.

PATENT.

[For Registration of Designs, see COPYRIGHT.
And see PLEADING, IN EQUITY, Demurrer.]

- (A) WHEN VALID OR VOID.
- (B) SPECIFICATION, CONSTRUCTION AND VALIDITY OF.
- (C) RENEWING, CONFIRMING, AND EXTENDING.
- (D) REPEALING.
- (E) LICENCE TO USE.
- (F) ASSIGNMENT TO TRUSTEES FOR CREDITORS.
- (G) INFRINGEMENT.
- (H) ACTIONS.
 - (a) Pleading.
 - (b) Costs.

(A) WHEN VALID OR VOID.

[*Cooke v. Pearce*, 5 Law J. Dig. 507; 8 Q.B. Rep. 1044.]

A patent was taken out for "a new and improved mode of manufacturing silk, cotton, linen and woollen fabrics." The specification, and a disclaimer, subsequently filed under the statute 5 & 6 Will. 4. c. 83, set forth that the patentees claimed the mode hereinbefore described of producing or preparing stripes of silk, cotton, woollen, or linen, or of a mixture of two or more of these materials, in such a manner that the weft or lateral fibres of both cut edges of each stripe are all brought up on one side, and into close contact with each other, and the re-weaving of such stripes with the whole fur or pile uppermost, into the surfaces of carpets," &c. It appeared that one of these processes was old. The Judge directed the jury that if one was new, the patent could be supported for the combination of them, and would only be invalid if there had been a public use of both before the date of the patent:—Held, that this direction was erroneous, and that the patent was void. *Templeton v. Macfarlane*, 1 H.L. Cas. 595.

The user of an invention in England, prior to the date of letters patent granted for Scotland, will invalidate the Scotch patent. The Judicial Committee of the Privy Council, under the 5 & 6 Will. 4. c. 83. s. 2, refused to confirm a Scotch patent, the invention being used in England before the date of the Scotch patent. *In re Robinson's Patent*, 5 Moore, P.C. 65.

Case for the infringement of a patent. Fifth plea, that one D was the inventor of the subject-matter of the patent, and used the same in France; that D was an alien, domiciled abroad, and employed one B, as agent, to procure the said letters patent in his own name, in trust for D, and communicated the invention to B; that B, thereupon, brought into this country the knowledge of the invention, and was no otherwise the first inventor; and that B, afterwards, as agent for D, procured the letters patent upon trust for D, being such alien, and not for his own use:—Held, on special demurrer, that the plea was bad in substance: that a person who has imported an invention into this country, where it was not known before, is the first inventor, within the statute of Jac.: secondly, that it does not affect the patent that the party importing it is merely an agent for the inventor; thirdly, nor that it was taken out in trust for aliens residing abroad.

The sixth plea, after stating as in the fifth plea, stated that D, by agreement, assigned to the government of France the invention in question, and that thereby, according to the laws of France, the invention became the property of the King of the French, who became entitled, by the laws of France, to publish the invention as well in France as in Great Britain. The seventh plea, after stating as in the sixth plea, stated, that the King of the French published the invention to the people of France, for the benefit of all nations:—Held, that both these pleas were bad in substance, as containing no answer to the allegation in the declaration that B was the first and true inventor within this realm.

The title of the invention was, "a new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura":—Held, that it was not ambiguous or repugnant. *Beard v. Egerton*, 15 Law J. Rep. (n.s.) C.P. 270; 3 Com. B. Rep. 97.

A person availing himself of information from abroad is an inventor within the 21 Jac. 1. c. 3. s. 6. *Nickels v. Ross*, 8 Com. B. Rep. 679.

Where by a patent previously granted to B, the same object for which a patent was afterwards granted to A was effected by a similar method, with a trifling addition, but the object might be effected without such addition:—Held, that the two patents were substantially the same, and that A's patent was void. *Dobbs v. Penn*, 3 Exch. Rep. 427.

Before the date of the patent, part of the *garancine* (colouring matter) in madder had been obtained by boiling, but the spent (boiled) madder still contained *garancine*; the whole of the *garancine* had also been obtained by a known process. The patent was for the application of the latter process to spent madder:—Held, that it was not a new manufacture. *Steiner v. Heald*, 2 Car. & K. 1022.

(B) SPECIFICATION, CONSTRUCTION AND VALIDITY OF.

It is a question for the jury, whether or not the specification in a patent describes with sufficient accuracy the material of which the proposed article is to be made; that question being raised by the issue. *Bickford v. Skewes*, 10 Law J. Rep. (n.s.) Q.B. 302; 1 G. & D. 736.

In an action of covenant upon a deed of licence to use a patent for making buttons, the issue being whether certain buttons made by the defendant were made under the licence, the specification stated the invention to be the application of such fabrics only wherein the ground is produced by a warp of "*soft or organzine silk such as is used in weaving satin*," and claimed the application of such fabrics to the covering of buttons as have the ground woven with "*soft or organzine silk*" for the warp:—Held, that the proper meaning of the word "or" being disjunctive, it ought to be so construed, unless there were anything in the context or the facts proved to give it a different meaning; and that the Judge ought not to have told the jury absolutely, that unless the buttons were made of organzine silk they were not within the patent, but that the words "soft" and "organzine" were capable of being construed to mean the same thing, if the jury were satisfied that there was only one description of silk, viz., organzine, used for weaving satin, at the date of the

patent. *Elliott v. Turner*, 15 Law J. Rep. (N.S.) C.P. 49; 2 Com. B. Rep. 446.

The terms of the specification of a patent are to be read altogether, and a fair and reasonable interpretation given thereto; then, if it be sufficiently plain to be understood by an operator of fair intelligence, the specification is good.

A specification of the daguerreotype patent stated, "the process is divided into five parts, the first consists in polishing and cleaning the plate with nitric acid, to prepare it for receiving the sensitive coating upon which the action of light traces the design, the nitric acid is to be applied three times, and the plate rubbed dry with cotton. When the plate is not intended for immediate use, the first part of the operation may be done at any time; it is, however, indispensable just before the moment of using the plate in the camera to put at least once more some acid on the plate. The second operation is applying the sensitive coating (iodine) to the plate. The third, is submitting to the camera the prepared plate to the action of the light to receive the images." It was proved that the application of acid after the plate had been iodized would render the process abortive:—Held, that the direction in the specification "just before the moment of using the plate in the camera acid is to be put upon the plate" was to be confined to a direction as to the first operation; that the passage in which that direction occurs was not of universal application, but applied only when the plate was to be partially prepared and put by for future use; and that the patentee did not intend any separate operation to intervene between the application of iodine and the introduction of the plate into the camera obscura. *Beard v. Eger-ton*, 19 Law J. Rep. (N.S.) C.P. 36; 8 Com. B. Rep. 165; overruling the decision at Nisi Prius, 2 Car. & K. 667.

Case for infringement of a patent. Fourth plea, that the patentee did not particularly describe the nature of his invention; sixth plea, that the invention described was different from that for which the patent was granted. The patent was granted with a title for "improvements in the manufacture of gas, and in the apparatus used when transmitting and measuring gas." The specification, enrolled, recited a patent, with a title for "improvements in the manufacture of gas, and in the apparatus used therein and when transmitting and measuring gas;" and in the body of the specification, claim was made for improvements in the apparatus used when transmitting and measuring gas, and also for improved modes of manufacturing apparatus used in making gas, but not used in transmitting or measuring gas:—Held, that by reason of the variance between the invention described in the specification, and that comprised in the patent, the specification was insufficient, and the patent void.

Held, also, that the objection was raised either by the fourth or by the sixth plea. *Croll v. Edge*, 19 Law J. Rep. (N.S.) C.P. 261.

In a patent for "a process or method of combining various materials so as to form stuccoes, plasters and cements, and for the manufacture of artificial stones, marbles, &c. used in buildings," the specification, after stating the invention to consist in producing certain hard cements of the combination of the power of gypsum, powder of limestone and

chalk, with other materials, such combinations being (subsequent to their mixing) submitted to heat, described the method or process of making a cement from gypsum to consist in mixing with powdered gypsum strong alkali (for instance, best American pearlash) dissolved in a certain proportion of water, this solution to be neutralized with acid (sulphuric acid being the best); the mass to be kept in agitation, and the acid to be added gradually till the effervescence should cease; and then a certain proportion of water to be added (if other alkali were used, the quantity to be varied in proportion to its strength); and the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in moulds, and finally subjected to a furnace capable of producing a red heat. The description of the mode of making the cement differed little from that of the preceding process. The specification, after proceeding to state the mode of using the cement so made, stated in conclusion that other acids and alkalies besides those before mentioned would answer the purposes of the invention, though not so well; and that the inventor claimed the method or process thereinbefore described:—Held, that the specification was bad; for that either the inventor claimed *all* acids and alkalies or those only which would answer the purpose; in the former of which cases, as some acids and alkalies would not answer the purposes of the invention, the specification was therefore bad; and in the latter case it was bad for not specifying those acids and alkalies which would be found to succeed. *Stevens v. Keating*, 19 Law J. Rep. (N.S.) Exch. 57; 2 Exch. 772.

(C) RENEWING, CONFIRMING, AND EXTENDING.

Persons using the invention in the interval are not liable to an action; and those who have invested capital in it may be heard before the Privy Council.

New letters patent were granted to the plaintiff below on his securing to W (the original inventor) an annuity, so long as the new letters patent should last; but if he could not secure the annuity, then, upon signification by Her Majesty, &c., the new letters patent should cease. The declaration stated that, from the making of the said letters patent thence hitherto the said annuity has been duly secured to W, according to the true intent and meaning of the said letters patent:—Held, good after verdict. *Ledsam v. Russell*, 16 Law J. Rep. (N.S.) Exch. 145; 16 Mee. & W. 633.

The assignees of letters patent may, under the 1st and 4th sections of the 5 & 6 Will. 4. c. 83, lawfully obtain a renewal of such patents.

The statute does not authorize the Judicial Committee of the Privy Council to impose terms as conditions on which patents are to be renewed. The authority of the committee is limited to reporting on matters as between the public and the party applying.

There is nothing in the statute to fetter the discretion of the Crown in the renewal, except the length of time for which that renewal is to be granted, and which must not exceed seven years.

An application for a renewal is "prosecuted with effect" within the terms of the statute, if the party

applying obtains the report of the Judicial Committee of the Privy Council before the expiration of the original patent.

The Crown is not restricted as to the time within which it may act upon such report, and renewed letters patent are not void because they are dated after the expiration of the original letters patent.

If the Judicial Committee should impose a condition on a party applying for the renewal of a patent, such party need not, in an action for the infringement of the patent, aver that such condition was complied with before the patent was renewed. *Jedsam v. Russell*, 1 H.L. Cas. 687; confirming the decision of the Court of Exchequer Chamber, 16 Law J. Rep. (N.S.) Exch. 145; 16 Mee. & W. 633.

To entitle a patentee to a confirmation of letters patent, under the statute 5 & 6 Will. 4. c. 83. s. 2, the patentee must shew, that he believed himself the first and original inventor. Upon an application for a confirmation of letters patent, it was proved, that the patent article was not publicly and generally known prior to the letters patent; but that some persons had systematically used an article, identical with the patent article, for several years prior to the grant of the letters patent, and that the subject of the patent was little more than an application of a well-known article in trade. Under such circumstances, held by the Judicial Committee, that it was not a case in which the statute was intended to apply, and their Lordships refused to recommend the confirmation of the letters patent. *In re Card's Patent*, 6 Moore, P.C. 207.

Extension of term of letters patent granted to assignees of patentee.

The inventor and patentee had lost largely by the patent, but his assignees had lately made very considerable profits, and from their position in the trade, were likely to command a very large sale of the patent article. The patent was of high merit, and of great service to the public safety. In such circumstances, a prolongation of the term was granted to the assignees for four years, upon conditions, first, that the assignees secured to the patentee half the profits derived from the sale; and, secondly, that the patented article should be sold by the assignees to the public, at a certain fixed price.

In estimating the profits made under a patent, the profits arising from the sale of the patented article for exportation must be included. *In re Hardy's Patent*, 6 Moore, P.C. 441.

Where the executor of the surviving assignee of a patentee petitioned for an extension of the term of the letters patent, and it was established that a valuable consideration had been given for the assignment, and that the assignee had sustained considerable loss, the Judicial Committee, in granting an extension of the term, refused to impose terms upon the petitioners, in favour of the patentee. *In re Bodmer's Patent*, 6 Moore, P.C. 468.

A patentee entered into an agreement with certain parties to work the patent, but owing to disputes between them, the invention was not prosecuted until a short time before the expiration of the term of the letters patent; in such circumstances, an extension was refused. *In re Patterson's Patent*, 6 Moore, P.C. 469.

(D) REPEALING.

The record of a judgment on a *scire facias* to repeal letters patent for an invention, stated that the Lord Chancellor had delivered into the Court of Queen's Bench "a record had before the Queen in her Chancery, in these words," setting out the original writ of *scire facias*, issuing out of Chancery and returnable there, which called upon B, the patentee, to shew why the letters patent therein set forth, and the enrolment thereof, should not be cancelled, vacated, and disallowed, and the letters patent restored into Chancery, there to be cancelled. It then set out the pleas in bar, the issues in fact joined thereon, and the proceeding to trial, and the postea returned into the Queen's Bench. It then concluded with final judgment given by the Queen's Bench, "that the said letters patent be cancelled, vacated, disallowed, annulled, made void and invalid, and be altogether had and held for nothing, and also that the enrolment thereof be cancelled, and that the said letters patent be restored into her said Majesty's Court of Chancery in Westminster aforesaid, there to be cancelled. And the tenour of the said record so delivered by the said Lord High Chancellor into the said court of our said Lady the Queen before the Queen herself, and of all things had thereupon in the same court, is remanded into the said Chancery of our said Lady the Queen:"—Held, upon writ of error, that the Court of Queen's Bench had power to give such judgment. *Bynner v. Regina*, 15 Law J. Rep. (N.S.) Q.B. 412; 9 Q.B. Rep. 523.

A *scire facias* to repeal letters patent was issued out of Chancery, returnable there; appearance entered, declaration filed, plea pleaded, and issue joined in the Petty Bag Office. The case was then sent to the Court of Queen's Bench for trial, and the entry there was, that the Chancellor, with his own hand, delivered "a record." On motion (by a party bringing error) to amend by substituting the words "transcript of a record,"—Held, that the entry did not require amendment. *Regina v. Bynner*, 9 Q.B. Rep. 529, n.

To a declaration in *scire facias* to repeal letters patent, on the ground that the defendants (two in number) were not the first and true inventors, and that the invention was not new nor an improvement; one of the defendants, B, pleaded that before the suing out of the *scire facias*, the other defendant, S, assigned to him all his share in the letters patent, and the privilege thereby granted, and had not since had any interest whatever in the said letters patent. That the said defendant, S, could not be compelled to plead or demur to the said writ and declaration; and therefore the defendant B prayed judgment whether he ought to be compelled to plead or demur to the said declaration:—Held, upon demurrer, that both the defendants had been properly made defendants, the letters patent having been granted to them jointly.

Held, also, that the joinder of too many defendants could not be made the subject of a plea in abatement; and, therefore, that the plea was bad. *Regina v. Betts*, 19 Law J. Rep. (N.S.) Q.B. 531; 15 Q.B. Rep. 540.

A *scire facias* to repeal certain letters patent was issued under the fiat of the Attorney General.

The patentee applied to the Attorney General for the purpose of obtaining his direction that all further proceedings in the action should be stayed, or that a *nolle prosequi* should be entered. That application having been unsuccessful, the patentee applied to this Court for an order to stay the proceedings in the action:—Held, that the Court had no jurisdiction to interfere in the matter; that the writ of *scire facias* was not granted as of course, and that the Attorney General, when applied to for his fiat (without which the writ could not issue), has an important duty to perform.

The Attorney General conducts an action of *scire facias* according to his own judgment and discretion, and may, when he thinks fit, stay the proceedings therein, or enter a *nolle prosequi*, and the controul which he exercises is subject only to the responsibility to which every public servant is liable in the discharge of his duty.

The Lord Chancellor acting as a Judge in the Court of Chancery, either on the common law or equity side, has no authority in matters which depend on the discretionary exercise of the Royal prerogative.

Semble—The Crown would not forbear to direct the necessary process to be taken in a case like the present, because the information was given by an alien, or by a person who had no special or direct interest in the matter, or was actuated by some improper motive.

The practice of taking security in cases of this kind was introduced by the Attorney General alone, almost within living memory, and there is no instance of the Court interfering upon the subject; but if it could be shewn to the Attorney General that the security had become or was insufficient, he would stay the process till it was made good. *Regina v. Prosser*, 18 Law J. Rep. (N.S.) Chanc. 35; 11 Beav. 306.

(E) LICENCE TO USE.

A patentee, by deed, granted an exclusive licence to A, who covenanted to work the patent in a particular mode. A then contracted to sell all his interest in the patent to B, C and D. On bill filed by the patentee to restrain B, C and D from violating the covenants and conditions of the deed of licence, they, by their answer, denied the validity of the patent, and alleged that they had discontinued the use of it. A motion for an injunction was ordered to stand over, with liberty to the plaintiff to bring his action at law:—Held, that the plaintiff was not entitled to any admission from the defendants as to the validity of the patent, or as to their being licensees. *Pidding v. Franks*, 18 Law J. Rep. (N.S.) Chanc. 295; 1 Mac. & G. 56; 1 Hall & Tw. 220.

(F) ASSIGNMENT TO TRUSTEES FOR CREDITORS.

A voluntary assignment by the patentee, of letters patent, to trustees, for the benefit of creditors, more than twelve in number, is not such an assignment as will avoid the patent. *M'Alpine v. Mangnall*, 15 Law J. Rep. (N.S.) C.P. 298; 3 Com. B. Rep. 496.

(G) INFRINGEMENT.

In an action for the infringement of a patent

claimed to be for nine several improvements, the Court refused to make an order upon the plaintiff for particulars of the infringement. *Electric Telegraph Co. v. Nott, Electric Telegraph Co. v. Gamble*, 16 Law J. Rep. (N.S.) C.P. 174; 4 Com. B. Rep. 462.

In an action for the infringement of a patent, the plaintiff's specifications alleged that the invention was described by a statement and a drawing annexed, and stated that it consisted in submitting hosiery and similar goods to the finishing process of a *press* heated by steam, hot water, or other fluid in the manner thereafter described. The drawing was then described, from which it appeared that the invention consisted of two cast-iron boxes filled with steam, between the heated surfaces of which hosiery goods were introduced and subjected to pressure produced by hydraulic power. The pressure generally lasted three minutes, and might be produced either by a screw or by hydraulic power. The specification then stated that the patentee was aware that woollen cloths had been pressed by boxes or surfaces heated by steam or water, and that stockings, &c. had been placed between plates of iron heated by fires or ovens; that he did not therefore claim the finishing of such goods by heat generally, but what he did claim was the submitting of hosiery, &c. to the pressure of hot boxes or surfaces heated by steam, water, or other fluid as above described. The defendant's machine consisted of *rollers* heated by steam, between which woollen fabrics similar to those of the plaintiff were introduced and subjected to pressure. The jury found that the defendant's rollers were not a colourable imitation of the plaintiff's patent:—Held, that the defendant had not been guilty of an infringement of the plaintiff's patent. *Barber v. Grace*, 17 Law J. Rep. (N.S.) Exch. 122; 1 Exch. Rep. 339.

Upon the invasion of a patent right the party complaining has a right to the protection of an injunction, although the other party may promise to commit no further infringement, and may offer to pay the costs of preparing the bill; and if the defendant do not, after injunction obtained, offer to pay the costs of it, the plaintiff may bring the suit to a hearing and will be entitled to the costs of suit.

Quære—Whether, in such a case, the Court will give an account of damages. *Geary v. Norton*, 1 De Gex & S. 9.

[See INJUNCTION.]

(H) ACTIONS.

(a) Pleading.

Upon an issue of not guilty to an action for infringement of a patent, the question whether there was a fraudulent evasion of the patent does not arise.

In determining whether a defendant has infringed a patent, no question arises as to his intention, but only as to his acts.

A plea, that the plaintiff was not the first and true inventor, is proved by shewing a publication before the plaintiff's invention.

A plea, that "before the letters patent, the invention had been and was wholly and in part publicly and generally known, used, practised, and published in England," sets up the single defence of user:—

Knowledge and publication before the letters patent is no denial of the plaintiff being the first inventor, and does not, therefore, render the plea double. *Stead v. Anderson*, 16 Law J. Rep. (N.S.) C.P. 250; 4 Com. B. Rep. 806.

In case for infringement, the declaration alleged that plaintiff was the inventor, and the grant of the patent; plea, *non concessit*.—Held, that the plaintiff having, at the trial, put in the letters and specifications, and shewn the novelty of the invention, was entitled to a verdict upon the issue joined by the plea. *Nickels v. Ross*, 8 Com. B. Rep. 679.

(b) Costs.

At the trial of an action for the infringement of a patent, the plaintiff obtained a verdict which was afterwards set aside, and a new trial granted. Before the second trial the plaintiff became insolvent, and the defendants applied for security for costs:—Held, that in such case, the Court will not order a plaintiff to give security for costs, unless it can be fairly presumed that the action is adopted and promoted by his assignee. *Stead v. Williams*, 17 Law J. Rep. (N.S.) C.P. 109; 5 Dowl. & L. P.C. 497; 5 Com. B. Rep. 528.

PAUPER.

[See PRACTICE, IN EQUITY.]

Liability to Costs of the Day.

The plaintiff, a pauper, gave notice of trial, and on the day on which it was to be entered, the clerk to his attorney, having been detained at the Judge's chambers, issued by mistake a writ of *distingas juratores*, instead of *habeas corpora juratorum*. His error was pointed out to him, but before he could amend it and issue a writ of *habeas corpora* the office closed, and he was prevented from entering the record. The cause stood in the paper, and costs were consequently incurred by the defendants:—Held, that under the rule, 2 Will. 4. r. 10, the plaintiff ought to be compelled to pay the costs of the day. *Hodges v. Toplis*, 15 Law J. Rep. (N.S.) C.P. 195; 3 Dowl. & L. P.C. 786; 2 Com. B. Rep. 921.

Where a pauper plaintiff, in an action of trespass against magistrates of the northern division of the county of Lancaster for a cause of action arising there, laid the venue in the southern division, and at the assizes withdrew the record,—Held, that the plaintiff ought to pay the costs of the day, though not dispaupered. *Thompson v. Hornby*, 16 Law J. Rep. (N.S.) Q.B. 152; 9 Q.B. Rep. 978.

Where a pauper makes default in proceeding to trial in pursuance of notice, and is resident without the jurisdiction of the Court,—Held, that in an application for the costs of the day for not proceeding to trial, the defendant was entitled to make the payment of the costs a condition precedent to further proceedings. *Cross v. Port of London Assurance Co.*, 18 Law J. Rep. (N.S.) Q.B. 72.

A plaintiff suing *in formâ pauperis*, and conducting himself vexatiously, may be called upon by the same rule to shew cause why he should not pay the costs of the day for not proceeding to trial, as well as be dispaupered. *Bedwell v. Coulstring*, 3 Dowl. & L. P.C. 767.

Liability to Costs in India.

The plaintiff instituted a suit, *in formâ pauperis*, and by the terms of a deed of compromise, the defendants undertook to pay the costs, upon his entering up the *razi-nama*. The Courts in India sustained the compromise, and decreed the plaintiff to pay, out of the consideration-money to be received by him, the costs incurred subsequent to the deed of compromise. Such decree affirmed, on appeal. *Munni Ram Awasthy v. Sheo Churn Awasthy*, 4 Moore, In. App. 114.

Liability to Payment of Fee for signing Judgment.

Where a plaintiff suing *in formâ pauperis* recovers a verdict for any amount, the officer of the Court is bound to sign judgment on that verdict without payment of any fee. *Hoare v. Coupland*, 19 Law J. Rep. (N.S.) Q.B. 150.

Power to settle Action.

A pauper may settle the action, although the attorney will thereby lose his costs, unless it be clearly collusive. *Francis v. Webb*, 7 Com. B. Rep. 731.

When Dispaupered in Ecclesiastical Court.

A party having been admitted to sue as a pauper was, on facts respecting an income, proved against him by the proctor assigned to him, dispaupered. *Lait v. Bailey*, 2 Robert. 150.

Prosecution of Indian Appeal by.

Semle.—Although the Courts in India admit a party to appeal to England, *in formâ pauperis*, yet the appellant ought to make a special application to the Queen in Council, for leave to prosecute such appeal *in formâ pauperis*. *Munni Ram Awasthy v. Sheo Churn Awasthy*, 4 Moore, In. App. 114.

PAVING ACTS.

[See STATUTE, CONSTRUCTION OF.]

PAWNBROKER.

Hours for receiving and delivering pawns altered by the 9 & 10 Vict. c. 98; 24 Law J. Stat. 250.

A pawnbroker is not disqualified from lending a sum exceeding 10*l.* upon a deposit of goods, upon such terms as to interest as are allowed by the 2 & 3 Vict. c. 37.

A pawnbroker advanced a sum of money, exceeding 10*l.* upon a deposit of goods, with power of sale, and by the contract (executed in duplicate), stipulated for interest at the rate of 3*d.* per month for every 20*s.* lent; and in case of sale that he should retain the surplus, if not claimed by the borrower within three years, and that the goods might be delivered up to any person who produced the duplicate, and paid the debt:—Held, that this contract was not invalid on the ground that the lender was a pawnbroker, and had reserved to himself the usual advantages stipulated for in a pawnbroking

transaction. *Fitch v. Rochfort*, 18 Law J. Rep. (N.S.) Chanc. 458; 1 Mac. & G. 184; 1 Hall & Tw. 255.

PAYMENT.

[See PLEADING.]

(A) EVIDENCE, AND EFFECT OF.

(B) PLEA OF.

- (a) *When necessary.*
- (b) *In Satisfaction.*
- (c) *In Debt.*

(C) PAYMENT INTO COURT.

- (a) *Plea of.*
 - (1) *Under Statute.*
 - (2) *In Debt.*
 - (3) *Where there are concurrent Actions.*
 - (4) *On Bill of Exchange.*
 - (5) *To the further Maintenance.*
- (b) *Costs.*

(A) EVIDENCE, AND EFFECT OF.

The statement in a deed of compromise, that the consideration money was paid, is not of itself, according to the practice of the native courts in India, conclusive evidence of such payment, and may be rebutted by evidence of non-payment.

Where payment is denied and evidence of non-payment produced, the burthen of proof that the money was paid lies on the debtor. *Persad v. Sing*, 3 Moore, In. App. 347.

Payment and acceptance of a sum, which is the amount of a debt certain, in respect of the omission to pay which the creditor is entitled to nominal damages, is sufficient evidence to support a plea of payment of the debt and damages.

A person who accepts the amount of a debt in respect of the non-payment of which at the stipulated period he has become entitled to nominal damages, cannot, after the acceptance of the debt, sue for such nominal damages.

A payment by one of several makers of a joint and several promissory note may be pleaded by any of the parties as a payment by himself. *Beaumont v. Greathead*, 15 Law J. Rep. (N.S.) C.P. 130; 3 Dowl. & L.P.C. 631; 2 Com. B. Rep. 494.

Where after action brought the debt is paid and accepted in satisfaction, and costs are offered but refused, the damage is merely nominal independently of the costs, and the plaintiff therefore cannot proceed for the costs.

To an action on a cheque for 25*l.* there was a plea of payment of 60*l.*, after action brought, in satisfaction of the debt, damages and costs. It was proved that after action brought the defendant paid the amount of the cheque, and offered to pay any costs, which offer the plaintiff refused, saying that he would pay them himself:—Held, that the defendant was entitled to a verdict on the plea. *Thame v. Boast*, 17 Law J. Rep. (N.S.) Q.B. 339; 12 Q.B. Rep. 808.

A post-office order, sent in answer to a demand for payment, in which the payee was described by a wrong name, which he kept, although informed at the office that he might have the money at any

time by signing it in the name described:—Held, not evidence to support a plea of payment. *Gordon v. Strange*, 1 Exch. Rep. 477.

(B) PLEA OF.

(a) *When necessary.*

Payment cannot be given in evidence under a replication of “never indebted” to a plea of set-off. *Miller v. Atlee*, 3 Exch. Rep. 799.

(b) *In Satisfaction.*

An averment that a bill of exchange was given “for and on account of and in payment and discharge” of a debt, is not equivalent to an averment that the bill was given in satisfaction of such debt, and therefore where a plea with such averment further stated that the bill so given was afterwards altered, and shewed that in consequence thereof it became ineffectual, and the plaintiff traversed the fact of alteration, upon which issue the defendant had a verdict, *judgment non obstante veredicto* was awarded to the plaintiff. *M'Dowall v. Boyd*, 17 Law J. Rep. (N.S.) Q.B. 295.

(c) *In Debt.*

In an action of debt a plea of payment before action brought, in full satisfaction and discharge of all the causes of action in the declaration mentioned, is a plea to the damages as well as to the debt. *Triston v. Barrington*, 16 Law J. Rep. (N.S.) Exch. 2; 16 Mee. & W. 61; 4 Dowl. & L.P.C. 273.

(C) PAYMENT INTO COURT.

(a) *Plea of.*

(1) *Under Statute.*

To an action for assault and battery the defendants pleaded payment of 25*l.* into court, pursuant to the Reg. Gen. Trinity term, the 1 Vict. r. 7, to which the plaintiff replied damages ultra, and issue being joined thereon, the defendant obtained a verdict:—Held, that as this plea to an action for assault and battery, although prohibited by the 3 & 4 Will. 4. c. 42. s. 21, might be pleaded under other statutes, the plaintiff was not entitled to judgment *non obstante veredicto*.

Justices and other officers paying money into court under particular statutes are not bound to state in their plea the character in which they make the payment. *Aston v. Ashton v. Perkes*, 15 Law J. Rep. (N.S.) Exch. 241; 15 Mee. & W. 385; 3 Dowl. & L.P.C. 655.

(2) *In Debt.*

A plea of payment into court, in an action of debt, in the form given by the Reg. Gen. Trinity term, the 1 Vict. r. 7, is bad, if it omit to notice the damages; it should be varied so as to include a payment into court on account of the damages. *Lowe v. Steele*, 15 Law J. Rep. (N.S.) Exch. 244; 15 Mee. & W. 380; 3 Dowl. & L.P.C. 662.

(3) *Where there are concurrent Actions.*

The plaintiffs having brought one action against the defendant and another against T, two directors of the same railway, to recover the same sum of

money, T pleaded payment of 300*l.* into court, and the plaintiffs, without proceeding further against him, gave notice of trial in the action against the defendant. The Court, on an application by the defendant to stay proceedings unless the plaintiffs would give the defendant the benefit of the 300*l.* paid into court by T, allowed the defendant to plead payment into court of 300*l.* without actually paying in the same. *Rendel v. Malleson*, 16 Law J. Rep. (N.S.) Exch. 168; 16 Mee. & W. 828.

(4) On Bill of Exchange.

The first count of a declaration in assumpsit was on a bill of exchange for 26*l.* 13*s.* 2*d.* The second count was for 30*l.* for money lent, and on an account stated. The defendant pleaded to the last count, except as to 10*l.* 9*s.* 1*d.*, non assumpsit, and as to the whole declaration, except 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.* parcel of the last count, payment before action and a set-off; and as to 10*l.* 9*s.* 1*d.*, parcel of the first count, and 10*l.* 9*s.* 1*d.*, parcel of the last count, payment into court of 11*l.*:—Held, on special demurrer, that the plea was bad.

A plea of payment into court of a less sum of money than the sum pleaded to, with no other answer to the difference than that no more damages have been sustained, is bad.

Where a declaration contains a count on a bill of exchange, and also an indebitatus count, the latter relating to the sum which is the consideration for the bill, *semble*, that it would be correct to plead to both counts that the bill was given on account of the debt in the second count, and then to plead payment into court of the amount of the bill and interest. *Tattersall v. Parkinson*, 16 Law J. Rep. (N.S.) Exch. 196; 16 Mee. & W. 752; 4 Dowl. & L. P.C. 522.

Assumpsit by the drawer against the acceptor of bills of exchange amounting to 912*l.* Plea, that after the accruing of the causes of action, an account was stated between the plaintiff and the defendant of and concerning the said causes of action, and certain other demands of the plaintiff against the defendant, and certain other demands of the defendant against the plaintiff; and that 50*l.* and no more was found to be and was then due from the defendant to the plaintiff, which said sum the defendant paid to the plaintiff in satisfaction of the sum so due:—Held, on special demurrer, a good answer and well pleaded; for the plea in effect set up the allowances in account by way of partial payment and an actual payment of the residue. *Calander v. Howard*, 19 Law J. Rep. (N.S.) C.P. 312.

(5) To the further Maintenance.

Assumpsit for 500*l.* for goods sold, 500*l.* for work done, 500*l.* for money paid, and 500*l.* for an account stated. Breach, non-payment. Damages, 500*l.* Plea, to the further maintenance of the action, payment into court of 230*l.* 3*s.*, and no damages ultra, in respect of the causes of action in the declaration mentioned:—Held, on special demurrer, that the plea was bad, as affording no answer to the causes of action in the declaration mentioned, except as related to the sum of 230*l.* 3*s.* *Grimley v. Parker*, 18 Law J. Rep. (N.S.) Exch. 290; 3 Exch. Rep. 610.

(b) Costs.

To debt for goods sold and delivered, the defendant pleaded, first, as to all but 15*s.*, parcel, &c., *nunquam indebitatus*; second, as to that sum, payment into court of 15*s.* The plaintiff replied by adding the *similiter* to the first plea; and as to the second, that the plaintiff accepts the 15*s.* in full satisfaction and discharge of the cause of action in the introductory part of that plea mentioned, with prayer of judgment for his costs sustained in that behalf. The jury found that the defendants never had been indebted to the plaintiff to a greater amount than 15*s.*:—Held, that the plaintiff was entitled to costs on the replication to the second plea. *Harrison v. Watt*, 17 Law J. Rep. (N.S.) Exch. 74; 4 Dowl. & L. P.C. 519; 16 Mee. & W. 316.

PENALTIES.

[See COAL ACT—CONVICTION, Distribution of Penalty—RAILWAY.]

Under Merchant Seamen's Act, to whom payable.

The 7 & 8 Vict. c. 112, relating to merchant seamen, is an act relating to *trade or navigation*. Therefore, all penalties recovered under it are by virtue thereof payable to the Merchant Seamen's Society; and are within the proviso of the 5 & 6 Will. 4. c. 76, which disentitles certain boroughs to penalties recovered under any act relating to "trade or navigation." *The Seamen's Hospital Society v. Mayor, &c. of Liverpool*, 18 Law J. Rep. (N.S.) Exch. 371; 4 Exch. Rep. 180.

When not cumulative, and how recoverable.

By the London Coal Act, 1 & 2 Will. 4. c. lxxvi. s. 57, a penalty not exceeding 5*l.* is imposed on the seller of coals for every sack that shall be found deficient, on its being weighed according to the act. Twenty sacks were sent out to a purchaser at the same time under one contract, seventeen of which were found to be deficient in weight:—Held, that only one penalty was incurred in respect of such deficiency; and that an action of debt was maintainable in the superior courts, notwithstanding the 77th section, whereby all penalties imposed by the act, not exceeding 25*l.*, are to be levied and recovered before Justices of the Peace. *Collins v. Hopwood*, 16 Law J. Rep. (N.S.) Exch. 124; 15 Mee. & W. 459.

PERJURY AND FALSE STATEMENTS.

[See MALICIOUS PROSECUTION.]

- (A) PERJURY.
- (B) FALSE STATEMENTS AND FALSE OATHS.
- (C) EVIDENCE.

(A) PERJURY.

Where a trial has been had before the Secondary of London, it is properly described as being had before the sheriff to whom the writ is directed.

Where two or more issues are joined on the record on such trial, it is properly alleged that they came

on to be tried, though only one may have been tried in fact.

Perjury may be assigned as to what a man has sworn that he thought or believed; the difficulty, if any, being in the proof of the assignment.

A witness having sworn at a trial that he did not write certain words in the presence of D, it is a good assignment of perjury that he did write them in the presence of D. The presence of D may be a fact as material as the writing of the words. *Regina v. Schlesinger*, 17 Law J. Rep. (N.S.) M.C. 29; 10 Q.B. Rep. 670.

An indictment for perjury contained four counts, stating that the defendant had retained U, an attorney, who had delivered his bill under the 6 & 7 Vict. c. 73, and that after the expiration of one month from such delivery, U had taken out a summons before a Judge to get the bill taxed; that the defendant, before shewing cause against the summons, made an affidavit denying that he had retained U, and perjury was assigned on this statement, the indictment alleging that "it became and was material in shewing cause against the summons to ascertain whether the defendant did retain U." Each of the counts concluded, "and so the jurors, &c. did say that the said defendant, &c. did commit wilful perjury," &c.—Held, that the word "month" was to be construed with reference to the 6 & 7 Vict. c. 73, and meant calendar month.

Held, also, that it was sufficiently shewn that the Judge had jurisdiction to issue a summons on the application of the attorney, without negating a prior application within the month by the party chargeable.

Held, also, that the fact of the retainer of U by the defendant was a material ingredient in the inquiry.

Held, also, that the conclusion of the counts might be rejected as surplusage.

The record stated the *venire* to be to try whether the defendant was guilty of the *perjury and misdemeanour* aforesaid, and the entry of the verdict that "he is guilty of the *perjury and misdemeanour* aforesaid, in manner and form," &c., and a general judgment of imprisonment was given "on the premises."—Held, that "*misdemeanour*" being *nomen collectivum*, the *venire* and verdict applied to all the counts, and that the judgment of imprisonment was divisible. *Ryalls v. Regina*, 17 Law J. Rep. (N.S.) M.C. 92; 11 Q.B. Rep. 781.

On error to the Exchequer Chamber, the judgment was affirmed, and, held, by that Court that where dates in an indictment are laid under a *videlicet*, the *videlicet* may be rejected after verdict, in order to support the indictment.

One count of an indictment for perjury stated that the defendant had retained U, an attorney, who had delivered his bill under the 6 & 7 Vict. c. 73, to wit, on the 7th of August 1844; and that, after the expiration of one month from such delivery, to wit, upon the 25th day of April 1845, U had taken out a summons before a Judge to have the bill taxed. The perjury was charged to have been committed in an affidavit made by the defendant prior to the hearing of the summons, as to the retainer of U. There were three other counts in the indictment. The *venire* was to try whether the de-

fendant was guilty of the perjury and misdemeanour aforesaid, and the entry of the verdict was that "he is guilty of the perjury and misdemeanour aforesaid, in manner and form," &c., and a general judgment of imprisonment was given:—Held, that assuming that the word "month" meant lunar and not calendar month, as the Court of Queen's Bench had decided, and assuming that it was necessary to shew that a calendar month had expired before the application to tax, the count shewed that that time had expired, for the *videlicet* might be rejected.

But *semble*, that it was unnecessary to aver that the calendar month had expired, for that the summons having been issued by a Judge of one of the superior courts, it must be intended that he had jurisdiction to issue such a summons until the contrary was shewn.

Held, also, that perjury and misdemeanour were *nomina collectivae*, and that the *venire* and judgment were right. *Ryalls v. Regina*, 18 Law J. Rep. (N.S.) M.C. 69; 11 Q.B. Rep. 795.

The record of the proceedings in the Queen's Bench upon an indictment containing several counts for perjury in an affidavit to procure a defendant to be arrested and held to bail, after regularly setting forth all the proceedings down to the finding of a verdict of guilty, and the prayer of judgment, went on to state that "because it appears to the said Court here that the said verdict so given against the said O W K as aforesaid was unduly given; therefore the said verdict is by the Court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff of, &c. is commanded, so that he cause a jury thereupon to come, &c. by whom the truth of the matter may be the better known," &c. And then, after regularly carrying down the further proceedings to the finding of a second verdict of guilty, and a second prayer of judgment, it concluded thus: "it is considered and adjudged and ordered, &c. that he, the said O W K, for the offence charged upon him in and by each and every count of the indictment aforesaid, be imprisoned in the Queen's Prison for the space of eight calendar months," &c.:—Held, upon a writ of error by the party indicted, that the record in terms contained a sufficient entry of the award of a new trial, it appearing that the form adopted was the same as the precedents used and approved of in *The King v. Mawbey*, and followed in subsequent cases, and that the entry of the final judgment and sentence was sufficiently certain.

Held, also, no objection that the record alleged that "it was presented as follows," instead of the present tense being used.

Also, that it was no objection that the affidavit before a Judge to hold the defendant to bail upon which the perjury was assigned was sworn before the issuing of the writ of summons in the action. *King v. Regina*, 18 Law J. Rep. (N.S.) Q.B. 253.

An affidavit of debt may still be made under the 1 & 2 Vict. c. 110. s. 8, as the 5 & 6 Vict. c. 122. s. 11, by which other provisions are made for similar affidavits, is not necessarily inconsistent with the previous statute.

Such affidavit is an affidavit by virtue of a statute "relating to bankrupts," and may, there-

fore, be sworn before the registrar of the Court of Bankruptcy, or other person named in the 5 & 6 Vict. c. 122. s. 67.

Such affidavit is a material matter upon which perjury may be assigned, although under the 1 & 2 Vict. c. 110. s. 8, there is no power of making the person a bankrupt. *Dunn v. Regina*, 18 Law J. Rep. (N.S.) M.C. 41; 12 Q.B. Rep. 1031.

(B) FALSE STATEMENTS AND FALSE OATHS.

An indictment, under the 6 & 7 Will. 4. c. 86. s. 41. (Registration of Marriages Act), charged that a clergyman had solemnized a marriage, and was about to register in duplicate the particulars relating to the marriage, and that the defendant did wilfully make to the said clergyman, "for the purpose of being inserted in the register of marriage," certain false statements. The proof was, that the particulars were entered by the clerk of the church before the marriage; that after the marriage the clergyman asked the defendant if they were correct, and that he then answered in the affirmative, and the clergyman signed the register:—Held, that the defendant was rightly convicted.

Held, also, that it was not necessary upon an indictment under the act, to prove that the register-books used by the clergyman were furnished to him by the Registrar-General.

It is purely for the discretion of the Judge at the trial, whether a plea may be withdrawn or not; and the exercise of such discretion cannot be reviewed upon a case reserved. *Regina v. Brown*, 17 Law J. Rep. (N.S.) M.C. 145; 1 Den. C.C. 291; 2 Car. & K. 504.

Any one act of fraud upon a public officer with intent to deceive, whereby a matter required by law for the accomplishment of an act of a public nature is illegally obtained, amounts to an indictable misdemeanour, and it need not be alleged or proved either that the act was, in fact, accomplished, or that the party at the time of committing the fraud intended that it should be.

Where, therefore, a party by means of a false oath made before the surrogate of a diocese and intended to deceive, obtained from that officer a licence for the solemnization of a marriage in fraud and violation of the 4 Geo. 4. c. 19,—Held, that he had been properly found guilty of a misdemeanour, although only part of the false oath charged in the indictment was sufficiently established in evidence; and although it appeared that he was not the person going to be married.

Held, also, that it was not necessary either to allege or prove that the marriage had been solemnized, or that the party when he had made the false oath really intended that it should be, and that it was no objection that the licence was not alleged to be in writing.

Quare—Whether perjury can be assigned upon such a false oath taken before a surrogate. *Regina v. Chapman*, 18 Law J. Rep. (N.S.) M.C. 152; 2 Car. & K. 846; 1 Den. C.C. 432.

The statute 5 & 6 Will. 4. c. 76. s. 34. (Municipal Corporation Act) makes it a misdemeanour for a burgess wilfully to make a false answer to any of the questions therein specified. The indictment

charged (in the first four counts) that "the defendant *falsely and fraudulently* answered," &c.:—Held, bad, for omitting "wilfully."

In the last two counts, that the defendant *falsely, fraudulently, deceitfully and contrary to, and in fraud of the said statute, did personate one J H*:—Held, first, that this was no offence under the statute, no offence so described being specified therein; secondly, that it was no offence at common law, either in itself; or as a violation (in effect) of a statutory prohibition, because (if it were) the statute in the same clause created the offence and provided the penalty. *Regina v. Bent*, 1 Den. C.C. 157; 2 Car. & K. 179.

(C) EVIDENCE.

In cases of perjury, although an assignment of perjury must be proved by two witnesses, it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury.

A, to prove an *alibi* for B, had sworn that B was not out of his sight between the hours of 8 a.m. and 9 a.m. on a certain day, and on this perjury was assigned. Proof by one witness that between those hours A was at one place on foot, and by another witness that between those hours B was walking at another place six miles off,—Held, to be sufficient proof of the assignment of perjury. *Regina v. Roberts*, 2 Car. & K. 607.

In an indictment for perjury, it was alleged that A made his will, and thereby appointed B his executor:—Held, that the production of the probate was the proper proof of this allegation; but, that if it had been necessary to prove that A had devised real estates, the original will must have been produced and one of the attesting witnesses called.

In an indictment for perjury, it was averred, that a suit was instituted in the Prerogative Court by C against B, to dispute the validity of a codicil to a will:—Held, that the production of the original allegations of both parties in the suit, signed by their advocates, and proof of the advocates' signatures, and that they acted as advocates in that court, such allegations being produced from the registrar of that court, was sufficient proof of the averment, and that the caveat need not be produced.

On the trial of an indictment for perjury, assigned on an affidavit sworn in the Queen's Bench, proof of the defendant's signature to the affidavit, and proof that, under a jurat "sworn in open court at Westminster Hall, the 10th day of June 1846," the words "By the Court," are in the handwriting of one of the Masters of the Court, is sufficient evidence of the swearing of the affidavit in the Court of Queen's Bench, without any further proof that the Master was in court when the affidavit was sworn. *Regina v. Turner*, 2 Car. & K. 732.

On an indictment for perjury, in the usual form, setting forth with proper innuendoes a copy of a deposition before a magistrate, written in the English language and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition signed by him is the substance. *Regina v. Thomas*, 2 Car. & K. 806.

PETITION OF RIGHT.

Where lands in a foreign state were invested in a line of feudatories in the claimant's father, who, in 1791, ceded them absolutely to the claimant, his eldest son, but continued in the management on his behalf, and both afterwards emigrated, in violation of the new French revolutionary code of laws which had been imposed, and extinguished the former feudal law there, and by a decree the lands were declared confiscated in consequence of such emigration, the son, by a petition of right, claimed to be entitled to be compensated for his loss out of the funds paid by the French government under the conventions with this country in 1813, 1814 and 1815, and the 59 Geo. 3. c. 31, for ascertaining the validity and amount of claims of British subjects injured by the revolutionary government of that country; the petitioner's claim had been rejected by the Commissioners and the decision confirmed by the Privy Council; the remainder of the fund applied continued, under the direction of the Lords of the Treasury, at the Bank of England, on the Government account:—Held, that a petition of right was not maintainable for money claimed as a debt or by way of damages; and *semble*, for no other object than land or specific chattels; that the case shewed no proof of the Sovereign having had a personal benefit from that which was sought to be received at her hands, and which proof would be requisite to support such petition; and that upon the facts the petitioner had failed in proving that the property in respect of which the claim was made had been unduly confiscated by the new government imposed on France.

Where the party had ceded his entire rights to his eldest son, a minor, but continued afterwards to manage the estates,—Held, that his declaration that he did so in the name of the latter made after such cession was admissible evidence in a suit relating to a claim by the son in respect thereof.

In order to prove the foreign law of inheritance, a lawyer of that country, deposing that up to a certain period it had been, &c., but had then been put an end to by a revolution, and subsequently by a decree of the then National Assembly passed to that effect, the knowledge of which he had acquired in the course of his legal studies,—Held, admissible, and that it was not necessary to produce a copy of such decree. *Baron de Bode's case*, 8 Q.B. Rep. 208.

PHYSICIAN.

[See EXECUTOR AND ADMINISTRATOR, Rights, Duties, &c. of.]

PIRATES.

The law as to piratical vessels altered by the 13 & 14 Vict. c. 26; 28 Law J. Stat. 34.

Bounties upon the capture of piratical prahus decreed in respect of their crews under the statute 6 Geo. 4. c. 49. *The Serhassan*, 2 Rob. 354.

PLEADING, AT LAW.

[See INFERIOR COURT—MASTER AND SERVANT—REVERSION—SLANDER.]

- (A) COMMENCEMENT AND CONCLUSION.
- (B) MISJOINDER.
- (C) MATERIAL AND IMMATERIAL AVERMENTS.
- (D) VIDELICET.
- (E) SURPLUSAGE.
- (F) CERTAINTY AND PARTICULARITY.
- (G) ARGUMENTATIVENESS.
- (H) DUPLICITY.
- (I) DIVISIBLE ALLEGATIONS AND DISTRIBUTIVE ISSUES.
- (K) NEGATING EXCEPTIONS.
- (L) CONFESSING AND AVOIDING.
- (M) ADMISSIONS.
- (N) PROFERT.
- (O) DEPARTURE.
- (P) DEFECTS CURED BY VERDICT.
- (Q) CONSTRUCTION OF PLEADINGS.
- (R) DECLARATION, GENERAL FORM AND SUFFICIENCY OF.
- (S) PLEAS IN PARTICULAR CASES.
 - (a) *In Bar*.
 - (b) *Amounting to the General Issue*.
 - (c) *Foreign Attachment*.
 - (d) *Possessory Plea to Assault and Imprisonment*.
 - (e) *Judgment recovered*.
 - (f) *No Consideration for Note*.
 - (g) *Colonial Law*.
 - (h) *Payment of Money by Broker*.
 - (i) *Acceptance in Satisfaction*.
- (T) REPLICATION.
 - (a) *Of Non est factum to Plea setting out Deed, but not on Oyer*.
 - (b) *De Injuri*.
- (U) NEW ASSIGNMENT.

The Judges of the common law courts enabled to alter the forms of pleading, by the 13 Vict. c. 16; 28 Law J. Stat. 19.

(A) COMMENCEMENT AND CONCLUSION.

Debt on a promissory note for 15*l.*, with a count for 30*l.* on an account stated. First plea, to the first count, alleging special circumstances as to the making of the note, which shewed that it was given upon a misrepresentation of facts and without consideration. Second plea, as to the sum of 15*l.*, parcel of the money and causes of action in the last count mentioned, that the making of the said promissory note in the first count mentioned was and is the said account stated in the last count mentioned, so far as the same relates to the said sum of 15*l.*, parcel, &c.; and that the several allegations and statements by the defendant made in his first plea were and are true, *modo et forma*. On special demurrer to the second plea, on the ground, that professing to answer part of the count on the account stated, it nevertheless presented an answer to the cause of action in the first count also:—Held, that the plea was good. *Hammond v. Dayson*, 15 Law J. Rep. (N.S.) Exch. 278; 15 Mee. & W. 373.

Plea, to the further maintenance of the action,

payment after action brought, and prayer of judgment if the plaintiff ought further to maintain his action. Replication (without any commencement of *præcludi non*), a traverse of the payment:—Held, bad, on special demurrer. *Futvoye v. Stevens*, 18 Law J. Rep. (N.S.) Exch. 261; 3 Exch. Rep. 439.

Plea in covenant, that the plaintiff ought not further to maintain his action, because the defendant brings into court 5s. and says that the plaintiff hath not sustained damages beyond that sum. Replication (without any commencement of *præcludi non*), damages *ultra*:—Held, bad, on special demurrer. *Howcutt v. Bonser*, 18 Law J. Rep. (N.S.) Exch. 262; 3 Exch. Rep. 491.

A plea of not guilty by three of several defendants in an action on the case, concluded thus, "and of the defendants, Henry Whitehouse, Daniel Gardner and John Priest, put themselves upon the country":—Held, bad on special demurrer for uncertainty. *Kempster v. Whitehouse*, 19 Law J. Rep. (N.S.) Exch. 29.

To a declaration in debt, containing a count on a bill of exchange for 12l. 10s., indorsed by the defendant to the plaintiff, and alleging that the defendant had due notice of dishonour, and a count for goods sold and delivered, the defendant pleaded, as to the first count, and as to 12l. 10s. parcel of the last count, that there never was more than 12l. 10s. due from the defendant to the plaintiff in respect of the debts in the introductory part of the plea mentioned, and that the defendant after the accruing of the debt in the last count and introductory part of the plea mentioned, indorsed to the plaintiff and the plaintiff received the said bill of exchange on account and in respect of the said debt and all causes of action in respect thereof, and that the defendant never had due notice of dishonour of the said bill of exchange as in the said first count alleged, concluding with a verification:—Held, on special demurrer, that the plea was bad. *Day v. Smith*, 16 Law J. Rep. (N.S.) Q.B. 425; 15 Q.B. Rep. 584.

[See *post*, (C), *Rosling v. Muggeridge and Ricketts v. Loftus*.]

(B) MISJOINDER.

In assumpsit, the first count of the declaration alleged that F was indebted to the plaintiff, as executrix, in 350l., secured on mortgage; that the plaintiff, as executrix, had commenced proceedings at law against F, which were pending, and had been put to divers costs in such proceedings, &c.; and thereupon, in consideration of the premises, and that the plaintiff would stay the proceedings against F for twenty-one days, the defendant undertook and promised the plaintiff, that, within the twenty-one days, he would pay the 350l., and the plaintiff's costs. Averment, that the plaintiff did stay the proceedings accordingly, and breach in non-payment by the defendant to the plaintiff of the mortgage-money and costs. The second count was upon an account stated with the plaintiff as executrix:—Held, a misjoinder. *Webb v. Cowdell*, 14 Mee. & W. 820.

[See *Esdale v. Maclean*, *post*, (F).]

(C) MATERIAL AND IMMATERIAL AVERMENTS.

In an action against the surety on a bond under

the statute 1 & 2 Vict. c. 110. s. 8. for the payment of a debt by H, or his rendering himself in any action that might be brought, the defendant pleaded that the plaintiff, having recovered judgment for the debt in the Queen's Bench, issued a writ of *ca. sa.* against H thereupon, and delivered it to the sheriff; and, before the return of the writ or any breach of the condition, H was taken and surrendered himself, and was detained under it: whereupon H issued a *habeas corpus cum causa*, and, being taken before a Judge, was committed to the custody of the gaoler of the Court of Queen's Bench in execution, and there detained until and after the return day of the writ, and which facts the sheriff returned to the writ of *ca. sa.* The plea further stated that H was always ready to render himself, and would have rendered himself, according to the practice of the court, but that he was prevented by the plaintiff in manner aforesaid from so doing:—Held, upon special demurrer, that the plea was bad for not averring distinctly that it was impossible for H to render himself, as the Court could not take notice that, by the practice of the Court of Queen's Bench, he could not have done so, or that the facts themselves, according to the practice of that court, constituted a tender. *Hayward v. Bennett*, 15 Law J. Rep. (N.S.) C.P. 315; 4 Dowl. & L. P.C. 228; 3 Com.B. Rep. 404.

In replevin the plaintiff pleaded in bar to an avowry for the rent of a house, that before the defendant had any interest in the house, one F was seised in fee of the same, and devised to S his wife for her life, in case she should so long continue to be his widow, and not live with any other man, except a father or brother, a rent-charge of 25l. issuing out of the said house, with power of distress; that F died seised, leaving his wife surviving, and that she continued seised of such rent-charge until the half-yearly payment thereof was in arrear to her, and that the plaintiff to prevent a distress upon his goods paid her the amount of the rent:—Held, on special demurrer, that the words in the will were a condition subsequent in defeasance of the estate in the rent-charge, and not a condition precedent, and therefore that the plaintiff was not bound to aver performance of the conditions, but that the breach thereof ought to be shewn by the defendants. *Brooke v. Spong*, 15 Law J. Rep. (N.S.) Exch. 94; 15 Mee. & W. 153.

Assumpsit against the acceptor of two bills of exchange. First plea, as to 26l. 10s. 2d., that the plaintiff ought not to maintain his action, because the defendant brings that sum into court, concluding with a prayer of "judgment if the plaintiff ought further to maintain his action," &c.:—Held, on special demurrer, that the plea was bad in not stating in the commencement that the plaintiff ought not further to maintain his action.

Second plea, that the defendant being unable to pay the plaintiff and his other creditors in full, it was agreed by the plaintiff and the other creditors that a sum of 4s. 6d. in the pound upon their debts should be paid by the defendant to the plaintiff and the other creditors, and that upon receiving the money the plaintiff and the other creditors should execute a release of their debts; that a release was prepared for execution, and that the creditors, except the plaintiff, received the com-

position and executed the release; that the defendant had always been ready and willing to pay the plaintiff the 4s. 6d. in the pound upon the plaintiff's executing such release, whereof the plaintiff had notice, and was requested by the defendant to accept the composition and execute the release, which the plaintiff refused to do, but brought the present suit to recover the full amount of his debt:—Held, that the plea was bad in omitting to state that the defendant offered to pay the composition-money or tendered a deed of release to the plaintiff for execution. *Rosling v. Mugeridge*, 16 Law J. Rep. (N.S.) Exch. 38; 16 Mee. & W. 181; 4 Dowl. & L. P.C. 298.

The declaration stated that by certain articles of agreement the plaintiff agreed to sell, and the defendant to purchase, a piece of land, and the plaintiff agreed to deliver an abstract of title and to deduce a clear title within a month from the signing of the contract, or from being required so to do; that the defendant agreed to pay a portion of the purchase-money on the signing of the contract, and the residue on or before a future fixed day, and to pay interest in the mean time half-yearly; and that the plaintiff did, within one month from being required, deliver an abstract of title and deduce a clear title. Breach, non-payment by the defendant of half a year's interest. Plea, that the plaintiff did not deliver an abstract of title, and deduce a clear title in manner and form, &c. Upon demurrer, for immateriality and duplicity,—Held, that the plea was bad, for raising an immaterial issue, the delivery of the abstract and the deduction of title not being a condition precedent to the payment of the money.

Quære—Whether the plea was not also bad for duplicity, in denying both the delivery of the abstract and the deduction of the title. *Dicker v. Jackson*, 17 Law J. Rep. (N.S.) C.P. 234; 6 Com. B. Rep. 103.

The declaration was in debt on a bond given by the defendants and L for 8,000*l.* to be paid by them to the plaintiffs, or Everett, on request, whereby and by reason of the non-payment, &c. The defendants, by their plea cravedoyer, and set out the bond and condition and recitals. The condition was that the defendants and L should pay over sums of money assessed and collected by L, and that L should demand the sums assessed and proceed against defaulters. Averment, that the defendants performed all things on their part to be performed. The plaintiffs replied, praying that the deed and condition might be enrolled, and being set out on enrolment, demurred, on the ground, that they were falsely set out by the defendants on account of the recitals being introduced, and that the plea of general performance was bad:—Held, first, that it was not necessary to state a request in the declaration. Secondly, that the allegation "by reason of the non-payment," &c. was a sufficient denial of payment to the plaintiffs or Everett, after plea. Thirdly, that the plea was bad for not shewing performance by L as well as by the defendants. Fourthly, that the plea was bad for averring general performance, instead of shewing what was done in performance of the condition.

Semble—First, that it is not the practice to demur for mis-recital onoyer. Secondly, that the

effect of the enrolment is to make the matter set out part of the declaration. *Kepp v. Wiggett*, 17 Law J. Rep. (N.S.) C.P. 295; 6 Com. B. Rep. 280.

A declaration stated, that in consideration that the plaintiff had become tenant to the defendant of a farm, upon the terms that if the plaintiff should receive from the defendant notice to quit, and should have made expensive improvements upon the farm, for which the subsequent crops should not have compensated the plaintiff, the farm should, upon the determination of the tenancy, be looked over by two men, one to be appointed by each party, and that the persons so appointed should determine to what compensation the plaintiff should be entitled, the defendant promised the plaintiff that if the tenancy should be determined, and the plaintiff should have made improvements for which he should not have been compensated, the defendant would, at the plaintiff's request, appoint a person for such purposes. Averment, that the tenancy was determined by the defendant; that the plaintiff had made improvements for which he had not been compensated; that although the plaintiff, after the determination of the tenancy, appointed J D to determine the compensation, and J D was ready to act, of which the defendant had notice, and was then requested by the plaintiff to appoint some person on his behalf, yet the defendant did not nor would appoint some person in that behalf:—Held, on special demurrer, that the declaration was ill in omitting to state that the plaintiff had requested the defendant to appoint a valuer before the commencement of the suit. *Lattimore v. Garrard*, 17 Law J. Rep. (N.S.) Exch. 100; 1 Exch. Rep. 809.

A declaration in trespass to goods charged the defendant with taking and carrying them away, and also with converting them to his own use:—Held, that such conversion was merely matter of aggravation, and a plea to the whole declaration justifying the taking the goods and carrying them away, but omitting to justify their conversion, was a good plea. *Pratt v. Pratt*, 17 Law J. Rep. (N.S.) Exch. 299; 2 Exch. Rep. 413.

In an action for dismissing the plaintiff from the defendant's service before the expiration of a year, the declaration alleged that the plaintiff had always been ready and willing and offered to remain in the defendant's employ for a year. Plea, that the plaintiff did not offer to remain, &c.:—Held, that the plea raised an immaterial issue; the gist of the averment in the declaration being the readiness, which implied the ability and willingness of the plaintiff to continue his services. *Wallis v. Warren*, 18 Law J. Rep. (N.S.) Exch. 449; 4 Exch. Rep. 361.

Declaration in an action of account between the plaintiffs and the defendant, as tenants in common under certain deeds of lease, release and settlement, made on the marriage of W. Loftus, the father of the plaintiff's wife, and the defendant, and which were alleged to be in possession of the defendant, shewed, amongst other limitations, that the alleged tenancy in common was vested, subject to certain powers of limitation and appointment either by deed or will, reserved to the said W. Loftus in and by the said deed of release and settlement, and therein stated, and then averred the death of the said W. Loftus without having made any

such limitation or appointment, and that thereby the plaintiffs became seised as tenants in common with the defendant, &c. The defendant's third plea set out in terms the whole of the deed of release, and then alleged affirmatively, that the said W. Loftus by a certain indenture then brought into court, and the effect of which the plea set out, had made a valid appointment by deed, under and by virtue of one of the powers contained in the deed of release and mentioned in the declaration. Defendant in his fourth plea pleaded affirmatively that the said W. Loftus had by his last will and testament made a subsequent valid appointment (subject to the former appointment), under and by virtue of another of the powers contained in the deed of release, and mentioned in the declaration. Both pleas concluded with a verification:—Held, upon special demurrer, that the pleas were good. That the allegation in the declaration, that W. Loftus died without making any appointment under the deed of release, was premature, and therefore that the defendant was not bound to traverse it. That even if such allegation had been necessary, and amounted to a direct allegation that W. Loftus had not appointed, still the rules of pleading require that the defendant should, in relying upon the exercise of the powers of appointment, shew how and to whom the appointments were made, so as to make his pleas an answer to the action. *Ricketts v. Loftus*, 19 Law J. Rep. (n.s.) Q.B. 94.

A declaration in assumpsit set forth a special contract to take a portion of a ship's cargo on the ship's arriving at B, and after averring the plaintiff's readiness and willingness to deliver the cargo at and after the ship's arrival, alleged as a breach that the defendant, before the arrival of the ship at B, discharged the plaintiff from delivering the cargo, and thenceforth continually afterwards refused to perform the agreement. The defendant, after pleading some pleas to the whole declaration, pleaded, thirdly, as to so much of the breach as related to the discharging the plaintiff from delivering the cargo and to the refusing to perform the agreement that he did not discharge the plaintiff or refuse to perform the agreement. The fourth plea was pleaded as to so much of the breach as related to the defendant's having, before the arrival of the vessel, discharged the plaintiff from delivering the cargo, and refused to perform the agreement, and averred, that before the arrival of the ship the defendant retracted his discharge and refusal. The fifth plea was pleaded as to the residue of the breach, and traversed the plaintiff's readiness and willingness to deliver the cargo. The jury found for the plaintiff on all the issues but the fifth, and on that issue for the defendant. In the judgment roll the damages were assessed for the plaintiff "on occasion of the breach of promise in the declaration assigned (other than the part of the said breach in the fifth plea mentioned)". It also stated that the plaintiff was in mercy as to the issue found for the defendant on the fifth plea:—Held, that whatever be the construction of the word "residue" in the introductory part of the fifth plea, the assessment of damages was correct, and the judgment unimpeachable by the defendant. That if the term "residue" in the fifth plea meant

that part of the breach not covered by the fourth plea, and if the fourth plea covered only that part of the breach which related to what took place before the arrival of the ship, the issue on the fifth plea was immaterial, as the third and fourth issues were found for the plaintiff, and the plaintiff ought to have had judgment *non obstante veredicto*, and that the defendant was not entitled to complain of having judgment wrongly entered in his own favour. That if the "residue" meant that part of the breach not covered by either the third or fourth pleas, the residue amounted to nothing, as the third plea answered the whole breach, and that on that view the fifth plea was wholly irrelevant. *McClure v. Ripley*, 19 Law J. Rep. (n.s.) Exch. 194; 5 Exch. Rep. 140.

A plea of justification in trespass *qu. cl. fr.* stated that the town and borough of Holt was and is an ancient town, and that the burgesses of the borough were from time immemorial a body politic and corporate, and then stated a grant to the burgesses of the town of Holt, their English heirs and successors, and their tenants, of common of pasture for all their cattle within the said town of Holt levant and couchant, to hold to the said burgesses, their English heirs and assigns, and their tenants several, at all times of the year, and then justified the acts charged, because the defendant, as a burgess and English successor, was entitled to the right of common. The replication traversed that the defendant was entitled to enjoy such right of common:—Held, that upon this issue evidence that the right of common had been extinguished by proceedings under the General Inclosure Act, was inadmissible.

But held, also, that the plea was bad after verdict, for not shewing that it was a grant to the corporation for the benefit of the individual burgesses. *Parry v. Thomas*, 19 Law J. Rep. (n.s.) Exch. 198; 5 Exch. Rep. 37.

In an action on a charter-party the declaration stated, that by a charter-party made between the defendant, the ship-owner, and the plaintiffs, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiffs' factors a full cargo and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. Averment, that the ship arrived at Messina. Breach, that the defendant within a reasonable time after the delivery of her outward cargo, and before the plaintiffs could have given orders for the ship to proceed to the said port, made a contract with other persons for the conveyance of goods from Messina, and therewith, and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London without taking on board the cargo agreed to be taken from the plaintiffs, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charter-party, although the plaintiffs within such reasonable time as aforesaid provided merchandise, and were ready and willing to load on board the said ship the said merchandise, and although the plaintiffs would have been ready and willing to have named and appointed, and given orders to the defendant to proceed to two ports, and to have there loaded a full cargo:—Held, that the declaration was

bad for not shewing performance by the plaintiffs of the conditions precedent of tendering a cargo, giving orders, and naming a port, or not shewing a sufficient excuse for non-performance thereof. *Matthews v. Lowther*, 19 Law J. Rep. (n.s.) Exch. 364; 5 Exch. Rep. 574.

A declaration charged the defendants with breaking and entering the plaintiff's house, and breaking doors and locks, and seizing goods; they justified the seizing of goods under a *fi. fa.*:—Held, that the plea was bad, the breaking, &c., being not aggravation merely, but a substantive trespass distinct from the entering, and requiring to be justified. *Curlewis v. Laurie*, 12 Q.B. Rep. 640.

To an action on an attorney's bill, the defendant pleaded that the plaintiff did not deliver "one month" before bringing the action a signed bill of his fees, "pursuant to the statute in such case made," "contrary to the form of the said statute." The 6 & 7 Vict. c. 73. s. 37. requires a bill to be delivered "one month" before bringing an action, and by the interpretation clause, "month" is declared to mean "calendar month":—Held, on special demurrer, that the word "month" in the plea was to be taken to mean "lunar month;" that the words "pursuant to the statute," &c. would not enable the Court to construe it as a "calendar month;" and that as the act required a delivery a "calendar month" before the action, the plea was bad as tendering an inconclusive and immaterial issue.

Quere—if the plea was not also bad as being an argumentative averment that the plaintiff did not deliver one "calendar" month before bringing the action, a signed bill, &c. *Parker v. Gill*, 5 Dowl. & L.P.C. 21.

[See PRACTICE, Issuable Pleas. And see *Wilkinson v. Gaston*, and *Dietrichsen v. Giubilei*, *post*, (H).]

(D) VIDELICET.

When the time at which an event occurred is material, the date, though laid under a *videlicet* in pleading, must be proved as laid.

To a declaration in debt the defendant pleaded that after the accruing of the debt and before action, *to wit*, on the 22nd of November 1843, a petition for protection of the defendant from process was, according to the statute in such case made, presented to the Court of Bankruptcy, and thereupon and before action, *to wit*, on the 29th of January 1844, a final order for protection and distribution was duly made in the matter of the said petition. Special demurrer, for that two acts were passed in 1842 and 1844 respectively, by the latter of which a petitioner was not protected from actions, but only from process against the person; that the plea should have stated *distinctly* that the said order was made after the act of 1842 and before the act of 1844; that the dates therein being under a *videlicet*, it did not appear under which act the plea was pleaded, and if traversed proof of a final order made under either act would support the issue, &c.:—Held, that the date of granting the final order, though laid under a *videlicet*, was sufficiently positive, and that the time was material, and must be proved as laid. *Nash v. Brown*, 18 Law J. Rep. (n.s.) C.P. 62; 6 Com. B. Rep. 584.

(E) SURPLUSAGE.

A declaration in assumpsit upon a special agreement, after stating a sufficient breach by refusal to employ the plaintiff, contained an averment "that the defendant did not nor would pay" certain weekly wages according to the agreement (specifying them), "and did not nor would pay" certain sums (specifying them), by means of which, &c. The defendant demurred generally "as to the second and third breaches." The plaintiff having joined in demurrer, and it being admitted that, as breaches, they were insufficient,—Held, that the averments could not be treated as surplusage, and that the defendant was entitled to judgment. *Lush v. Russell*, 19 Law J. Rep. (n.s.) Exch. 56; 4 Exch. Rep. 637.

(F) CERTAINTY AND PARTICULARITY.

To an action of trespass for false imprisonment, the defendant pleaded that a judgment was recovered against the plaintiff, and that a *ca. sa.* issued thereon, under which he was arrested. Replication, that the judgment was signed upon a warrant of attorney, and that the judgment and *ca. sa.* were set aside by a Judge's order, which was afterwards made a rule of court, on the ground that the warrant of attorney was never delivered as a complete authority to do or suffer any of the acts therein specified, but as an escrow, to take effect in a certain event which had never happened, and was to be kept by the plaintiff in his own possession till such event should happen; and that the defendants, by an improper contrivance, obtained and kept possession of it without the plaintiff's consent; that judgment was signed under colour of the said document, and the *ca. sa.* issued upon the judgment:—Held, on demurrer, first, that the replication was good, as it sufficiently appeared that the *ca. sa.* was set aside, not on the ground of its being erroneous, but on the ground of irregularity, or want of good faith. Secondly, that the replication was not bad in omitting to state that the order was made a rule of court before the commencement of the suit, inasmuch as it was not necessary that that fact should be stated at all. *Brown v. Jones*, 15 Law J. Rep. (n.s.) Exch. 210; 15 Mee. & W. 191; 3 Dowl. & L.P.C. 678.

Declaration in assumpsit, that the defendant and A were in partnership as attorneys, and in consideration that the plaintiff would retain them, as such attorneys, to conduct an action at the suit of B against L for negligent driving, the defendant and his partner promised to fulfil their duty as such attorneys in and about prosecuting the said action, and recovering damages; that the defendant and his partner did, under the said retainer, commence an action against L, and such proceedings were thereupon taken that B recovered judgment against L for 66*l.* 15*s.*; that afterwards the defendant and his said partner as such attorneys as *aforesaid*, for obtaining satisfaction of the said damages, sued out a writ of *fi. fa.*, to which the sheriff returned that he had levied 9*l.*, part of the damages, and *nulla bona* as to the residue; that the defendant and his said partner, as such attorneys as *aforesaid*, for obtaining satisfaction of the said residue, issued a *ca. sa.* by virtue whereof L was imprisoned, and

paid the residue of the damages to the governor of the gaol, who paid the same to the defendant and his partner, *as such attorneys as aforesaid*; that before they received the same they sent, as such attorneys as aforesaid, to the gaoler, a discharge of L out of custody, by virtue whereof he was discharged. Breach, that although the defendant and his partner received the said damages, and the plaintiff duly paid to them, as such attorneys as aforesaid, their costs and charges of prosecuting the said action, yet they had not paid to B or the plaintiff the residue of the said damages:—Held, that this declaration was bad, on special demurrer, for not shewing distinctly that the money was received by the defendant under his original retainer by the plaintiff in the action against L. *Bevins v. Hulme*, 15 Law J. Rep. (N.S.) Exch. 226; 15 Mee. & W. 88; 3 Dowl. & L.P.C. 309, 722.

A declaration, containing counts on bills of exchange by the indorsee against the indorser in the form prescribed by the Reg. Gen. Trin. term, 1 Will. 4, stated that the defendant *promised* to pay the bills, and commenced and concluded in the form of a declaration in debt. It also contained the *indebitatus* counts in debt:—Held, that there was no misjoinder.

The declaration described a party to a bill of exchange by the initials of his christian name, without shewing that he was so designated in the bill:—Held, ill.

A declaration, containing several counts on bills of exchange, each count of which described the bill, and then referred to it as “the said” bill of exchange:—Held, that as the words “the said” had reference to the last antecedent, the declaration was sufficiently certain even on special demurrer. *Esdaile v. Maclean*, 16 Law J. Rep. (N.S.) Exch. 71; 5 Mee. & W. 277.

A declaration stated that the plaintiff had divers dealings with the defendants, and that divers accounts remained unsettled between them; that the plaintiff had, for the accommodation of one of the defendants, accepted divers bills of exchange, and thereupon, in consideration that the plaintiff then delivered to the defendants three acceptances as follows:—16*l.* 6*s.* at two months, 21*l.* 15*s.* 2*d.* at three months, and 26*l.* 7*s.* 11*d.*, dated the 7th of April, at five months, *as full settlement of debts*, the defendants promised the plaintiff to return to him the acceptances drawn by the said defendant as follows:—28*l.* 15*s.* and 28*l.* Breach, that the defendants did not return the acceptances:—Held, on special demurrer, that the declaration was ill for want of certainty. *Webster v. Crouch*, 17 Law J. Rep. (N.S.) Exch. 303; 2 Exch. Rep. 555.

The full christian names of persons mentioned in pleadings should be stated therein, or a sufficient excuse shewn for the omission; if neither be done, the proper mode of objecting is by demurrer.

When, in pleading, a single vowel immediately precedes a surname, the Court will understand such vowel to be the christian name of the party. *Kinnersley v. Knott*, 18 Law J. Rep. (N.S.) C.P. 281; 7 Com. B. Rep. 980.

A defendant in a suit was described by the initial letter of his Christian name only:—Held, that this was not a misnomer of the defendant, but an insufficient description of him, and that the objection

might be taken on special demurrer. *Miller v. Haigh*, 18 Law J. Rep. (N.S.) Exch. 487.

A declaration on a policy of assurance stated that the defendants were assurers of ships, &c., and, “thereupon, the plaintiffs, by certain persons using and carrying on business, and in the said policy designated and described by the names, style, and firm of Dewar & Culliford, the agents of the plaintiffs in that behalf,” made with the defendants a certain policy of assurance, purporting that the said persons so using, and in the said policy designated and described by the said name, style, and firm of Dewar & Culliford, as agents, as well in their own names as for others, so did make assurance. The declaration then stated, that the ship was stranded; that the waters flowed over the corn, goods, &c., which became thereby wetted, damaged, and spoiled, whereby the plaintiffs sustained an average loss on the said corn, to a large amount, to wit, to the amount of 800*l.*, and thereby the said corn, &c. became of no use and value to the plaintiffs:—Held, on special demurrer, first, that the declaration was bad for not stating the Christian names of Dewar & Culliford. Secondly, that it was not bad on the ground that it did not shew the amount that the defendants became liable to pay by reason of the average loss; nor on the ground of its not stating with certainty whether the plaintiffs meant a total or only a partial loss. *Sturge v. Rahm*, 19 Law J. Rep. (N.S.) Exch. 119; 4 Exch. Rep. 646.

In case for wrongfully working mines, whereby the plaintiff’s house fell down, stating that the plaintiff was “of right entitled to have his dwelling-house so supported, in part by land between the house and the mines, without any hindrance,” &c.:—Held, after verdict, a bad declaration for not stating the grounds on which the plaintiff was entitled to have his house supported by the land above the mines. *Hilton v. Whitehead*, 12 Q.B. Rep. 734.

The statement of the names of persons in pleading is not necessary, when it would, by reason of their number, lead to prolixity.

The Court will take judicial notice that the rate-payers of a parish are so numerous that it would lead to prolixity to set forth their names in pleading. *Kingsford v. Dutton*, 1 L. M. & P. 479.

In an action for assaulting the plaintiff, the defendants pleaded, that the plaintiff was beating “a certain boy whose name is to the defendants unknown,” and that the defendants, to prevent his beating “the said boy,” quietly laid their hands on him. Replication, that “the said boy” in the plea mentioned “was one Barnes W, and was and is the lawful son of the plaintiff,” of the age of ten years, and that “the said Barnes W” refused to obey his lawful commands, whereupon the plaintiff moderately chastised him. Rejoinder, that the plaintiff, at the time when, &c., was beating “the said Barnes W” with more violence than was proper and reasonable. Rejoinder, that the plaintiff “did not beat” &c. the said Barnes W “with more violence than was proper and reasonable.” On the part of the plaintiff, evidence was given that the plaintiff, just before the defendants interfered with him, had been beating his son Barnes W, who was ten years old, with a strap, but not immoderately; but the last witness for the plaintiff stated that the

plaintiff had another son, aged eight. It was proved for the defendants, that, after the plaintiff had beaten his elder son, Barnes W, he began beating the younger, when the defendants laid hold of him:—Held, that, on these pleadings, the issue was limited to the question of the excessive beating of Barnes W, and that anything the plaintiff did to the younger boy was not in issue; and the Judge at the trial would not allow any amendment as to the name of Barnes W, as the two boys had both been beaten, and if the issue had been different the plaintiff might have adduced other evidence as to the extent of the beating of the younger boy. *Winterburn v. Brooks*, 2 Car. & K. 16.

(G) ARGUMENTATIVENESS.

To an action of trespass *quare clausum fregit*, the defendant pleaded, fourthly, that the close was the freehold of H, and that the defendants, as his servants, and by his command, committed the alleged trespasses. The plaintiff replied, that the defendants did not, as servants of H, and by his command, commit the trespasses:—Held, on special demurrer, that the replication was bad as involving a negative pregnant. *Jones v. Jones*, 16 Law J. Rep. (N.S.) Exch. 299; 4 Dowl. & L. P.C. 494; 16 Mee. & W. 699.

The declaration stated that the plaintiff agreed with the defendants to act as their salesman for a year, and not to be connected with any other house in disposing of their goods, and that the defendants agreed to pay the plaintiff 200*l.* for such servitude. Averment, that the plaintiff entered into the defendants' service, and was not connected with any other house, and had always until the expiration of one year from the making of the agreement, been ready and willing, and offered to remain in such employ. Breach, that the defendants would not suffer the plaintiff to act as their salesman during the remainder of the year, but discharged him from the performance of his agreement, and had not paid him the 200*l.* Plea, as to the non-payment of the 200*l.*, that after the plaintiff ceased to be in the defendants' employ, and during the said year, he entered into the service of another house, and became connected with that house in disposing of their goods:—Held, on special demurrer, that the plea was bad, as amounting to an argumentative denial of the plaintiff's readiness and willingness to continue in the defendants' employment. *Spotswood v. Barrow*, 17 Law J. Rep. (N.S.) Exch. 98; 1 Exch. Rep. 804; 5 Dowl. & L. P.C. 373.

A plea setting up in addition to the consideration stated in the declaration, another and not inconsistent consideration or condition, and shewing a non-performance of it by the plaintiff, is a plea in confession and avoidance.

The declaration stated that in consideration that the plaintiff would leave a steam-engine on certain premises, of which he was tenant to the defendant, at the end of the term, the defendant promised to purchase it at a valuation, and that the plaintiff had left the engine on the premises, but that the defendant had not appointed a valuer. Plea, that the defendant made the promise upon the consideration that the plaintiff would deliver up possession of the premises and steam-engine at the end of the term, and that he had not done so:—Held, on special

demurrer, that the plea did not amount to the general issue, nor to an argumentative traverse of the allegation that the plaintiff had left the steam-engine on the premises; but was a good plea. *Weedon v. Woodbridge*, 18 Law J. Rep. (N.S.) Q.B. 158; 13 Q.B. Rep. 462. But held, by the Court of Exchequer Chamber, reversing the judgment of the Queen's Bench, that the plea was bad; that if the word "leave" in the declaration meant merely "quitting the steam-engine," the plea was an argumentative traverse of the contract declared on, and amounted to a plea of non assumpsit; that if "leave" meant "deliver up possession," the first allegation in the plea was merely a repetition of the alleged consideration, but that the latter allegation, that the plaintiff did not deliver up possession was a traverse of the performance of the condition precedent, and ought to have concluded to the country; that the first allegation in the plea denied the contract declared on; that that allegation could not be looked upon as matter of inducement introductory to the second allegation, so as to permit the latter to be treated as the substance of the plea; and that the plea could not be considered as giving implied colour, so as to render it good as a plea by way of confession and avoidance. *Weedon v. Woodbridge*, 19 Law J. Rep. (N.S.) Q.B. 217; 13 Q.B. Rep. 470.

To an action upon a foreign judgment obtained in France the defendant pleaded that he was not during the accruing of the cause of action resident in France or within the jurisdiction of the Court, or subject to the laws of France; that he had not been served with any process or notice, or had any notice of any proceeding in the action before judgment, nor any opportunity of defending himself against the said claim, and that the proceedings were taken behind his back, without his knowledge, privity, or consent. Replication, that the defendant had bought shares in a company in France, and that it became necessary by the law of France for him to elect a domicile in France where the directors might notify to him the proceedings of the company; that the defendant elected a domicile in Paris; that the assets of the company being insufficient to discharge their debts, the defendant as one of the shareholders became liable to be sued by the plaintiffs for his share; that a summons for that purpose was left at his elected domicile, but that he did not appear, but made default; and that by the law of France the plaintiffs recovered judgment against him:—Held, that the word "notice" in the plea meant *actual* notice, and that the replication did not amount to an argumentative denial of the notice stated in the plea.

Whether the plea was bad in omitting to state that the defendant was not a native in France, and had no property there—*quare*. *Vallée v. Dumergue*, 18 Law J. Rep. (N.S.) Exch. 398; 4 Exch. Rep. 290.

In case, the declaration stated, that the plaintiff was lawfully possessed of a mill, and by reason thereof of right ought to have and enjoy the benefit of the water of a watercourse which ran and flowed, by means of a weir therein erected a little above the plaintiff's mill, being kept at a certain height, unto the said mill of the plaintiff, for supplying it with water for the working thereof; and complained that the defendant wrongfully pulled down the weir, and placed and kept it at a lower height than it ought to have been, &c. The defendant pleaded, that,

before and at the times when, &c., he was the occupier of a certain close adjoining to the watercourse, and that he and all others the occupiers for the time being of the said close for twenty years *next before the commencement of the suit*, enjoyed, as of right and without interruption, the right of from time to time, as occasion required, removing a part of the weir, and placing and keeping it at a lower height than the rest, to such an extent and for such a time as was necessary for diverting enough of the water to irrigate the said close; that, at the times when, &c. irrigation was necessary for the close, wherefore the defendant removed the said part of the weir, and placed and kept it at such lower height, to such an extent and for such a time as, and no more or longer than, was necessary for diverting the water for the irrigation of the said close; *quæ sunt eadem*, &c.:—Held, that this plea was good; that it was not an argumentative traverse of the right alleged in the declaration, inasmuch as it set up a right which, under the statute 2 & 3 Will. 4. c. 71, was not complete until the commencement of the suit, and, therefore, was not inconsistent with the plaintiff's right to have the weir at a greater height at the time of the act complained of. *Ward v. Robins*, 15 Mee. & W. 237.

Plea in trover that the goods were deposited with the defendant as security for a debt due from the plaintiff, and non-payment of debt:—Held, bad on special demurrer, as being an argumentative denial of the plaintiff's right of possession at the time of the alleged conversion. *Dorrington v. Carter*, 1 Exch. Rep. 566.

Plea in detinue that the plaintiff indorsed the bill to P, and that P indorsed the bill to the defendant:—Held, bad, as an argumentative denial of the plaintiff's property in the bill. *Austin v. Kolle*, 1 Exch. Rep. 586.

[See *Fearne v. Cochrane* (H).]

(H) DUPLICITY.

To an action of trespass to a mill, fixtures and goods therein, the defendants pleaded that they were assignees of H, a bankrupt, to whom the mill had been demised for a term, and who had placed the fixtures and goods in it. Replication, that before his bankruptcy, H demised to R for a term the mill, fixtures and goods, by way of mortgage; that he entered, and by an agreement in 1840 between R, H and the plaintiff, it was agreed that R and H should grant and execute to the plaintiff a lease of the premises for a term, at a rent, and that the plaintiff should accept the lease and execute a counterpart; and that R and H should bargain and sell to the plaintiff, who should accept the fixtures and goods at a certain price to be paid to them, whereupon the plaintiff entered:—Held, upon special demurrer, that the replication was neither double nor ambiguous; that the defendants might have traversed both the mortgage and the agreement, and that if they had traversed the mortgage alone, the plaintiff would not have been entitled to judgment *non obstante veredicto*, as the rejoinder would not have implied an admission of the plaintiff's title; and that the replication was good. *Pim v. Grazebrook*, 15 Law J. Rep. (N.S.) C.P. 32; 3 Dowl. & L. P.C. 454; 2 Com. B. Rep. 429.

The declaration stated that, on the 15th of October 1845, in consideration that A would enter into B's employ, and serve him for a certain time, to wit, from the day and year aforesaid, until the service should be determined by due notice, upon certain terms, &c., B promised to retain and employ A upon the terms aforesaid. Averment, that A did, afterwards, to wit, on the day and year aforesaid, enter B's service, and hath always from the commencement thereof hitherto been ready and willing to continue in the said service, and during all that time tendered and offered himself to serve B, &c. Breach, that B did not continue A in his said service, but on the contrary thereof, afterwards, to wit, on the same day and year aforesaid, refused to suffer A to continue any longer in the said service, and wrongfully discharged A without any previous notice whatever in that behalf:—Held, on special demurrer, first, that it was unnecessary to aver that A gave no notice himself to determine the service. Secondly, that the contract declared on included the day on which it was made, and therefore that it sufficiently appeared that A's discharge took place after the commencement of the service. Lastly, that the declaration was not double, for alleging A's readiness and willingness, as well as his tender and offer to serve. *Wilkinson v. Gaston*, 15 Law J. Rep. (N.S.) Q.B. 339; 9 Q.B. Rep. 137.

The first count of the declaration stated, that, whereas the defendant had become and was tenant to the plaintiff of certain rooms and premises, on the terms of not causing any nails to be driven into the walls, or that, if any damage should arise from so doing, he, the defendant, should pay the costs of repairing the same on vacating the rooms; and, in consideration thereof, the defendant promised the plaintiff that he would pay the costs of repairing all injuries occasioned by such driving; and that the defendant quitted possession. Breach, that the defendant pulled down and removed divers bells, and broke divers chimney-pieces and grates, and caused nails to be driven into the walls; that the costs of repairing the damages and injuries of the walls amounted to 150*l.*, and that the defendant had not paid that sum to the plaintiff. The second count stated, that, in consideration that the plaintiff would permit a brass plate to be fixed on the outer door of the premises, the defendant promised the plaintiff to cause a new outer door to be fixed in the premises at the expiration of the tenancy, and alleged that the defendant did not at any time cause a new outer door to be fixed in the premises. The defendant pleaded to the first count, that, after making the promise in the said first count mentioned, so far as relates to the driving of the nails, the defendant did pay the costs of repairing the injuries occasioned thereby. To the second count he pleaded, that, before any cause of action accrued, the defendant offered to the plaintiff to cause a new door to be fixed, but that the plaintiff prevented the defendant from causing the said door to be so fixed, and that he discharged the defendant from carrying the said agreement into execution:—Held, first, that the first plea was bad, in not answering the whole of the declaration; secondly, that the second plea was bad for duplicity; thirdly, that the breach to the first count was good, as the meaning of the contract was, that the defendant should pay to the plaintiff

the costs of damaging the chimney-pieces, &c., and of repairing the walls.

And, *semble*, that the declaration was not bad in omitting to state that the defendant became tenant to the plaintiff at his (the defendant's) request, but that, at all events, it was good on general demurrer. *Dietrichsen v. Gtibilet*, 15 Law J. Rep. (n.s.) Exch. 73; 14 Mee. & W. 845; 3 Dowl. & L. P.C. 292.

Plea, that the defendant made his promissory note in writing, and thereby promised to pay, to the plaintiff's order on demand, 1,050*l.*, and delivered the same to the plaintiff, who took and received it for and on account of the debt in the declaration, and all causes of action in respect thereof, and that afterwards a warrant of attorney was given in full satisfaction and discharge of the said promissory note, and of all causes of action in respect thereof, and of the causes of action in the declaration mentioned:—Held, not bad for duplicity.

Quere—Whether bad as an argumentative plea of payment. *Fearne v. Cochrane*, 16 Law J. Rep. (n.s.) C.P. 161; 4 Dowl. & L. P.C. 797; 4 Com. B. Rep. 274.

The declaration stated, that the plaintiff drew his bill of exchange, to wit, on the 16th of February 1846, which the defendant afterwards accepted, to wit, on the day and year aforesaid. The plea stated, that the defendant accepted the said bill whilst he was an infant, being at the time of its acceptance without a date; that the plaintiff afterwards altered the bill by writing a date thereon, and that there never was any licence or ratification given by the defendant to such alteration, after he attained the age of twenty-one years; verification:—Held, that the plea was a good plea, and that it disclosed only a single defence—infancy. *Harrison v. Cotgreave*, 16 Law J. Rep. (n.s.) C.P. 198; 5 Dowl. & L. P.C. 169; 4 Com. B. Rep. 562.

In assumpsit for money had and received, a plea that the money was the amount of a prize in an illegal lottery held by the defendant, and that he paid over the amount to J S, whom he conceived to be the winner, and who was entitled to receive and to retain the money, is bad for duplicity. *Homes v. Lock*, 1 Com. B. Rep. 524.

In assumpsit against two executors, plea in abatement, the appointment of another, and proving the will, &c., by all:—Held, good on demurrer, for not stating that the other executor administered before the commencement of the suit, as dates might be assumed material on demurrer, when, if truly stated, they support the plea, and therefore it was to be presumed that the administering was before the commencement of suit: and held, also, that the plea was not double, as the allegation of probate was only an inducement to the averment of administration. *Ryalls v. Bramall*, 1 Exch. Rep. 734; 5 Dowl. & L. P.C. 753.

[See EXECUTOR, and also *Dicker v. Jackson*, ante, (C).]

(I) DIVISIBLE ALLEGATIONS AND DISTRIBUTIVE ISSUES.

To an action on a bill of exchange for 120*l.* 5*s.*, the defendant pleaded, amongst other pleas, that the plaintiff and the defendant accounted together concerning the said causes of action, and all other

claims and demands then being between them, and on that accounting, 50*l.* was found to be due from the defendant to the plaintiff, which he paid, and the plaintiff received, in satisfaction. Replication, that the plaintiff and the defendant did not account together of and concerning the said causes of action in the declaration mentioned and all other claims and demands then being between them, *modo et formd.* The defendant having demurred to this traverse specially, as being too large, and involving immaterial matter,—Held, upon motion to set aside the demurrer as frivolous, that the allegation in the plea of the accounting was not divisible, and that the traverse was good. *Sutton v. Page*, 15 Law J. Rep. (n.s.) C.P. 249; 4 Dowl. & L. P.C. 171; 3 Com. B. Rep. 204.

In assumpsit for non-delivery of railway shares the plaintiffs averred that they had "always from the time of making the agreement been ready and willing to accept the transfer of the shares." Plea, that "the plaintiffs were not always from the time of making the agreement ready and willing," &c. On special demurrer to the plea,—Held, that the allegation of time in the declaration was divisible; that the traverse, therefore, was too large, and the plea bad.

An interest in a partnership, though not assignable at law, is a thing of value, and may, therefore, be the subject of a valid contract. *Tempest v. Kilner*, 15 Law J. Rep. (n.s.) C.P. 10; 2 Com. B. Rep. 300; 3 Dowl. & L. P.C. 407.

Reg. Gen. Hil. term, 4 Will. 4. tit. 'Trespass,' rule 6. applies to actions on the case as well as trespass, and to declarations as well as pleas.

And therefore where in an action on the case for disturbance of a ferry, the plaintiff alleged in his declaration that he was possessed of an ancient ferry for passengers and goods to and from A, from and to B, and the defendant pleaded not possessed and a traverse of the ancient and entire right of ferry; and the jury found that there was a ferry from A to B only,—Held, that the verdict might be entered distributively for the plaintiff for so much as was proved at the trial. *Giles v. Groves*, 17 Law J. Rep. (n.s.) Q.B. 323; 12 Q.B. Rep. 721.

(K) NEGATING EXCEPTIONS.

To a declaration for work and labour the defendant pleaded that the work, &c. consisted of an appraisal of personal property, which the plaintiff appraised in expectation of reward to be therefore paid by the defendant to him, without being duly licensed according to the 46 Geo. 3. c. 43:—Held, that the plea was sufficient, without stating that the plaintiff did the work as an appraiser, as it followed the words of the statute.

Held, also, that the plea need not negative that the appraisal was for the purpose of ascertaining legacy duty.

There is no difference, in respect of declarations and subsequent pleadings, as to negating exceptions in acts of parliament. *Palk v. Force*, 17 Law J. Rep. (n.s.) Q.B. 299; 12 Q.B. Rep. 666.

(L) CONFESSING AND AVOIDING.

A declaration stated, in the first count, that it was agreed between the defendant and the plaintiffs, that the defendant should sell and deliver to the

plaintiffs certain iron rails to be made and delivered of certain weights and shapes at a price stated, and the said rails to be inspected and certified as then agreed on, and to be of a certain quality, and that the defendant did make and deliver certain rails as and for rails of such quality; and alleging as a breach that the rails were not of the said quality. The defendant pleaded that the said rails were, according to the agreement, to be inspected by an agent of the plaintiffs, who was at liberty to approve and accept the same if he should think fit, and that the said rails were inspected and approved and accepted by such agent on delivery of the same:—Held, bad, in substance, as not answering the breach complained of, and only shewing performance of one of the stipulations of the contract set out in the said count. And, *semble*, that it was also bad in form, as amounting to the general issue.

To the second count, which stated that the defendant promised to deliver rails fit and proper for the purpose of a certain railway, and alleging as a breach that the rails delivered were not fit and proper for such railway, the defendant pleaded a plea similar to the plea to the first count:—Held, that the plea was bad in substance, for the same reason as the plea to the first count; and, also, in form, as amounting to the general issue. *Bird v. Smith*, 17 Law J. Rep. (N.S.) Q.B. 309; 12 Q.B. Rep. 786.

To an action on a bond, the defendant pleaded, that one J F made the bond, and the defendant also made it as his surety; and that, after it was so made, the said J F being unable to meet his debts, entered into a deed with his creditors, of whom the plaintiff was one, by which deed he assigned all his property upon trust, for the benefit of the plaintiff and his other creditors, to certain trustees; and that the plaintiff did by the said deed covenant with the said J F, that the plaintiff would not at any time thereafter, commence or prosecute any action or other proceeding against the said J F for or by reason of any debt then due and owing by him to the plaintiff, and thereby the plaintiff gave time to the said J F in respect of the said debt and writing obligatory, in respect whereof the defendant was such surety. The plaintiff replied by setting out the deed *in hæc verba*. The deed contained (*inter alia*) a proviso, that nothing therein contained should prejudice or affect any claim, demand or remedy which the several parties thereto and creditors of the said J F then had or should have by virtue of any mortgage, lien, charge or other incumbrance against any person who might be liable for the payment of any of the debts of the said J F, in the character of a surety or otherwise; and it witnessed that, in consideration of the assignment thereinbefore made, the several parties thereto and creditors of the said J F covenanted with the said J F that they would not at any time commence or prosecute any action, suit, or other proceeding against the said J F for any debt then due from him to them; and that, in case of any such action or suit being commenced or prosecuted by them, contrary to the terms of the deed, the deed might be pleaded as a general release in bar of any such action or suit. Verification:—Held, on special demurrer to the replication, that it was good, inasmuch as it admitted the effect of

the deed as alleged in the plea, but avoided it by the terms of the proviso. *Stevens v. Stevens*, 5 Exch. Rep. 306.

[See *Weedon v. Woodbridge*, ante, (G).]

(M) ADMISSIONS.

Trespass for breaking and entering the plaintiff's close, and damaging the fences, hedges, &c. Plea, justifying the trespass, on the ground of a right of way; new assignment, that the action was brought for a trespass on a certain other portion of the said close (set out by abutments). Plea to the new assignment, that, before the said time when, &c., and whilst the defendant so had the right to the said way in the said first plea mentioned, the plaintiff obstructed the way in the said first plea mentioned, by digging a trench across the same, and because the defendant could not remove the obstruction, he did, for the purpose of avoiding the same, and using the way, depart out of the same, along the said other portion of the close in the new assignment mentioned, and because the said fences and hedges in the new assignment mentioned were standing on a portion of the close in the new assignment mentioned, and that without breaking and damaging the same he could not go over the residue of the said close in which, &c. he did, necessarily, a little break and damage the said fences and hedges. Replication, *de injuriâ*:—Held, *dissentiente Platt, B.*, that the right of way, stated in the plea to the declaration, was not admitted by the new assignment; that the right was informally re-asserted in the plea to the new assignment, and being put in issue by the replication, the defendant was bound to prove it. *Robertson v. Gantlett*, 16 Law J. Rep. (N.S.) Exch. 156; 16 Mee. & W. 289; 4 Dowl. & L. P.C. 548.

Debt on a joint and several bond for 500*l.* The condition, set out on oyer by the defendant, recited that one S had been appointed collector of taxes, and that the plaintiff had become surety for the payment of such sums as S should receive, that the plaintiff consented to become surety on the condition that the defendant and S would indemnify him from all charges, &c. which he should incur as surety. Plea, that the plaintiff had not at any time since been in anywise damaged by reason of anything in the condition specified. Replication, that S received, as collector, divers sums of money, amounting in the whole to a large sum exceeding 500*l.*, to wit, 2,000*l.*, that S did not duly pay the said sums so received, nor any of them, but made default, by reason of which plaintiff afterwards was forced to pay to the receiver general a large sum, to wit, the sum of 500*l.*, and thereby sustained damage to a large amount, to wit, 500*l.* Rejoinder, that the plaintiff was not forced to pay the said sum in the replication mentioned, or any part thereof. At the trial, no proof was given of the receipt of any money by S as collector; but it was proved that S had not paid any over to the receiver general, and that the plaintiff had been called on as a surety to pay the 500*l.*, and, having been sued, had submitted to a judgment:—Held, that the receipt of 500*l.* by S was not admitted on the pleadings, and that the plaintiff, in default of proof of the receipt, was only entitled to nominal damages.

Held, also, that the defendant having been no

party to the judgment obtained against the plaintiff, the judgment was only evidence to shew that the plaintiff had been sued, or had been subjected to a *bond fide* pressure, but not evidence that he was legally liable to the extent for which the judgment was signed. *King v. Norman*, 17 Law J. Rep. (n.s.) C.P. 23; 4 Com. B. Rep. 884.

A declaration in case stated that the defendant was employed by the Commissioners of Sewers to make a sewer in a public highway, that he kept and continued on the highway two iron gratings lying thereon, *in the custody and care of the defendant*, for forming the sewer, without placing any light, &c. to shew that the gratings were there. Plea, not guilty:—Held, that the averment that the gratings were in the custody and care of the defendant being immaterial was not admitted by the plea of not guilty, and that the material averment of the declaration, namely, that the defendant kept and continued the gratings on the highway without a light, having been negatived by the jury, the plaintiffs ought to be nonsuited. *Grew v. Hill*, 18 Law J. Rep. (n.s.) Exch. 317; 3 Exch. Rep. 801.

(N) PROFERT.

Profert of deeds set out by way of inducement is unnecessary. Except in deducing title, deeds may be set out in their terms, or according to their legal effect.

The declaration set out a deed of settlement, dated January 1809, on the marriage of J W with L W, whereby the profits of a policy were to be subject to the appointment of J W and his wife or the survivor; and another deed of settlement, dated March 1840, on the marriage of M L W, a daughter of the former marriage, with the defendant, in which, after reciting that J W died, leaving his wife survivor, without appointing, the defendant's wife assigned all her fortune to which she might become entitled under her mother's will to trustees for her own use during her life, and at her death for her children. No profert was made of either of these deeds. The declaration then stated, that by an indenture of the 12th of November 1842, profert of which was duly made, it was recited that L W, the mother of the defendant's wife, had died, and by her will, dated July 1840, had appointed 2,000*l.* on the trusts of the deed of March 1840, or if she had no such power, to the defendant's wife; that the plaintiffs, as trustees under the deed of March 1840, received 2,000*l.* charged with the trusts of the deed, and considering that L W had no power to appoint to the trusts of the deed of 1840, the defendant's wife directed that the plaintiffs should stand possessed of the 2,000*l.* on trust, to lend it to the defendant, and the defendant covenanted to indemnify the plaintiffs. It was then averred that the plaintiffs, on the 12th of November 1842, lent the 2,000*l.* to the defendant, who had not repaid it; that T S and others who, in 1845, became trustees under the deed of March 1840 in place of the plaintiffs, commenced a suit in Chancery against the plaintiffs, and petitioned the Master of the Rolls to order the plaintiffs to transfer to the Accountant General in trust in the cause, as much 3*l.* per cent. consols as could have been bought for 2,000*l.* on the 12th of November 1842; that the plaintiffs being advised that they had no

defence consented to such an order being made by the Master of the Rolls:—Held, that profert of the deeds of 1809 and 1840 was unnecessary, they being only matter of inducement.

That the deed of 1840, as it did not deduce title, was well set out in its terms.

That it was not necessary that the trust deed should be a valid assignment in law if it bound the fund in equity, which it had been held to do.

That the consent given by the plaintiffs to the order of the Master of the Rolls did not defeat their right of action. *Newborough v. Schroeder*, 18 Law J. Rep. (n.s.) C.P. 200; 7 Com. B. Rep. 342.

Replication bad for putting in issue matter which was only inducement to an acceptance in satisfaction, such acceptance being the material part of the pleas. *Jones v. Sawkins*, 17 Law J. Rep. (n.s.) C.P. 92; 5 Com. B. Rep. 142; 5 Dowl. & L. P.C. 353.

A declaration in covenant stated that by a deed made between W B of the first part, G D and S A of the second part, P V and W B of the third part, and the Thames Haven Dock and Railway Company of the fourth part, and after reciting that J and V, on behalf of the company, agreed to purchase certain premises, it was witnessed that W B agreed with the said company, the defendants, to sell them certain messuages and lands, and that W B would deduce a good title to the hereditaments, &c., and that W B would, on or before, &c., execute a proper conveyance of the said hereditaments to the said company; and the said company agreed with W B and his assigns to pay the said sum of, &c. Averment, that W B became bankrupt, and the plaintiffs became his assignees; that both he and they were ready and willing to deduce a good title to the said hereditaments; that W B and his heirs and assigns were ready and willing, on payment by the company of, &c. to execute a proper conveyance of the said hereditaments to the company, and would have deduced a good title and would have executed a proper conveyance, but that the company discharged him and the plaintiffs from deducing such title and executing such conveyance. Breach, that the company would not prepare such proper conveyance for execution or pay the sum of, &c.:—Held, on special demurrer, that the declaration was not bad in omitting to allege that the deed was sealed with the seal of the defendants, nor in omitting an averment of profert.

Held, also, that the declaration was not bad on general demurrer, in omitting to allege the discharge of W B and of the plaintiffs from deducing title to be by deed.

Quare—Whether the deducing of the title was a condition precedent. *Brymer v. Thames Haven Dock and Rail. Co.*, 18 Law J. Rep. (n.s.) Exch. 110; 2 Exch. Rep. 549.

(O) DEPARTURE.

In an action on a bill of exchange the declaration stated that certain persons using the name and style of J B & Co., by that name and designation drew a bill of exchange on Messrs. G & E W, and indorsed the said bill to the defendant, who indorsed it to the plaintiffs. The defendant pleaded that the plaintiffs were the persons mentioned in the declaration as using the name and style of J B & Co. and as so making the bill; that the indorsement of

the bill to the defendant was in fact an indorsement by the plaintiffs in the said name and style of J B & Co., and that they so indorsed it to him *before* he indorsed the same to them; and that, at the time of his so indorsing the bill to the plaintiffs, they were liable to pay the amount to him, according to their previous indorsement. The plaintiffs replied, stating an agreement between them and the defendant and G & E W, to forbear and give time to the defendant and G & E W for the payment of another bill accepted by G W, and indorsed by E W, the maker, to the defendant and by him to the plaintiffs, till the time for payment of the bill declared on had elapsed, and then averred that the plaintiffs had forbore accordingly:—Held, that the replication was bad, as being a departure from the declaration. *Boulcott v. Woolcott*, 17 Law J. Rep. (N.S.) Exch. 149; 16 Mee. & W. 584.

To an action on a charter-party, the defendant pleaded that at the time it was made the defendant represented to him that the ship was then at W, and that he entered into the charter-party confiding in that representation, and that the ship was not at the time, &c. at W. Replication, that the plaintiff, when he made the representation, believed it to be true, and that the ship at the time, &c. was in fact on her homeward voyage from W. Rejoinder, that the representation was contained in the charter-party, and was part of the contract:—Held, a departure from the plea.

Quare—if the statement of the place where the vessel was amounted to a warranty. *Elliott v. Von Glehn*, 18 Law J. Rep. (N.S.) Q.B. 221.

Indorsee against indorser of a promissory note made by E B, payable to O M, and indorsed by O M to the defendant, and by the defendant indorsed to the plaintiff. Plea, that O M and the plaintiff were one and the same person. Replication, that E B was indebted to the plaintiff in 23*l.*, and thereupon it was agreed between E B and the plaintiff, that E B should give to the plaintiff the promissory note on account of such debt, and that the plaintiff should give (which he accordingly did) time to E B for payment of the said debt, until the promissory note became due and payable, provided E B would procure the defendant to indorse the promissory note to the plaintiff, by way of security and guarantee to the plaintiff, of all which premises the defendant had full notice, and assented and agreed thereto; and therefore, and in pursuance of the said agreement, the plaintiff, without consideration or value, indorsed the note to the defendant, in order that the defendant might indorse the same to the plaintiff; and the defendant did indorse as alleged in the declaration. Demurrer to the replication:—Held, that the replication was not a departure from the declaration. *Morris v. Walker*, 19 Law J. Rep. (N.S.) Q.B. 400; 15 Q.B. Rep. 589.

(P) DEFECTS CURED BY VERDICT.

Declaration on a written agreement (not under seal) by the plaintiff to let land to the defendant for two years, and by the defendant to make satisfaction for damage done to tenants by game on their farms, over which he was to be at liberty to preserve the game; the amount of damage to be settled by two referees, one chosen by each party, or by their umpire in case of disagreement. Aver-

ment, that the defendant entered and enjoyed the exclusive right of shooting during the whole term agreed upon. Breach, that, although within a reasonable time one W M was chosen and nominated on behalf of the plaintiff, and notice thereof given to the defendant, who was requested by the plaintiff to give the name and address of a referee on his behalf to act with the said W M within ten days, or that in default the said W M would assess the damage alone, yet the defendant did not nor would give notice to the plaintiff of any person chosen or nominated on his behalf, nor ever made any satisfaction for the damage done; that, accordingly, W M alone assessed the damage, and that the defendant had not paid any compensation to the plaintiff:—Held, that, after verdict, the declaration sufficiently alleged a refusal by the defendant to nominate a referee.

Held, also, that the agreement to make compensation was not void, although the right of shooting, being an incorporeal hereditament, did not pass by it.

Held, also, that as the defendant was stated to have enjoyed the right of shooting during the whole period agreed for, the absence of an averment of a grant of such right as a condition precedent would not render the declaration bad.

The jury found for the defendant, on an issue that the plaintiff did not notify to the defendant his choice of an arbitrator within a reasonable time:—Held, to be an immaterial finding. *Thomas v. Fredricks*, 16 Law J. Rep. (N.S.) Q.B. 393; 10 Q.B. Rep. 775.

(Q) CONSTRUCTION OF PLEADINGS.

To a declaration in case for obstructing a private right of way, a watercourse and a drain, the defendants pleaded that under a certain act of parliament of the 8 Vict. they were authorized to make a certain railway near the premises of the plaintiff; and in order to enable them to make the same according to the said act they agreed in writing, on the 25th of April 1846, with the plaintiff to purchase a portion of the plaintiff's land; and whereas the works of the said railway would occasion injury to the plaintiff's premises, it was thereby also agreed that the defendants should pay for the said portion of land such a sum of money as should compensate the plaintiff not only for the value, but also for all such damage, &c. as should be incidental to making the said railway near the premises of the plaintiff. That by a deed of assignment the plaintiff, in consideration of 575*l.* then paid to her by the defendants, conveyed to them the said land for the purposes of the said railway; and it was then agreed by the said deed of assignment that the 575*l.* so paid should be accepted, and was then accepted by the plaintiff for the purchase of the said land, and by way of full compensation for all damage, &c. whatsoever which could be sustained by reason of the exercise of the powers of the said act upon the said land, the said sum of 575*l.* being the sum theretofore agreed to be paid to compensate the plaintiff, not only for the price of the said land, but all such damage, &c. as should be incidental to the making the said railway. That the said grievances were part of the damage, &c., necessarily incidental to making the railway, and were part of the damage

sustained by the plaintiff by reason of the exercise of the powers of the said act. The replication craved oyer of and set out the deed of assignment, and the plaintiff demurred to the plea. The recital of the agreement of the 25th of April in the deed of assignment was, "that the plaintiff agreed to accept and the defendants agreed to pay 575*l.* for damage, &c." of a different kind from that stated in the plea:—Held, first, that the plea relied upon a justification under a contract, and not under the act of parliament. Secondly, that the legal effect of the agreement of the 25th of April, as recited in the deed set out on oyer, and as recited in the plea, was different in substance; that the variance was fatal, and the plea bad on general demurrer. *Pilgrim v. Southampton and Dorchester Rail. Co.*, 18 Law J. Rep. (N.S.) C.P. 139; 7 Com. B. Rep. 205.

To a declaration in debt in the ordinary form containing three counts, the defendant pleaded, secondly, "and as to the residue of the said first and last counts," payment to the plaintiff of (to wit) 50*l.* after action, in full satisfaction and discharge "of the causes of action in this plea mentioned." The plaintiff signed judgment for damages in respect of the first and last counts, which he contended where unanswered by the plea:—Held, that the plea was an answer to the residue of the sums claimed in the first and last counts respectively, and also to the damages accruing in respect of the detention of each of those sums respectively, inasmuch as the word "count" included the sum claimed as a debt, and also the damages for the detention thereof. *Gell v. Burgess*, 18 Law J. Rep. (N.S.) C.P. 153; 7 Com. B. Rep. 16.

(R) DECLARATION, GENERAL FORM AND SUFFICIENCY OF.

In a declaration against a public officer of an insurance and loan company, the first count alleged that in consideration that the plaintiff at the request of the company had agreed to become their permanent attorney, the company agreed to retain and employ the plaintiff as such permanent attorney. Breach, that the company dismissed the plaintiff from the office without just cause, and appointed other persons solicitors to the company.

The second count stated it was agreed between the company and the plaintiff, that from the 1st of January then next the plaintiff as the attorney of the said company should receive a salary of 100*l.* per annum in lieu of rendering an annual bill of costs for general business, &c.; and in consideration that the plaintiff had promised to fulfil the agreement on his part, the company promised to fulfil the same on their part, and to retain and employ the plaintiff as such attorney. Breach, that the company refused to employ the plaintiff as such attorney, and wrongfully dismissed him, and thence refused to employ him or to pay him the salary:—

Held, that the word "permanent" in the first count did not confer any durable or special appointment as attorney, and therefore, on non assumpsit, the defendant was entitled to the verdict.

Held, that the agreement in the second count implied no obligation to retain, &c. as therein alleged, that the promise was indivisible, and there was no consideration to support it.

The Court ordered a verdict to be entered for

the defendant on the first count, and on the second arrested the judgment. *Elderton v. Emmens*, 16 Law J. Rep. (N.S.) C.P. 209; 4 Com. B. Rep. 479.

The first count of the declaration stated, that the plaintiff by A. B., "h attorney, complains of the defendant who h been summoned," and alleged as a breach in the count on the account stated, that the defendant ha not paid the same," &c. The second count was for work done and materials provided for the defendant "at h request":—Held, on demurrer, that the first and third counts were good, and that the second count was bad. *Berdoo v. Spittle*, 16 Law J. Rep. (N.S.) Exch. 258; 1 Exch. Rep. 175.

A declaration in case stated that T was possessed of an undivided moiety of certain waste land, as tenant in common with A, and that T being so possessed, by a certain indenture granted to the plaintiff liberty, power, and authority to dig, work, and search for clay, in all the said undivided moiety of the grantor in a certain parcel of the waste land, and to raise, wash, &c. such clay, and convert the same to the plaintiff's use, and to make pits and leats within the said undivided moiety, as the plaintiff should think necessary for the more effectual exercise of the liberties, &c. thereby granted, to hold the said liberties, &c. for a term of twenty-one years from September 1833. Averment, that at the time of the grant, and thence continually, there were within the parcel of waste land so described in the grant divers clay pits, &c., and certain leats necessary for washing and making merchantable the clay. That whilst the said grant was in full force, and after the plaintiff had so become entitled to use, exercise, and enjoy the liberties, &c. in the said indenture specified, and had in fact begun to use, exercise, and enjoy, and was actually using, &c. the same by and under the grant, by and with the assent of A, the co-tenant in common, the defendant wrongfully disturbed the plaintiff in the use of the said liberties, by destroying certain dams, lawfully and necessarily erected on the said parcel of waste land for the enjoyment and working by the plaintiff of the said clay pits, and diverted the said leats lawfully and necessarily made by the plaintiff in and about his clay pits, and in and about the washing and making merchantable the said clay.

Held, on special demurrer, that the declaration was good.

First, that the right of the plaintiff to maintain the action being founded on his possession, the statement as to his title was pleaded as matter of inducement only, and required no allegation of seisin in fee.

Secondly, for the same reason, that it was unnecessary to make profert of the indenture.

Thirdly, that the breach was sufficiently stated.

Fourthly, that the allegation as to the consent of the co-tenant was immaterial, and might be rejected as surplusage. *Thruscott v. Martin*, 18 Law J. Rep. (N.S.) Exch. 291; 3 Exch. Rep. 454.

A declaration stated that the defendant agreed that he and his wife should for three months perform as equestrians on the stage and in the ring in all entertainments which might be produced at A, or elsewhere, under the direction of the plaintiff, in such parts as the plaintiff should require, and should attend all calls and rehearsals; that

although the plaintiff had an establishment at P under his direction, for equestrian entertainments, and although the plaintiff required the defendant and his wife to join the plaintiff's establishment at P for the purpose of performing in entertainments to be produced there, and although a reasonable time for joining elapsed before the suit, yet the defendant and his wife did not join or perform in the entertainments to be produced at P, &c. On demurrer, the declaration was held good, inasmuch as it sufficiently appeared that the requisition by the plaintiff was to appear and perform as equestrians on the stage or in the ring.

Held, also, that as the writ appeared to have been issued within three months from the making of the contract, it was sufficiently shewn that reasonable time had elapsed after the notice, and within the three months.

Also, that the breach was good, shewing substantially an entire refusal to perform the contract. *Batty v. Melillo*, 19 Law J. Rep. (n.s.) C.P. 362.

Declaration alleging that defendant, as sheriff, contriving, &c., by and with the aid, counsel, and assistance of S, the other defendant, seized, &c.,—Held, to shew no cause of action against S. *Sedman v. Walker*, 1 Exch. Rep. 589.

In the general form of declaration given by the 8 & 9 Vict. c. 16. s. 26, in actions for calls on shares, the allegation that the defendant is the holder of shares, means that he was the holder at the time the call was made. *Belfast Rail. Co. v. Strange*, 1 Exch. Rep. 739.

In debt for calls, the declaration should follow the form given by the 8 & 9 Vict. c. 16. s. 25. *Newport, &c. Rail. Co. v. Hawes*, 3 Exch. Rep. 476.

(S) PLEAS IN PARTICULAR CASES.

(a) *In Bar.*

To a declaration upon a promissory note made by the defendant, and payable on demand to the plaintiffs as executors, the defendant pleaded that contemporaneously with the making of the note an agreement in writing was made between the defendant and other persons, whose names were stated, and the plaintiffs, whereby it was agreed that the note should not become due and payable until E S attained the age of twenty-five, or, in the event of his death before that age, until certain monies become divisible under the will of C S. The plea then alleged that E S was still living, and that he had not attained the age of twenty-five, and further that the plaintiffs accepted the note upon the terms and conditions of the said agreement, and upon no other. Replication, traversing the agreement *modo et formâ*, and verdict entered for the defendant upon that issue:—Held, upon writ of error, the Court below having given no decision on the point, that the plea was no bar to the right to recover upon the note, and that the plaintiff was entitled to judgment *non obstante veredicto*. *Webb v. Salmon*, and *Webb v. Spicer*, 19 Law J. Rep. (n.s.) Q.B. 34.

Plea, in debt, that after the accrual of the said debts by indenture of the 17th of May 1843, made between the defendant of the first part, J T and others of the second part, the plaintiff and divers other persons creditors of the defendant of the

third part, the parties thereto of the second and third parts did grant unto the defendant a licence to carry on his trade for their benefit for five years from the date of the said indenture, and it was agreed that if any of the parties thereto of the second and third parts should at any time during the continuance of the said licence, molest or interfere with the defendant, contrary to the meaning of the said indenture, the defendant should be for ever discharged from all debts then due to the creditor by whom such licence should be contravened, and from all actions in respect of the same, and that the said indenture might be pleaded in bar to such debts accordingly. Averment, that the plaintiff at the time of becoming a party to the said indenture was a creditor of the defendant, and became a party thereto in respect of the said debt and causes of action in the declaration mentioned, and that during the continuance of the licence he did molest the defendant contrary to the meaning of the said indenture, by commencing this suit against him:—Held, on demurrer, that suing the defendant was a molestation within the terms of the covenant in the indenture; that the covenant operated as a defeasance; and that the plea was a good plea in bar. *Gibbons v. Vouillon*, 19 Law J. Rep. (n.s.) C.P. 74; 8 Com. B. Rep. 483.

Covenant by the plaintiff as executor of P R on an indenture by the defendant and P R for the payment of 700l. to P R. Profert. Plea, setting out the will and probate granted by the Archbishop of Canterbury, that P R died in the parish of L; that he was resident there at the time of his death, and that he then had the indenture there; that the parish of L is a royal peculiar and out of the jurisdiction of the archbishop, whereby the proving of the will and granting of the probate of all the goods of P R in respect of the debt and cause of action, which is of the value of 5l., of right belonged to the Queen and not to the Archbishop; that the will was never proved before, nor were letters testamentary of P R ever granted by the Queen, and the letters testamentary so produced in court and granted by the archbishop are of no effect against the defendant in respect of the said debt and cause of action, and save as aforesaid by the granting of these letters testamentary the plaintiff never was executor of P R:—Held, on demurrer, first, that the plea was a plea in bar, and not in bar to the further maintenance of the action. Secondly, that the plea was good. *Easton v. Carter*, 19 Law J. Rep. (n.s.) Exch. 173; 5 Exch. Rep. 8.

(b) *Amounting to the General Issue.*

[*Littlechild v. Banks*, 5 Law J. Dig. 531; 7 Q.B. Rep. 739.]

[*Williams v. Vines*, 5 Law J. Dig. 528; 6 Q.B. Rep. 355.]

[*Newport v. Harley*, 5 Law J. Dig. 531; *nom. Newport v. Hardy*, 2 Dowl. & L.P.C. 921.]

In assumpsit, upon an agreement by the plaintiffs to supply and the defendant to receive certain bales of wool, and breach, that the defendant refused to receive them, the defendant pleaded, that the wool to have been delivered was to have been according to sample, and that the wool tendered was inferior to the sample:—Held, on special demurrer, that the plea did not amount to the general issue.

Sievekink v. Dutton, 15 Law J. Rep. (N.S.) C.P. 276; 4 Dowl. & L. P.C. 197; 3 Com. B. Rep. 331.

In assumpsit against a vendor for not delivering an abstract of title, the declaration set out certain conditions of sale, and among others, "that the vendor would deliver an abstract of title to the purchaser," and the breach stated that the defendant had not delivered to the plaintiff any abstract shewing such a good title as the plaintiff was entitled to require. Plea, that at the time of making the promise, it was agreed as part of the contract, that the defendant should deliver an abstract, commencing with a conveyance from B to M, dated 1843 only, and that the defendant should not be required to furnish any other abstract, and by no means to go into any previous title, and that the defendant did furnish such an abstract:—Held, bad on special demurrer, as amounting to the general issue. *Sharland v. Leifchild*, 16 Law J. Rep. (N.S.) C.P. 217; 5 Dowl. & L. P.C. 139; 4 Com. B. Rep. 529.

To an action for use and occupation of certain furnished rooms of the plaintiff, plea, that before the defendant held the said rooms under the plaintiff, he held the same under one A B, as tenant thereof to A B; that while the defendant was such tenant of A B, and before, &c.; the said A B assigned to the plaintiff all her estate in the said rooms, &c.; that the occupation in the declaration mentioned was a continuation of the tenancy under the said A B, and that the defendant paid to the said A B the money in the declaration mentioned, without any notice of the said assignment, nor did the defendant ever expressly promise the plaintiff to pay him the money in the declaration mentioned. Verification:—Held, that the words "nor did the defendant ever expressly promise" made the plea amount to the general issue; but that the plea, without those words, was good. *Cooke v. Moylon* or *Cook v. Moylan*, 16 Law J. Rep. (N.S.) Exch. 253; 1 Exch. Rep. 67; 5 Dowl. & L. P.C. 101.

An assault *ex vi termini* excludes consent; therefore, a plea of leave and licence to a declaration charging an assault is bad as amounting to the general issue. *Quære*—if it can be pleaded to an action for imprisonment. *Christopherson v. Bare*, 17 Law J. Rep. (N.S.) Q.B. 109; 11 Q.B. Rep. 473.

In an action for money had and received to the plaintiff's use, *non assumpsit* puts in issue both the receipt of the money and the existence of the facts which make it a receipt to the use of the plaintiff.

In such action the defendant pleaded, that the money claimed was paid to him and others, as members of a committee of management in a railway scheme, by way of deposits on shares allotted by them to the plaintiff, at his request, and that the plaintiff and the other shareholders agreed to form a partnership for carrying on the undertaking. That the plaintiff sought to recover his deposits, on the ground that the scheme had not been prosecuted for a time which he alleged to be unreasonable. That after the passing of the 9 & 10 Vict. c. 28. a meeting was duly held, at which it was resolved that the partnership should be dissolved, and the undertaking abandoned. That the affairs then became liable to be wound up as on the dissolution of a partnership by mutual consent. That the plaintiff's claim was part of the affairs to be wound up, and that they had not been wound up, nor had a

reasonable time for winding them up elapsed at the commencement of the suit:—On special demurrer, this plea was held bad, as amounting to the general issue. *Owen v. Challis*, 17 Law J. Rep. (N.S.) C.P. 266; 5 Dowl. & L. P.C. 802; 6 Com. B. Rep. 115.

A declaration stated that it was agreed between the plaintiffs and the defendant, that the plaintiffs should sell to the defendant 1,000 barrels of flour, to arrive at Liverpool by the *Hottinguer*, from New York; that should the vessel be lost before arriving at Liverpool the sale should be void. Averments, that the vessel was not lost, but did arrive at Liverpool from New York, having on board 1,000 barrels of flour. Breach, that the defendant did not accept the said flour. Plea, that the *Hottinguer* was one of a line of packet ships sailing from New York to Liverpool at fixed periods, published and known beforehand amongst merchants at Liverpool; that the *Hottinguer* was to have set sail from New York for Liverpool three weeks before the said agreement, and was, at the time of the agreement, expected to arrive at Liverpool within a week after; that it had been published and believed, amongst merchants at Liverpool, that the vessel was to arrive there in the course of the said voyage, which voyage was the voyage in this plea mentioned; that the plaintiffs had notice of the premises, and made the agreement with reference to the said voyage, and under the belief that the *Hottinguer* had sailed from New York; that the said vessel had not, at the time of the agreement, nor did she at any time set sail upon the said voyage in this plea mentioned, but that another vessel had been substituted for her, by reason whereof the defendant refused to accept and pay for the said flour:—Held, that the plea stated a different contract from that alleged in the declaration, and was therefore bad, as amounting to non assumpsit. *Mounsey v. Perrott*, 17 Law J. Rep. (N.S.) Exch. 281; 2 Exch. Rep. 522.

[See LIBEL—STATUTE.]

(c) Foreign Attachment.

A plea of foreign attachment, which stated the levying of the plaint against the plaintiff in the Lord Mayor's Court, before the commencement of the suit, but did not state that the *scire facias* to warn the defendant (the garnishee) was issued before the commencement of the suit,—Held, good.

A foreign attachment executed pending the action in a suit in the Lord Mayor's Court commenced previously, may be pleaded to the further maintenance of the action.

It is not necessary to aver in the plea, that a precept issued to the serjeant-at-mace to warn the defendant, the custom as stated not requiring any precept, and not being traversed. *Webb v. Hurrell*, 16 Law J. Rep. (N.S.) C.P. 187; 4 Dowl. & L. P.C. 324; 4 Com. B. Rep. 287.

(d) Possessory Plea to Assault and Imprisonment.

To trespass for assault and imprisonment the defendant pleaded secondly, to the assault, that he was possessed of a dwelling-house; that the plaintiff was making a noise and disturbance there; and that the defendant *mollior manus imposuit* to turn him out; fourthly, to the assault and imprisonment, that the defendant was possessed of a tavern or alehouse, and the plaintiff conducted himself in a

rude and quarrelsome manner in it, and assaulted the defendant and others, and afterwards and before, &c. remained standing in the street near the door of the house, using loud, menacing and disgusting language to the defendant and his family, who was within hearing, and by reason thereof many persons congregated about the house and made a riot and disturbance; and at the time when, &c. the plaintiff was causing persons to congregate in breach of the peace, whereupon the defendant, after requesting him to go, gave him in charge to a police officer.

To the second plea, the plaintiff replied that the house was a common alehouse, and that the plaintiff was lawfully drinking there, wherefore he refused to depart; and that the defendant of his own wrong committed the trespasses:—Held, on demurrer to this replication, that it was insufficient, as it must be taken to admit that the plaintiff was making a noise and disturbance, and was in that case no answer to the plea.

Held, also, on demurrer to the fourth plea, that it was good, as sufficiently shewing matter amounting to a breach of the peace by the plaintiff. *Webster v. Watts*, 17 Law J. Rep. (N.S.) Q.B. 73; 11 Q.B. Rep. 311.

(e) Judgment recovered.

To an action of debt, on simple contract, for 400*l.* the defendants pleaded as to 43*l.* 6*s.* 9*d.*, parcel, &c. payment; and as to the residue (356*l.* 13*s.* 3*d.*), that the plaintiffs impleaded the defendants for the said residue of the said cause of action in the declaration mentioned in an action on promises, and recovered 314*l.* 8*s.*, as well for their damages in the said action, and in respect whereof the plaintiffs had impleaded the defendants as aforesaid, as for their costs. Replication, that the residue of the said causes of action in the declaration mentioned were not the causes of action in the said plea mentioned in respect of which the judgment was recovered. This issue was found for the defendants. On writ of error, brought upon judgment given for the plaintiffs upon this issue *non obstante veredicto*, it was held (reversing the judgment of the Queen's Bench, 14 Law J. Rep. (N.S.) Q.B. 150; 9 Q.B. Rep. 759; 5 Law J. Dig. 236).—First, that after verdict, the plea must be taken to mean that plaintiffs had recovered a judgment in respect of *all* the damages which they sued for in the former action; *i.e.*, in respect of the same causes of action as constituted the residue of the causes of action declared upon, and that it amounted to an ordinary plea of judgment recovered.

Secondly, that the plea was good in substance, whether the meaning of it were that plaintiffs recovered as to part, and as to the residue it was found that no more was due, in which case the omission to plead the latter part of the judgment by way of estoppel would be mere ground of special demurrer; or whether the true construction of the plea be (as, *semble*, it is) that plaintiffs having once sued in assumpsit for the same debt, and having had the amount assessed and adjudicated on, cannot again sue for the same amount. *Stewart v. Todd*, 16 Law J. Rep. (N.S.) Q.B. 327; 9 Q.B. Rep. 767.

To an action for money received and on an account stated, the defendant pleaded that the plaintiff was indebted to him in 149*l.* 14*s.* 6*d.*, upon a

judgment recovered in the Exchequer, which he, the defendant, was ready to verify by the record, and in 43*l.* 12*s.* on a promissory note, and in 500*l.* for work and labour, money lent, &c., and which said several sums exceeded the debt and damages. The plea then offered to set off the debt and damages, and concluded with a verification. The plaintiff replied, denying that he was indebted, by reason that as to 149*l.* 14*s.* 6*d.* there was not any such record, with an offer to verify the same in such manner as the Court should direct, and by reason that as to the residue other than the said sum of 149*l.* 14*s.* 6*d.*, the plaintiff was not indebted to the defendant, concluding to the country:—*Semble*—that the plea and replication were ill. *Turnbull v. Pell*, 18 Law J. Rep. (N.S.) Exch. 45; 2 Exch. Rep. 793.

(f) No Consideration for Note.

To the first count of a declaration by the payee against the maker of a promissory note for 20*l.*, payable on demand, the defendant pleaded, secondly, "that the plaintiff was illegally possessed of the defendant's goods, and wrongfully detained the same without any right so to do, and refused to give them up without the defendant would make his promissory note for 20*l.* payable on demand, and deliver the same to the plaintiff, whereupon defendant, in order to gain possession of his goods, made and delivered the said note to the plaintiff for the possession aforesaid; and the defendant avers that except as hereinbefore mentioned, there never was any consideration for the making of the said note:—Held, (*dubitante Williams, J.*) that the plea was bad. The plea should have alleged the circumstances under which the detention took place, or should have alleged expressly that the plaintiff knew there was no colour or pretence for his detention of the goods.

To the same count the defendant pleaded, that at the time of the making of the said note there were certain accounts between the plaintiff and the defendant; that the plaintiff then alleged a balance was due to him on such accounts, and that the defendant, at the plaintiff's request, and on the faith of his said allegation, made and delivered the said note on account of the said balance alleged to be due to the plaintiff; that the said note was made on condition that the plaintiff should not demand payment thereof unless a balance was really due; and that, in fact, no balance was due as alleged by the plaintiff on the said accounts, nor was the defendant indebted to him in respect of the said accounts, and so the defendant says that, except as aforesaid, there never was any consideration for the said note, &c.:—Held, that the agreement not to enforce the note need not be alleged in the plea to be in writing; that such alleged agreement did not negative the absolute contract stated in the first count, and that the plea was good. *Kearns v. Durell*, 18 Law J. Rep. (N.S.) C.P. 28; 6 Com. B. Rep. 596.

(g) Colonial Law.

In an action of detinue for a deed the defendant pleaded that the plaintiff was indebted to him for business done as attorney for the plaintiff in New South Wales, and that the deed was delivered to him as such attorney, "by reason whereof" the

defendant was entitled to hold the same as a lien. Replication, that the defendant was not entitled to hold the deed as a lien:—Held, that the replication was bad, for traversing matter of law; that the plea was bad also, for not shewing that the lien claimed was not inconsistent with any charter, &c. as mentioned in the 9 Geo. 4. c. 83. s. 24, whereby the laws of England were extended to New South Wales. *Astley v. Fisher*, 18 Law J. Rep. (N.S.) C.P. 59; 6 Com. B. Rep. 572.

(h) *Payment of Money by Broker.*

Declaration on a bill of exchange by drawer against acceptor. Plea, to the whole declaration, that the defendant retained the plaintiff to act as his broker in the city of London, and as such broker to enter into contracts in the city of London for the defendant in the purchase of stock and shares, and to pay in and about completing such contracts and purchases certain monies; that in pursuance of such retainer, the plaintiff did, as such broker, in the city of London, enter into certain contracts for the purchase of shares, and did, by virtue of such retainer as such broker, and as incidental thereto, pay for the defendant in and about completing such contracts and purchases, certain monies; that the plaintiff was not at the time of the retainer and employment, and making such contracts and purchasing such shares, or paying such monies, a broker duly licensed within the city of London; and that the bill was accepted by the defendant and received by the plaintiff on account of money due from the defendant to the plaintiff, for his having as such broker entered into the contracts and paid such monies, &c.:—Held, ill, on general demurrer, the payment of money not being incidental to the character of a broker, and the plea being an answer only to so much of the plaintiff's demand as consisted of a remuneration for his services as broker. *Pidgeon v. Burslem*, 18 Law J. Rep. (N.S.) Exch. 193; 3 Exch. Rep. 465.

(i) *Acceptance in Satisfaction.*

A plea stated that it was agreed between the plaintiffs and the defendants that the defendants should do certain specified things, and that the action and the causes of action included in the same should be settled, satisfied, discharged, and terminated by the arrangement and agreement before mentioned. It then averred performance by the defendants of some of the things specified, and as to the others averred that the defendants were ready and willing to do them and to perform the agreement:—Held, bad, as not shewing whether the performance of the agreement or the agreement itself was relied on as the satisfaction of the causes of action; and also, that it was ambiguous whether the agreement by which the action was to be terminated was the same or different from the agreement stated in the plea.

Quare—Whether the averment that the agreement was accepted in satisfaction is involved in the allegation that it was agreed that the action should be settled, &c. by the agreement. *Flockton v. Hall*, 19 Law J. Rep. (N.S.) Q.B. 1.

In an action on a bill of exchange, drawn by W upon and accepted by the defendant, and by W indorsed to the plaintiff, the defendant pleaded that he

accepted the bill and delivered it to W as a security for a certain loan, and that certain scrip of the defendant was deposited with and received by W as a collateral security with the said bill for repayment of the said loan, and upon the terms that any sums which should be received by W, or any person to whom he might indorse the bill, and deliver the scrip, for or in respect of the scrip, should be taken to be in satisfaction *pro tanto* of the bill; that the plaintiff took the bill with notice of the agreement, and that while he held the bill upon the terms aforesaid, W delivered to the plaintiff, and the plaintiff received, the scrip, upon and subject to the terms aforesaid; that W indorsed the bill to the plaintiff after it became due, and that the plaintiff received it upon and subject to the same terms; that the plaintiff had received in respect of the scrip a sum equal to the amount of the bill and all damages, and that the said sum was thereupon accepted in full satisfaction and discharge of the causes of action. The plaintiff replied, that the scrip was not delivered to or received by W upon the terms alleged. The defendant gave in evidence a memorandum signed by W and dated the same day as the bill, stating that the defendant "has this day deposited with me 220 shares in the H Railway as a collateral security for the due payment of his acceptance:—Held, (*dubitante Wightman, J.*) that the evidence supported the plea. *Malpas v. Clements*, 19 Law J. Rep. (N.S.) Q.B. 435.

(T) REPLICATION.

[See INSOLVENT—DISCHARGE.]

(a) *Of Non est factum to Plea setting out Deed, but not on Oyer.*

Where a deed is pleaded according to its supposed legal effect, a plea or replication of *non est factum* (the deed not being set out on oyer), not only puts in issue the fact of its execution, but the construction of it as alleged in the previous pleading.

To an action on a promissory note made by the defendant he pleaded that the note was the joint and several note of the defendant and one C, and that the plaintiffs released C, "and thereby also released the defendant." The plaintiff replied *non est factum*. It appeared that in the deed of release there was a proviso that it should not operate to discharge any one jointly liable with C to the debt:—Held, first, that the legal operation of the deed was raised by the replication. Secondly, that the proviso qualified the release, and that it did not operate to discharge the defendant. *North v. Wakefield*, 18 Law J. Rep. (N.S.) Q.B. 214; 13 Q.B. Rep. 536.

(b) *De Injuria.*

[*Simons v. Lloyd*, 5 Law J. Dig. 536; 2 Dowl. & L. P.C. 981.]

De injuria is a good replication to a plea justifying under a custom.

To an action of replevin, the defendant pleaded a justification under a custom for the master forester of the forest or chase of D, in the name of the lord of the manor of the said forest or chase, to cause drifts to be made of all cattle found depasturing in the said forest and the uninclosed commons adjoining, and to drive such cattle to a certain pound

situate in the *locus in quo*, in order to ascertain whether any of the cattle were estrays, and whether the commoners had surcharged the forest and commons, and averred that the plaintiff's cattle were driven and taken by the defendant, on the occasion of a drift, made under the custom, and he was found to have surcharged. Replication (admitting the seisin of the lord of the manor) *de injuriâ absque residuo causæ*:—Held, that the replication was good.

Quære—if the plea was good. *Mortimer v. Moore*, 15 Law J. Rep. (N.S.) Q.B. 118; 8 Q.B. Rep. 294.

Assumpsit on a bill of exchange by indorsee against acceptor. Plea, that the bill was accepted for the accommodation of the drawer and without any consideration; and that, at the commencement of the suit, the plaintiff was the holder, without consideration. Replication, *de injuriâ*:—Held, good. *Laforest v. Wall*, 16 Law J. Rep. (N.S.) Q.B. 100; 9 Q.B. Rep. 599.

Where, in trespass for taking chattels, the defendant justified, under a heriot custom, by several pleas claiming heriots in respect of different tenements, and the plaintiff replied to all by one replication of *de injuriâ*:—*Semble*, that the replication was good. *Price v. Woodhouse*, 16 Law J. Rep. (N.S.) Exch. 41; 16 Mee. & W. 1; 4 Dowl. & L.P.C. 286.

De injuriâ is a good replication to a plea of the Tipping Act, 24 Geo. 2. c. 40. s. 12, pleaded to a declaration for goods sold and delivered. *Lansdale v. Clarke*, 16 Law J. Rep. (N.S.) Exch. 246; 1 Exch. Rep. 78; 5 Dowl. & L.P.C. 95.

Trespass for breaking and entering plaintiff's dwelling-house, locking, &c. the doors thereof, ejecting the plaintiff, and seizing and converting his goods. Plea, justifying the trespasses (except the ejecting) under a distress for rent, alleging an impounding in the dwelling-house, and that the defendant in order to a safe impounding, necessarily locked, &c. the doors of the dwelling-house; and a subsequent sale in satisfaction of the rent and costs of distress and sale. Replication, that the defendant, at &c., broke and entered the dwelling-house, and locked the doors, &c., of his own wrong, and for another and different purpose than the purpose in the plea mentioned, that is to say, for the purpose of ejecting, &c. the plaintiff from the dwelling-house, &c. Verification:—*Semble*—that the replication was bad, inasmuch as it raised an immaterial issue on the intention of the defendant in entering, instead of traversing the entry for the purpose of distraining, with a conclusion to the contrary.

Semble—that the plea was not bad for want of an averment of notice of distress (with the cause of such taking) according to the 2 Will. & Mary, sess. 1. c. 5. s. 2, nor for superfluously answering the conversion, that being matter of aggravation only.

But held, that the plea was bad for not negating the improper expulsion, and keeping out of possession, of the plaintiff, by shewing that the house, or that part of it which was locked up, was necessary, or the most fit and convenient place for impounding the distress. *Woods v. Durrant*, 16 Law J. Rep. (N.S.) Exch. 313; 16 Mee. & W. 149.

To a declaration against the maker of a promissory note, indorsed by W to the plaintiff, the defendant pleaded a set-off due to him from W before the indorsement to the plaintiff, and that W in order

to deprive the defendant of his set-off, fraudulently indorsed to the plaintiff, in order to enable the plaintiff to sue on the said note as agent of W, and that there was no consideration for the indorsement to the plaintiff, and that the plaintiff sued as agent of W according to the said fraud. Replication, *de injuriâ*:—Held good, as the substance of the plea was, that the indorsement to the plaintiff was fraudulent. *Tolhurst v. Nottley*, 17 Law J. Rep. (N.S.) Q.B. 97; 11 Q.B. Rep. 406.

Trover for hops. Plea, that before the plaintiff was possessed, M & Co. were possessed of the said hops as of their own property; that M & Co. lost the same, which came, by finding, into the possession of S B, who immediately lost possession of the same, and the same came, by finding, into the possession of T E, who immediately and just before the said time when, &c., sold and delivered the same to the plaintiff, whereupon the defendants as servants and by the command of M & Co. took the said hops, &c., which is the same conversion, &c. Replication, *de injuriâ*:—Held, that on the issue raised by *de injuriâ*, the plaintiff could give in evidence a valid sale of the hops by M & Co. to S B, through whom the plaintiff derived his title.

On motion for a new trial for misdirection by the Judge in telling the jury that if there was a valid sale to S B the plaintiff was entitled to recover,—Held, that the plea must be taken, after verdict, to import a continuing title in M & Co. down to the time of the conversion, which fact being material was put in issue by the replication *de injuriâ*, and so the evidence was admissible and the direction right; or, that the plea was immaterial for not containing such allegation; and in either case that the defendants were not entitled to a new trial. *Eyre v. Scovell*, 17 Law J. Rep. (N.S.) C.P. 132; 5 Dowl. & L.P.C. 516; 5 Com. B. Rep. 702.

To a plea in assumpsit for monies paid, that they were paid for differences on illegal time bargains, against the statute,—Held, that the replication *de injuriâ* was good. *Mortimer v. Gell*, 4 Com. B. Rep. 543.

A plea admitting a contract in fact, and seeking to avoid it on the ground of illegality or fraud, is a plea in excuse, and may be traversed by replication *de injuriâ*. *Bennett v. Bull*, 1 Exch. Rep. 593.

The general traverse *de injuriâ* can be replied to those pleas only which shew that the plaintiff had not at any time a cause of action against the defendant. *Caterall v. Lees*, 8 Com. B. Rep. 113.

[See LANDLORD AND TENANT.]

(U) NEW ASSIGNMENT.

To trover for ten barges, ten chains and ten pieces of timber, the defendant pleaded generally, that the barges tied and fastened by the chains and timber obstructed the navigation of the Thames, wherefore he removed them. The plaintiff replied *de injuriâ*, and also new assigned that he brought his action for five pieces of timber other than and different from the pieces of timber in the plea mentioned, which the defendant converted, for another and different cause than the cause in the fifth plea mentioned, in manner and form as the plaintiff has declared against the defendant:—Held, that the replication was not bad for duplicity or as enlarg-

ing or departing from the declaration; and was well pleaded. *Page v. Hatchett*, 15 Law J. Rep. (n.s.) Q.B. 68; 8 Q.B. Rep. 187.

A declaration in trespass alleged, that the defendant, on a certain day, assaulted the plaintiff, and then seized and shook him, and struck him many blows. Second plea, a justification in defence of the possession of the defendant's close, which the plaintiff with a strong hand attempted forcibly to enter. Third plea, stating, that the defendant was possessed of a cow, then being in a certain close; that the plaintiff, against the will of the defendant, attempted to drive away the cow from the close and to dispossess the defendant of her, and would forcibly and in breach of the peace have driven away and dispossessed the defendant of her, wherefore, &c., justifying the trespass in defence of the possession of the cow. Replication, *de injuria*, and new assignment, that the plaintiff issued his writ, &c., not only for the trespasses in the pleas mentioned, but also for that the defendant, on other and different occasions, and with more force than necessary, seized and shook the plaintiff:—Held, on special demurrer, that the replication and new assignment were bad for duplicity, and that upon the declaration the plaintiff was confined to trespasses on one occasion.

Held, also, that it was unnecessary to allege in the pleas a request to the plaintiff to desist, before resisting with force.

Held, also, that having pleaded over, the plaintiff could not object that the third plea did not shew to whom the close therein mentioned belonged. *Poldinhorn v. Wright*, 15 Law J. Rep. (n.s.) Q.B. 70; 8 Q.B. Rep. 197.

Trespass for breaking and entering the plaintiff's close, and cutting down the rails of the plaintiff there standing, to wit, &c. Plea, a right of way across the said close, and because the said rails in the declaration mentioned were, at the several times when, &c. standing in and across the said highway, &c., a justification of their removal, which are the same supposed trespasses, &c. Replication, that the said rails were not then standing in or across the way. Conclusion to the country, and issue thereon:—Held, that the defendant maintained the issue by proving that some of the rails cut down were standing on a highway, and that on these pleadings the plaintiff could not recover in respect of the rails which were not on the highway; that in order to do so, he should have new assigned. *Bracegirdle v. Peacock*, 15 Law J. Rep. (n.s.) Q.B. 73; 8 Q.B. Rep. 174.

Where the declaration was in the common form, for goods sold and delivered, and on an account stated, and the defendant pleaded that, by a certain deed (of which profert was made), the plaintiff released the defendant, to which the plaintiff replied *non est factum*,—Held, that, under the above issue, the plaintiff was not entitled to shew that the cause of action accrued subsequently to the date of the release, but should have made it the subject of a new assignment. *Jubb v. Ellis*, 15 Law J. Rep. (n.s.) Q.B. 94; 3 Dowl. & L.P.C. 364.

The declaration was against two defendants, who severed in their pleadings; the new assignment was against one only, but was not specially demurred to as being a departure from the declaration on that

ground:—Held, that such an objection could only be taken upon special demurrer.

The plea alleged under a *videlicet* 4*l.* 16*s.* to be the rent in arrear. The new assignment alleged, also under a *videlicet*, a payment of 4*l.* 15*s.*, which was averred to be a sufficient sum to discharge arrears and costs, and to have been received in full satisfaction, &c.:—Held, a sufficient averment of the payment of the rent in arrear and costs. *West v. Nibbs*, 17 Law J. Rep. (n.s.) C.P. 150; 4 Com. B. Rep. 172.

To a declaration alleging that the defendant broke and entered a certain shop, rooms, and apartments of the plaintiff, the defendant pleaded that by the leave and licence of the plaintiff he broke and entered the said shop in the declaration mentioned, "the said shop, rooms and apartments in the declaration mentioned being one and the same shop, and not different rooms and apartments," and stayed only a reasonable time. To this the plaintiff replied, that the defendant of his own wrong, &c. committed the trespasses in the plea mentioned, and further assigned that the action was not only for the trespasses in the plea mentioned, but also for that the defendant continued in the shop a much longer time than in the plea mentioned; and also at the same time when, &c. broke and entered two other rooms and apartments behind the said shop, to wit, &c., being other rooms and apartments in the declaration mentioned and other and different from the said shop, and there stayed, &c., which were other and different trespasses from those in the plea mentioned:—Held, that such new assignment was proper, and that a special demurrer thereto on the ground that it charged a fresh trespass, and was a departure from the declaration, was frivolous. *Harvey v. Lankester*, 18 Law J. Rep. (n.s.) Q.B. 299.

The expulsion of a person from his dwelling-house is an injury to the dwelling-house.

Declaration in trespass for breaking the plaintiff's dwelling-house, expelling the plaintiff, and taking his goods. Pleas of *liberum tenementum* were pleaded as to the trespasses in and to the dwelling-house. The plaintiff replied, denying the pleas, and new assigning the expulsion:—Held, on demurrer, that the new assignment was bad, as the pleas justified the expulsion as well as the breaking of the house. *Meriton v. Coombes*, 19 Law J. Rep. (n.s.) C.P. 336.

In case for obstructing the plaintiff's right to take clay, the declaration averred the plaintiff's right to get and work the clay in a certain piece of land, and that defendant built and erected a wall and fence in and upon the said land, and thereby obstructed the plaintiff in the enjoyment of his right. Plea—*Liberum tenementum*, and that the wall and fence were built and erected upon the edge and boundary of the said piece of land; and that the clay in and upon, and under the piece of land wherein the wall and fence were built and erected, was worked out and exhausted. Replication, that the clay was not worked out and exhausted *modo et forma*, and a new assignment that the piece of land in which the plaintiff had such right, abutted on the east side on the plaintiff's close, and that the said wall and fence were built and erected on the edge and boundary to the east side, and upon and

along the whole of the east side, and that his right was obstructed in other parts than where the wall and fence were built and erected:—Held, on special demurrer, that the new assignment was good, and upon motion for judgment *non obstante veredicto* that the plea was bad. *Grove v. Withers*, 19 Law J. Rep. (N.S.) Exch. 188; 4 Exch. Rep. 875.

PLEADING, IN EQUITY.

(A) BILL.

- (a) *Statements and Charges in.*
- (b) *Multifariousness.*
- (c) *Amending.*
- (d) *Of Revisor.*
- (e) *Supplemental.*

(B) DEMURRER.

- (a) *For Want of Equity.*
- (b) *For other Causes.*

(C) DISCLAIMER.

(D) ANSWER.

(E) PLEA.

(a) BILL.

(a) *Statements and Charges in.*

If the will of a testator is stated to have been proved by A his executor in the Prerogative Court, and the will of A to have been proved by B his executor in the proper ecclesiastical court, *non constat* that B is the personal representative of the original testator. *Jossaume v. Abbot*, 15 Sim. 127.

The plaintiff, a solicitor, being the projector of a railway, took upon himself the expenses of preliminary inspections and surveys, and also spent much time and labour in maturing the necessary plans and prospectuses. Upon the directors being appointed, the plaintiff entered into an agreement with them for the sale of all his interest in the undertaking, in consideration of 1,000 shares, upon which the deposit should be considered to be paid, and also a sum of 812*l*. The plaintiff filed a bill against the directors for specific performance of this agreement; that scrip certificates for the shares might be delivered to him, and that he might be declared entitled to a lien upon the funds of the company for the amount. The defendants demurred, on the ground, that the bill did not allege that they had any scrip certificates in their hands, and that they had no power to allot shares with the deposit paid up, and also for want of parties, on the ground that all the shareholders ought to have been parties. The demurrer was overruled by the Court below, but allowed on appeal upon the first-mentioned ground; and leave to amend refused. *Colombine v. Chichester*, 15 Law J. Rep. (N.S.) Chanc. 408; 2 Ph. 27.

Bill for administration of an estate by some of the *cestuis que trust* against the trustee and one J G, charged that J G had alleged that the plaintiffs had contracted to sell him real estate, and that he had given notice of his claim to the trustees, but the plaintiffs charged that they had not entered into any agreement to sell to J G, and if they had, it had been abandoned and waived by J G, and that

he had no charge, interest, or claim on the estate:—Held, that the allegations against J G were insufficient, and his demurrer was allowed. *Hodgson v. Espinasse*, 10 Beav. 473.

The equity of a case may be stated in the charging part of the bill. A charge to the contrary of a defendant's pretence, is a sufficient averment of the contrary. A general allegation of facts, shewing the liability of a defendant to account, is not limited by claims for a more limited account, although frequently repeated in the bill. *The Mayor, &c. of Rochester v. Lee*, 15 Law J. Rep. (N.S.) Chanc. 97.

A bill filed against drainage commissioners under a local act, complained of a misapplication of the funds, but neither treated the commissioners collectively as a corporation, nor separately as individuals, each answerable for himself, but partly in one character, and partly in the other; and the charge most relied on of applying the monies received to their own purposes was not so stated as to make it appear whether all or which of the defendants was sought to be affected. A general demurrer on the ground of uncertainty was allowed. *Armistead v. Durham*, 11 Beav. 422.

A bill was filed by two shareholders in a railway company, on behalf of themselves and all the other shareholders, except the defendants, against the committee of management and provisional committee, praying an account of the assets received by them, and that the defendants might be decreed to pay up the deposits on the shares allotted to them. The plaintiffs alleged that they were induced to take shares upon the faith of the defendants having joined the undertaking, and upon the prospectuses issued by them. Two of the defendants demurred on the ground that they had taken no share in the management of the affairs of the company, but had only lent their names as provisional committeemen, and that they had not signed the parliamentary contract, and had never taken up their shares:—Held, that the bill did not sufficiently allege that the two demurring defendants had agreed to take shares; or that the plaintiffs had been induced to take their shares upon the faith of those defendants having joined the undertaking. Demurrer allowed. *Bell v. the Earl of Mexborough*, 15 Law J. Rep. (N.S.) Chanc. 453; affirmed 17 Law J. Rep. (N.S.) Chanc. 296.

The plaintiff, being the holder of 100 certificates for shares in the Royal North of Spain Railway Company, filed a bill, on behalf of himself and all the other shareholders in the company, against the directors, charging them with fraud and misconduct, and praying that they might be decreed to refund a sum of 20,000*l*., said to have been improperly paid by them, and that they might render an account of the affairs of the company:—Held, upon demurrer, that the charges in the bill amounted to a direct allegation that the project was a fraud, and that the undertaking was utterly impracticable, and that the defendants knew it to be so; that these statements went to prove the company to be a bubble speculation, and that the bill could not therefore be sustained. *Harvey v. Collett*, 15 Law J. Rep. (N.S.) Chanc. 376; 15 Sim. 332.

The proper form of a bill by an equitable mortgagee, being also a specialty creditor, who seeks

to charge the real assets of a testator generally, as well as to enforce his security, is on behalf of the plaintiff, and all other creditors of the testator, and the Court permitted a plaintiff at the hearing to amend his bill accordingly; and with reference to the Statute of Limitations,—Held, that such bill dates from the filing of the original bill, and not from the day of the amendment. *Blair v. Ormond*, 1 De Gex & S. 428.

A bill was determined to be defective by reason of its merely containing an allegation, that a defendant was the representative of a firm: that not being sufficient to admit proof of circumstances which might have made that party not only a representative, but actually the party carrying on the business. *Schneider v. Lizardi*, 15 Law J. Rep. (N.S.) Chanc. 435; 9 Beav. 461.

A bill seeking to restrain an action at law, and not shewing any grounds on which the action could be sustained,—Held, to be demurrable. *Derbyshire, Staffordshire, &c. Rail. Co. v. Serrell*, 2 De Gex & S. 353.

A subscriber to a projected railway company by his bill, filed on behalf of himself and all other shareholders, except the defendants, alleged that the promoters (who were defendants) together with the provisional committee (also defendants) issued a prospectus representing the capital as 450,000*l.*, in 22,500 shares; on the faith of which the plaintiff and many others paid deposits and signed the deed; that the provisional committee never superintended the administration of the affairs of the company, but that with their sanction certain of their body acted as directors, and exercised the whole direction of the company, and that the other provisional committee-men sanctioned all their acts without any inquiry. The bill alleged acts of misfeasance by the directors, and in particular that they did not allot the shares, although they had more than sufficient applications for them, and prayed for a dissolution, accounts, payment of liabilities of the company, and distribution of the surplus among the subscribers. Some of the provisional committee who were alleged to have applied for shares, but had never paid any deposit or accepted them, demurred:—Held, allowing the demurrer, that the charges were not sufficiently distinct or certain.

A defendant, stated in the bill to be a shareholder, demurred, on the ground that the case stated by the bill entitled the shareholders to a return of the whole deposit, and that the plaintiff could not represent absent shareholders for the purpose of seeking a less extensive remedy. Demurrer overruled. *Sibson v. Edgworth*, 2 De Gex & S. 73.

An allegation in a bill that "A B duly made her last will and testament" is sufficient, without stating the signature and attestation. *Hyde v. Edwards*, 12 Beav. 160.

A bill by the assignee of a lease for specific performance of an agreement to accept an assignment set forth the lessee's covenant not to assign without licence, but did not state that the lease contained any proviso for re-entry on breach or non-performance of the covenant. A demurrer on the ground that the bill did not aver that the licence would be obtained was overruled. *Smith v. Capron*, 18 Law J. Rep. (N.S.) Chanc. 135; 7 Hare, 185.

(b) Multifariousness.

[See COMPANY, (A).]

After judgment and execution obtained by a creditor against his debtor, the debtor becomes bankrupt and his goods are seized by the messenger. The creditor then brings trover against the assignees and trespass against the messenger. Upon a bill filed by the assignees against the creditor to enforce a substantial right in equity in respect of the bankrupt's goods, it is not an objection for multifariousness that the bill prays an injunction to restrain both actions. Effect, as between co-defendants, of the 23rd Order of August, 1841. *Boyd v. Moyle*, 2 Coll. C.C. 316.

A bill stated numerous transactions between the plaintiff and C; and that the plaintiff had given him a bill of exchange for 1,500*l.* without consideration, which he had indorsed to N, who held it merely as a trustee, and had recently commenced an action upon it. The bill prayed for an injunction and for an account. A demurrer by N for want of equity and for multifariousness, was overruled. *Knill v. Chadwick*, 16 Law J. Rep. (N.S.) Chanc. 410.

The bill stated that a railway company had been formed, and one of the creditors of the company, after being paid his debt by the managing committee, had brought an action for payment of the said debt, at the instigation of the committee against the plaintiff, who was a shareholder in the company. The bill was filed against the creditor and the members of the committee for an injunction to restrain the action, and that the committee might be restrained from distributing or paying away the assets in their hands, except in discharge of the liabilities of the company. A demurrer, for want of equity and multifariousness, was overruled:—Held, also, that the other shareholders need not be made parties to the suit. *Lewis v. Billing*, 15 Law J. Rep. (N.S.) Chanc. 425.

(c) Amending.

The plaintiff filed a bill for discovery, and for an injunction to restrain the defendant setting up any outstanding term; by the answer, it appeared that there was an outstanding term which had been assigned to secure a mortgage; the plaintiff then amended his bill, praying liberty to redeem the mortgaged premises. Upon motion to dismiss the original bill, on the ground that the amended bill set up a different case, it was held that the object was substantially the same in both bills, but the mode of obtaining it was varied. The motion was refused, with costs. *Abram v. Ward*, 15 Law J. Rep. (N.S.) Chanc. 29.

Where the defendant raised a new issue by his answer, and the plaintiff proceeded to the hearing without amending his bill, the Court, under the circumstances of the case, directed the plaintiff to amend his bill by charging the new matter insisted on by the answer. *Watts v. Hyde*, 2 Coll. C.C. 368.

An order made at a hearing that the plaintiff should be at liberty to amend by adding proper parties with apt words to charge them or to shew that others were not necessary parties, or to file a supplemental bill, does not entitle the plaintiff to introduce by amendment any charge against the

original defendants which is not necessary to explain the amendment. *Gibson v. Ingo*, 5 Hare, 156.

Under an order at the hearing, giving leave to amend, by adding parties, with apt words to charge them, the plaintiff will not be allowed by amendment to introduce charges raising a new issue as between himself and the original defendants; though such charges affect merely to state a conclusion of law. *Gibson v. Ingo*, 16 Law J. Rep. (n.s.) Chanc. 4.

Under an order made at the hearing giving the plaintiff leave to amend his bill by adding proper parties with apt words to charge them, or by stating reasons to shew why particular persons should not be parties, or to file a supplemental bill, the plaintiff may amend by stating a grant of letters of administration to the estate of a deceased person to one who is already a defendant in the suit, and by expunging a statement which the bill originally contained, that the deceased person died insolvent, and had no personal representative. *Bateman v. Margerison*, 6 Hare, 502.

The amendment of the bill by adding the personal representative as a party, and introducing the disclaimer of such personal representative upon the record, will not sustain the suit of the heir-at-law. *Griffith v. Ricketts*, 7 Hare, 305.

An order made at the hearing of a cause, giving liberty to the plaintiff to amend, by introducing an equity which was not set up in the bill, but appeared by the answer, was discharged, upon appeal. *Watts v. Hyde*, 17 Law J. Rep. (n.s.) Chanc. 39; 2 Ph. 406.

(d) Of Revivor.

The plaintiff brought ejectment against a party in possession, and afterwards filed a bill of discovery in aid of the action and to restrain the defendant from setting up outstanding terms. The suit abated by the death of the defendant, and the benefit of the action became lost. After twenty years' adverse possession, the plaintiff having filed a bill of revivor, a demurrer was allowed, as no effectual proceedings could be taken at law, and the discovery and relief sought would be useless. *Bampton v. Birchall*, 11 Beav. 38.

(e) Supplemental.

A testator gave his personal estate and the produce of the sale of his real estate in trust for such of his children as should attain twenty-one, and if all should die under twenty-one, in trust for the persons who under the Statute of Distributions would be entitled thereto. The children, all of whom were infants, filed a bill against the trustees to have the trusts of the will executed; and after decree, they filed a supplemental bill against the testator's widow and next-of-kin, praying to have the benefit of the decree and other proceedings in the original suit against them:—Held, that the bill should have been an original one. *Roberts v. Roberts*, 16 Sim. 867.

A bill being filed by shareholders of a company against directors for an account, and one of the directors becoming bankrupt a supplemental bill was filed against the defendant, alleging that the plaintiff had discovered, since filing the original bill, that the said director, before his bankruptcy, had paid

or secured to the defendant the amount for which he was liable to the company. Demurrer to the supplemental bill allowed, the case for relief existing prior to filing the original bill, and the plaintiff being entitled to that relief, if at all, prior to the bankruptcy. *Deeks v. Walker*, 19 Law J. Rep. (n.s.) Chanc. 274.

(B) DEMURRER.

[See (A) BILL, (a) *Statements and Charges in*. See also COMPANY—SHIP AND SHIPPING, Register and Registry Act—PARTIES TO SUITS.]

(a) For Want of Equity.

A client entered into an agreement with a solicitor, in Ireland, that in consideration of his procuring sureties in three administration bonds, to enable the client to receive some money out of the Court of Chancery in England, the sureties (of whom the solicitor was one) should retain a sufficient portion of the money in their hands for six years, as an indemnity, and that the solicitor should receive 10l. per cent. on the fund, in addition to the law charges. A bill being filed to enforce the agreement, a demurrer for want of equity was allowed. *Strange v. Brennan*, 15 Law J. Rep. (n.s.) Chanc. 389; 15 Sim. 346.

One of the shareholders in a railway company which had been abandoned filed a bill on behalf of himself and all other shareholders, except the managing committee (the defendants) praying an account of monies received, and expenses properly incurred on account of the company; that the plaintiff and other shareholders might be declared liable to contribute to such expenses in proportion to the number of their shares, or in such other proportion as the Court should think just; and that such proportion might be deducted out of the deposits paid, and the residue returned to them; and that the surplus of the monies in the defendants' hands, after discharging the debts and liabilities of the company, might be applied in aid of the objects of the suit, as the Court should direct. A demurrer to the bill for want of equity and want of parties was overruled. *Cooper v. Webb*, 15 Sim. 454.

To a bill by assignees of a bankrupt against a creditor, impeaching the amount of a debt for which the creditor had obtained judgment, and had taken the bankrupt's goods in execution, and praying an account of the dealings between the bankrupt and the creditor, a general demurrer for want of equity was allowed.

Semble—it is a good ground of equitable relief, that when the action on which the judgment was obtained was commenced, the bankrupt was in pecuniary difficulties, and was pressed for payment by several creditors, and was unable therefore to attend to the defence of the action. *Boyd v. Moyle*, 2 Coll. C.C. 316.

Bill by certain members of a lodge of the association called Odd Fellows, against the chief officers of the association, the grand master and secretary of the district, some members of the lodge who had differed from the plaintiffs, and the lodge trustees, who had in their hands a sum of money arising from the subscriptions; stating that they, the plaintiffs, had been improperly excluded from the

society, and praying for a declaration that such exclusion was void, and for a determination as to their rights to the money in the hands of the trustees, was demurred to for want of equity. Demurrer allowed. *Clough v. Ratcliffe*, 16 Law J. Rep. (N.S.) Chanc. 476; 1 De Gex & S. 164.

The plaintiff by his bill stated, that he had purchased the entirety of an estate, but that the defendants having afterwards given him reason for believing that they were entitled to a moiety, and having promised to produce the original instruments evidencing their title, the plaintiff was induced to join with the defendants in making a lease of the estate, but that the defendants now refused to produce such evidence. The bill prayed discovery and partition. Demurrer for want of equity overruled, but without costs. *Potter v. Waller*, 16 Law J. Rep. (N.S.) Chanc. 480.

A is in possession of an estate, to the entirety of which B makes claim, but without disclosing the grounds of his title. A, treating B's claim as a nullity, expends money in improvements, of which B is cognizant, but gives no further notice of his claim during the progress of the expenditure. It appears that B's title went only to a moiety, and that he knew this when he claimed the entirety. B afterwards recovers the premises in ejectment. Upon bill by A to restrain the proceedings in the ejectment,—Held, on general demurrer, that as A, previously to his expenditure, had distinct notice of a claim by B, he had no equity, as against B to be reimbursed his expenditure.

A, in possession of an estate claimed by B, granted a building lease to C, and covenanted to indemnify C against eviction. C expends money in building and is afterwards evicted. Whether the interest of A is sufficient to support a bill by him against B to be reimbursed the expenditure on the ground of B's acquiescence—*quære*.

The plaintiff in ejectment leads his adversary to suppose that he intends to try the action on the merits, but, in surprise of the defendant, obtains a verdict on the trial by matter of estoppel. The defendant at law has no equity to set aside the verdict, if it raises no impediment to the defendant's again trying the action at law. *Clare Hall v. Harding*, 17 Law J. Rep. (N.S.) Chanc. 301; 6 Hare, 273.

A party at New Brunswick contracted to supply a quantity of railway sleepers to a person in England; but when they were sent the purchaser refused to accept them. The seller then filed an affidavit of debt against him in the Court of Bankruptcy, for the value of them, according to the prices fixed by the contract, with the view of causing a fiat in bankruptcy to issue against him. The purchaser filed a bill against him, alleging that the sleepers were of an inferior quality and unsaleable, and that nothing was due from him to the defendant. A general demurrer for want of equity, on the ground that the Court of Chancery had no jurisdiction, was allowed. *Pim v. Wilson*, 17 Law J. Rep. (N.S.) Chanc. 428.

A banking firm, in which A was a partner, brought an action to recover a debt from another co-partnership in which A was also a partner. The latter co-partnership thereupon filed a bill to have their accounts taken, and for an injunction to restrain the action. A demurrer to the bill for want of

equity was overruled. *Rheam v. Smith*, 18 Law J. Rep. (N.S.) Chanc. 97.

(b) For other Causes.

To a vendor's bill for specific performance of a contract to purchase shares in mines, insisting that the plaintiff was not bound to give other evidence of his title to the shares than attested extracts from the cost-books or registers of the mines, and that the defendant had refused to accept such evidence—but not alleging that the plaintiff was unable to give other evidence of his title, the defendant demurred:—Held, that as the plaintiff was not precluded from giving other evidence of his title if necessary, the demurrer must be overruled. *Curling v. Flight*, 5 Hare, 242.

Demurrer to a bill overruled, there being a fair point for decision, and a probability of the plaintiff ultimately establishing his equity. *Norman v. Stiby*, 9 Beav. 560.

Demurrer allowed to a bill filed without leave for relief inconsistent with the relief obtained by the same plaintiff in a former suit. *Bainbrigge v. Baddeley*, 9 Beav. 538.

Demurrer to a bill filed by the representatives of a trustee defendant, who had died after decree, and whose interest survived to a co-defendant, allowed with costs. All the other defendants to the original bill were held to be necessary parties. *Buchanan v. Malins*, 11 Beav. 52.

A shareholder in an incorporated railway company filed a bill on behalf of himself and other shareholders to restrain the directors from issuing preference shares, on the ground that they were about to be issued contrary to the company's acts and for a purpose not authorized. The bill, filed September 22nd, stated that the plaintiff on September 17th became aware of resolutions passed on the 12th of September under which preference shares were to be offered to the shareholders on the 23rd of September, but it did not shew otherwise that the plaintiff had no means of procuring a suit to be instituted in the name of the corporation:—Held, that demurrers by the corporation and directors could not be overruled whether the proceedings sought to be restrained were legal or not.

The bill, being amended, stated that a majority of the shareholders supported the directors and refused to authorize the plaintiff to institute a suit in the name of the company. The demurrer was still allowed.

The corporation and directors having demurred separately, the Court refused to give costs of more than one demurrer. *Edwards v. Shrewsbury and Birmingham Rail. Co.*, 2 De Gex & S. 537.

The plaintiff granted a licence to the defendant to use two patents, upon payment of certain royalties. The plaintiff afterwards put in a disclaimer as to part of his patent; the defendant refused to continue paying the royalties, on the ground that the licence was void. The bill prayed an account of royalties under the licence; and in case the defendant should dispute the plaintiff's right to payment by reason of the invalidity of the patent or otherwise, then that the defendant might be restrained from continuing to manufacture articles the subject of the patent:—Held, upon demurrer, that if the licence were void, and the defendants

were not bound to account, they ought to be restrained from acting without the authority of the plaintiff. Demurrer overruled. *Huddan v. Smith*, 17 Law J. Rep. (N.S.) Chanc. 43; 16 Sim. 42.

To a bill filed to set aside a deed alleged by the plaintiff to have been executed for an immoral consideration, and in expectation of future illegal cohabitation, a demurrer was put in on the ground that the plaintiff being a party to the immorality could not claim relief when that relief was founded on his own turpitude:—Held, that as no immoral cohabitation had, in fact, taken place in pursuance of the alleged expectation, the demurrer must be overruled. *Sismey v. Eley*, 18 Law J. Rep. (N.S.) Chanc. 350; 17 Sim. 1.

A railway contractor on the completion of the works sued the company for the balance. The action and all matters in difference were referred to an arbitrator with full powers, and the Court was empowered to refer back the award from time to time. The award was made in July 1848, and in January 1850 the company filed a bill against the contractor alleging fraud in the performance of the works practised in collusion with the engineer and discovered since the award, and seeking to set aside the award and have the accounts taken. A general demurrer was allowed on the ground that the matter was already before another jurisdiction competent to reconsider the matter and decide all questions. *Londonderry and Enniskillen Rail. Co. v. Leishman*, 12 Beav. 423.

(C) DISCLAIMER.

A bill was filed to set aside a deed of 1809, on the ground that the plaintiff (the grantor) was of unsound mind. The plaintiff was found by inquisition to have been lunatic without lucid intervals from 1796. The defendants alleged that by deed of 1805 the lunatic had settled the estate upon himself and wife for their lives, and for their children in remainder. The children were made parties to the suit, and disclaimed, and offered to convey any interest they might have as the Court should direct:—Held, that the disclaimer and submission did not re-invest in the lunatic the interest which he would have had if the deed of 1805 had not existed, but the Court confined the decree to this reserved interest without prejudice to the rights of the children. *Price v. Berrington*, 7 Hare, 394.

(D) ANSWER.

Where the interrogatory in a bill has reference to particular circumstances, it is not enough for the defendant to answer generally; and in a bill seeking an account of receipts and payments, where the defendant was interrogated whether he did not in fact receive, and whether or not on behalf of the plaintiff, several or some and which of the sums therein mentioned from the several or some and which of the persons at the several or some and which of the times thereafter mentioned, viz., on the day of March 1837, or at some other stated time, from Sir R P J, the sum of 100*l.*, &c. or how otherwise, and from whom and when and on whose behalf, it is not a sufficient answer to state a denial of the defendant that he received on the plaintiff's behalf the several or any or any one of the sums from the several or any or any one of the persons at the

several or any or any one of the times mentioned, and in particular that he received, in the month of March 1837, or at any other time before or during the period to which the account referred to in the bill extended, on the plaintiff's behalf, from Sir R P J or any other person or persons, the sum of 300*l.* or any other sum, save as by the said account appeared, &c., or that he received the sums mentioned in the bill or any or any one of them from the persons in the bill mentioned, or any or any one of them, &c. The plaintiff is entitled to know whether the sums mentioned in the bill were received by the defendant, coupled with the statement whether they were received by the defendant on the plaintiff's behalf. *Jodrell v. Slaney*, 16 Law J. Rep. (N.S.) Chanc. 195; 10 Beav. 225.

A defendant may state in his answer and take issue upon matters which happened since the bill was filed; but the Court will not deal with the subject of the suit by interlocutory order founded on matters which occur after the answer has been filed, and are not brought forward by amendment, by supplemental bill or by supplemental answer. *Stamps v. Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 7 Hare, 268.

Quære—If a bill is not wholly demurrable, and the defendant answers it, he must answer fully. *Gatland v. Tanner*, 15 Sim. 567.

An interrogatory asked, whether the defendant had not had communication with A B and C D and other persons. The answer admitted communications with A B, but denied any with any other persons, omitting the name of C D:—Held, that the answer was insufficient. *The Duke of Brunswick v. the Duke of Cambridge*, 12 Beav. 281.

The bill alleged that the defendant had entered into an agreement for the purchase of a house on certain terms; and that the agreement was made out by the letters after mentioned, and that such letters were a sufficient memorandum of agreement signed by the defendant. The defendant, by his answer, denied that the agreement in the bill mentioned, or any agreement, had been made out by the said letters; and that the letters did not amount to an agreement; and insisted that no binding agreement had been entered into by him:—Held, that the defendant had not by his answer claimed the benefit of the Statute of Frauds, and was not entitled to avail himself of it. *Skinner v. M'Douall*, 17 Law J. Rep. (N.S.) Chanc. 347; 2 De Gex & S. 265.

Necessity of infants and Attorney General answering specially. *Lane v. Hardwicke*, 9 Beav. 148.

If a defendant submits to answer a bill which is not demurrable, he must answer it fully, notwithstanding that he denies the plaintiff's title, and sets up an adverse title himself. *Dott v. Hoyer*, 15 Sim. 372.

If a defendant puts in an answer to an interrogatory which is acquiesced in by the plaintiff, and the bill is afterwards amended, leaving the interrogatory and the corresponding statement unchanged, but varying an antecedent which alters the meaning of such statement, the plaintiff is not entitled to a new answer to such interrogatory unless he specially requires it; but a defendant who acquiesces in the new meaning of the statement by professing to answer it, must do so fully.

An answer may be verbally full, but technically insufficient, as where it sets up ignorance of facts of which the defendant had the means of information.

The answer of persons engaged in working a mine, stating that they could not as to their belief or otherwise set forth the mode of working, held insufficient, as it was assumed that they might have derived such information from workmen under their controul. *Attorney General v. Rees*, 12 Beav. 50.

A defendant who became bankrupt after the bill was filed, put in an answer (without having obtained any order for further time) merely stating the bankruptcy, and not purporting to answer any interrogatory in the bill:—Held, not a case for taking the answer off the file as evasive. *White v. Howard*, 2 De Gex & S. 223.

A bill was filed by a party, alleging that he was sole next-of-kin of an intestate, and that the defendant was the legal personal representative of the intestate, praying an account, and charging in the usual form, that the defendant had in her possession documents relating to the matters aforesaid, whereby the truth of the said matters would appear. The defendant pleaded to the whole bill, except so much as sought a discovery of who was the testator's next-of-kin, and as to so much as sought a discovery of documents, whereby the truth of such allegations would appear; and in her answer stated that the testator left the defendant and another person his next-of-kin, and denied that she had documents whereby the truth of the said allegations would appear. The Master found the answer insufficient:—Held, that the answer was sufficient as to such parts of the bill as were not covered by the plea. Exceptions to the Master's report allowed. *Leheup v. Tinsling*, 17 Law J. Rep. (N.S.) Chanc. 43.

The bill stated the plaintiff's title to an undivided moiety of an estate, and that he had purchased the other moiety, but that defendants alleged they were entitled to that moiety under a settlement and will prior to the plaintiff's purchase. The prayer was for a declaration of the rights of the parties and a partition. The bill required the defendants to discover whether they had not represented that they were entitled under the settlement and will, and to set forth the contents of those instruments, and the nature of their title, and a schedule of documents in their power in the usual way. The defendants in their answer submitted that they were not bound to make this discovery, and after admitting the possession of certain documents, denied having in their power any others relating in any manner to the title of the plaintiff:—Held, on exceptions to a report of the Master finding the answer sufficient, that the defendants were bound to set forth whether they had made the alleged representations as to their title, but not whether such representations were true, or to discover the nature of their title, and that they must set forth a schedule of all documents in their power. *Potter v. Waller*, 2 De Gex & S. 410.

A bill was filed by A against B, stating that A had transferred certain shares into the name of B, and that there had been various dealings and transactions between them. The bill contained interrogatories inquiring particularly as to the dealings

and transactions between A and B. The bill prayed for a re-transfer of the shares. B, by his answer, set out the 7 Geo. 2. c. 8. s. 8, and stated that he was a stockbroker, and that the answers to the interrogatories would tend to subject him to the penalties of the act, and declined to answer them:—Held, that B was protected. *Short v. Mercier*, 18 Law J. Rep. (N.S.) Chanc. 490.

The plaintiff made a verbal agreement with the defendants, who were stockbrokers, for the allowance of a portion of the commission to be received from customers whom he should introduce; disputes arose, and the plaintiff filed his bill asking for discovery, for an account of all transactions, and for payment of such share of the commission as he should be declared entitled to. The defendants by their answer admitted that business had been done for the plaintiff and for other persons introduced by him; that part of it was real and that other part was fictitious, and consisted of time bargains; that discovery would subject them to penalties under the 7 Geo. 2. c. 8; they also claimed the benefit of the Statute of Frauds. Exceptions were taken to the answer for insufficiency, and allowed by the Master; the defendants then excepted to the Master's report:—Held, that the defendants, admitting a verbal agreement, must answer the allegations in the bill relating to it, notwithstanding they suggested that some of the transactions inquired after were unlawful, and that the discovery would subject them to penalties.

Held, also, that the 38th General Order of August 1841 did not exempt the defendants from answering, because the bill was open to a demurrer; and the exceptions were overruled. *Fisher v. Price*, 18 Law J. Rep. (N.S.) Chanc. 235; 11 Beav. 194.

Plaintiffs filed a bill against executors for the administration of their testator's estate and for payment of a debt alleged to be due to them from the estate of the deceased. The interrogatories were framed with great minuteness, requiring the executors to set forth all the particulars relating to the testamentary property, and whether the defendants, or one and which of them, do or does not refuse to pay the plaintiffs the amount of their demand, or some and what part thereof, and why. One of the executors, in answers to the interrogatories, stated various facts relating to previous money transactions between himself and the plaintiffs as a reason for doubting the accuracy of the plaintiffs' claim. Exceptions were taken to the answer for impertinence, and allowed by the Master. Upon exceptions to the Master's report, the Court held that the defendant was justified, in answer to the pointed form of the interrogatories, in setting forth what he had done; and the exceptions to the Master's report were allowed. *Robson v. Lord Brougham*, 19 Law J. Rep. (N.S.) Chanc. 465.

(E) PLEA.

Where a defendant, neither pleading nor demurring to any part of a bill, answers it, whether sufficiently or insufficiently, he is generally precluded from filing a plea in the suit, notwithstanding the bill be amended. Where, therefore, an original bill was answered, and the bill was then amended, the amended bill not differing from the original bill in parties, or subject-matter, though

differing materially as to the extent of discovery sought, a plea to the amended bill was overruled. *Esdaile v. Molyneux*, 2 Coll. C.C. 636.

To a bill by A and B, on behalf of themselves and all the other shareholders of a company provisionally registered, against the provisional directors, charging malfeasance and misapplication of the assets, and praying an account of the costs, &c., properly incurred by the defendants, and of the application of the assets in discharge of the liabilities of the company, and a division of the surplus rateably among the shareholders, a plea in bar by a defendant, that B had assigned for value all his interest to C, was allowed, on the grounds, first, that B, after the sale of his shares, had no interest in the relief prayed, namely, the winding up of the concern, and the division of the surplus; secondly, that, under the frame of the suit, he could not ask the relief on the ground of a right to be indemnified from the liabilities of the company; and, thirdly, that in a suit by some on behalf of all the others, the assignor of the shares could not adequately represent the beneficial interest of the assignee. *Doyle v. Muntz*, 16 Law J. Rep. (n.s.) Chanc. 51; 5 Hare, 509.

To a bill filed by an executrix, the defendant pleaded that the stamp on the probate was insufficient to cover the amount claimed by the bill. Plea overruled, on the ground that a negative plea should not have stated affirmative matter, though the plea would have been good had it merely averred that the plaintiff was not executrix. *Roberts v. Maddocks*, 17 Law J. Rep. (n.s.) Chanc. 38; 16 Sim. 55.

A bill was ordered to be dismissed, with costs, and documents deposited by the defendants with the clerk of records and writs were ordered to be delivered over to them. One of the defendants died before the taxation of the costs was completed, and his personal representative filed a bill of revivor. The defendant to that bill put in a plea alleging that the documents had been delivered over in pursuance of the decree, and insisted that a bill of revivor for the costs only could not be sustained. The plea was overruled, as raising an immaterial point. *Andrews v. Lockwood*, 17 Law J. Rep. (n.s.) Chanc. 25; 2 Ph. 398.

The plaintiffs, by their bill, set up a title to an estate, and alleged that the defendant had got possession of the estate and the title deeds, and that there were outstanding terms, mortgages, incumbrances, and unexpired leases affecting the estate. The bill prayed a discovery of documents, and that the plaintiffs might have the estate and the outstanding terms conveyed to them. It also prayed an injunction to restrain the defendant from setting up any outstanding terms in bar of an action of ejectment. The defendant pleaded that he was sole tenant in fee, and that there was no outstanding estate:—Held, that the plea was good. *Dawson v. Pilling*, 17 Law J. Rep. (n.s.) Chanc. 393; 16 Sim. 203.

In a suit for the administration of a testator's estate, A B, in whom certain leaseholds were vested, was made a party. A B became bankrupt, and an official assignee was appointed. Before the creditors' assignee was appointed A B put in a plea, alleging his bankruptcy:—Held, that the plea could

not be supported, and that the bankrupt was a necessary party prior to the creditors' assignee having been appointed and having elected to take the leaseholds. Until that time there could be no final vesting of the property. *Turner v. Nicholls*, 18 Law J. Rep. (n.s.) Chanc. 278; 16 Sim. 565.

An action was pending against one of the defendants to the suit by a shareholder on whose behalf the plaintiff sued. A plea by this defendant that the sum sought to be recovered in the action was part of the monies which were the subject of relief sought by the bill, and that the plaintiff in equity had not such a common interest with the plaintiff at law as to entitle the former to sue on behalf of himself and the latter, was overruled, as the dependency of the action was no defence, as it must be assumed that the plaintiff at law repudiated the character of shareholder.

A subscriber to a projected company who had signed the subscription contract filed a bill on behalf of himself and all other shareholders, except the defendants, alleging misfeasance by the directors, and seeking a dissolution and distribution of the funds after discharging the liabilities of the company. One of the defendants pleaded that there were allottees who had not signed the deed. It appeared by the bill that the form of application for shares contained an undertaking to sign the deed. Plea overruled, without prejudice to the same defence by answer. *Sibson v. Edgworth*, 2 De Gex & S. 73.

To a bill filed against A & B, solicitors in partnership, in respect of a joint liability, A pleaded an order of the Insolvent Debtors Court, made subsequently to the filing of the bill, by which all the estate and effects of B became vested in the provisional assignee of that court. The plea was allowed. *Sergrove v. Mayhew*, 19 Law J. Rep. (n.s.) Chanc. 520; 2 Mac. & G. 97; 2 Hall & Tw. 218.

PLEADING, IN CRIMINAL CASES.

A plea of *autrefois convict*, which shews that the judgment on the former indictment has been reversed for error in the judgment, is not a good bar to a subsequent indictment for the same offence.

When, by reason of some defect in the record, either in the indictment, place of trial, process, or the like, a prisoner has not been lawfully liable to suffer judgment for the offence charged, he has not been in jeopardy in the sense which entitles him to plead the former proceeding in bar to a subsequent indictment.

A prisoner is lawfully liable to suffer punishment on an erroneous record, until it is reversed in a court of error.

A judgment reversed is the same as no judgment, and upon a record without any judgment no punishment can be inflicted; and therefore after judgment reversed on error, a prisoner cannot be said ever to have been in jeopardy within the meaning of the rule. *Regina v. Drury*, 18 Law J. Rep. (n.s.) M.C. 189.

The defendant was found guilty on a criminal information for a libel which contained four counts. The judgment was, that for the offence in the first

count, the defendant be imprisoned for two months now next ensuing; that for the offence in the second count, he be imprisoned for the further space of two months, to be computed from and after the end and expiration of his imprisonment for his offence in the first count; that for the offence in the third count, he be imprisoned for the further space of two months to be computed from and after the end and expiration of his imprisonment for his offence in the second count. The sentence on the fourth count was in like manner for a further space of two months, to be computed from and after the end and expiration of his imprisonment for his offence in the third count.

On a writ of error brought, the Court of Exchequer Chamber reversed the judgment on the third count; but held that the judgment on the fourth count was not affected thereby, and that the imprisonment for the offence in the fourth count would commence at the expiration of the imprisonment for the offence in the second count. *Gregory v. Regina*, 19 Law J. Rep. (N.S.) Q.B. 366.

POISONING.

The prisoner, with intent to murder, caused a child to swallow two coculus indicus berries. The case found that the kernel of the coculus indicus berry is a poison, but that the shell, which was hard, and too strong to be digested by a child's stomach, prevented the kernels in this case from doing the child any injury. The two kernels contained sufficient poisonous matter to destroy the child's life, had it been free to act:—Held, that the prisoner might be indicted and convicted for administering poison under the statute 7 Will. 4. & 1 Vict. c. 85. s. 2. *Regina v. Cluderay*, 19 Law J. Rep. (N.S.) M.C. 119; 1 Den. C.C. 514; 2 Car. & K. 907.

On an indictment against a prisoner for the murder of her husband by arsenic, in September 1848, evidence was tendered on behalf of the prosecution of arsenic having been taken by the prisoner's two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following, but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that the prisoner lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals and distributed them to the four parties:—Held, that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. *Regina v. Geering*, 18 Law J. Rep. (N.S.) M.C. 215.

On a trial for murder by poisoning, statements made by the deceased in conversation shortly before the time at which the poison is supposed to have been administered are evidence to prove the state of his health at that time. *Regina v. Johnson*, 2 Car. & K. 354.

POLICE.

Provisions usually inserted in acts regulating the police of towns consolidated by the 10 & 11 Vict. c. 89; 25 Law J. Stat. 250.

A moiety of certain penalties to be paid to the police superannuation fund by the 13 & 14 Vict. c. 88; 28 Law J. Stat. 219.

Qualification of Substitute of Parish Constable.

Under the 5 & 6 Vict. c. 109. it is not necessary that the deputy of a parish constable should be on the overseer's list of qualified persons.

The overseers of the township of S made out a list of 100 persons qualified to act as parochial constables. This list was allowed by the Justices at a special sessions, and thirteen persons chosen by them from such list to serve as constables. A B, one of the number, proposed C D, whose name was not on the list, but who was rated at 29l. and upwards, as his substitute, and C D was accepted by the Justices and sworn in accordingly:—Held, that C D was well appointed.

Semble, also, that no qualification is necessary for a substitute. *Regina v. Booth*, 18 Law J. Rep. (N.S.) M.C. 25; 12 Q.B. Rep. 884.

Appointment and Remuneration of Special Constables.

The statute 1 & 2 Will. 4. c. 41. is not repealed with respect to the appointment and remuneration of special constables within boroughs by the statute 5 & 6 Will. 4. c. 76. s. 83.

The borough of Manchester, which was incorporated subsequently to the passing of the 5 & 6 Will. 4. c. 76. and has a separate Quarter Sessions, is contributory to the county rate within the meaning of the 1 & 2 Will. 4. c. 41. s. 13; and therefore an order by the Justices of the borough of Manchester upon the treasurer of the county of Lancaster for payment of the expenses, &c. of special constables, appointed under the 1 & 2 Will. 4. c. 41, for the borough of Manchester, is good. *Regina v. Hulton*, 19 Law J. Rep. (N.S.) M.C. 32.

When acting in Execution of Duty.

A constable who does an act *bonâ fide* intending to do his duty is within the protection of the 24 Geo. 2. c. 44. s. 8, which provides that actions against constables in execution of their office must be brought within six months after the act committed.

A party who, seeing a man in custody of a constable for a supposed offence, points out another as the real offender, but does not direct the constable to take him into custody, is not liable in trespass if the constable does illegally take him into custody. *Flewster v. Royle* is not law. *Gosden v. Elphick*, 19 Law J. Rep. (N.S.) Exch. 9; 4 Exch. Rep. 445.

POOR.

[See RATE.]

(A) POOR LAW COMMISSIONERS; THEIR POWERS.

- (a) *Appointment and Removal of Officers.*
- (b) *Creation of Audit District.*
- (c) *Order to build Workhouse.*

- (B) BOARD OF GUARDIANS.
 - (a) *Contracts with.*
 - (b) *Dissolution of Incorporation.*
- (C) CHARGEABILITY.
- (D) SETTLEMENT.
 - (a) *Effect of Alteration in District.*
 - (b) *By Birth and Parentage.*
 - (c) *By Rating.*
 - (d) *By Renting a Tenement.*
 - (e) *By Estate.*
 - (f) *By Office.*
 - (g) *By Apprenticeship.*
 - (h) *By Hiring and Service.*
 - (i) *Evidence of by Relief.*
 - (k) *Order of Removal unappealed against.*
- (E) REMOVAL.
 - (a) *Pending Appeal.*
 - (b) *Removability.*
 - (1) *Of Widows and married Women.*
 - (2) *Residence under the 9 & 10 Vict. c. 66.*
 - (3) *To Birth Settlement.*
 - (4) *To Maiden Settlement.*
 - (c) *Order of Removal.*
 - (1) *Examinations.*
 - (2) *Form and Requisites of the Order.*
 - (3) *Sending Documents.*
 - (d) *Appeal.*
 - (1) *At what time.*
 - (2) *Notice and grounds of Appeal.*
 - (3) *Entry and Respite.*
 - (4) *Hearing of Appeal.—Jurisdiction.*
 - (5) *Trial and Evidence.*
- (F) PAUPER LUNATIC.
 - (a) *Settlement and Expenses.*
 - (b) *Appeal against Orders of Settlement and Maintenance.*
 - (c) *Removal of.*

The laws relating to the removal of the poor amended by the 9 & 10 Vict. c. 66; 24 Law J. Stat. 170.

The laws relating to the removal of poor persons to Ireland, or the Isles of Man, Scilly, Jersey, or Guernsey amended by the 10 & 11 Vict. c. 33; 25 Law J. Stat. 116.

Maintenance of paupers who are irremovable under the 9 & 10 Vict. c. 66, to be charged to the union by the 10 & 11 Vict. c. 110; 25 Law J. Stat. 289.

The procedure in respect of orders of removal and appeals therefrom altered by the 11 & 12 Vict. c. 31; 26 Law J. Stat. 56.

The provisions relating to the charges for the relief of poor in unions altered by the 11 & 12 Vict. c. 110; 26 Law J. Stat. App. xx.

The 9 & 10 Vict. c. 66. amended by the 11 & 12 Vict. c. 111; 26 Law J. Stat. App. xiii.

More effectual regulation and controul provided over the maintenance of poor persons in houses not being workhouses by the 12 Vict. c. 13; 27 Law J. Stat. 14.

Amendments in the laws for the relief of the poor made by the 12 & 13 Vict. c. 103; 27 Law J. Stat. App. v.

The 11 & 12 Vict. c. 110. and 12 & 13 Vict. c. 103. continued, and the laws for the relief of the poor amended by the 13 & 14 Vict. c. 101; 28 Law J. Stat. 297.

Commissioners for administering the laws for the relief of the poor authorized to be appointed, and further provision made for administering such laws by the 10 & 11 Vict. c. 109; 25 Law J. Stat. 286.

The law for the formation of districts for the education of the infant poor amended by the 11 & 12 Vict. c. 82; 26 Law J. Stat. App. iv.

District auditors restrained from taking proceedings in certain cases by the 11 & 12 Vict. c. 114; 26 Law J. Stat. 302.

(A) POOR LAW COMMISSIONERS; THEIR POWERS.

(a) *Appointment and Removal of Officers.*

The Poor Law Commissioners have power under the 4 & 5 Will. 4. c. 76. s. 40. to direct the overseers of townships comprised in a union to meet and appoint a returning officer at the election of guardians for the union. *Regina v. Overseers of the Oldham Union*, 16 Law J. Rep. (n.s.) M.C. 110; 10 Q.B. Rep. 700.

The Poor Law Commissioners have a discretionary power of removing a relieving officer of a union whom they deem unfit for his office, without giving him notice of their intention to remove him, or hearing what he has to say in his defence. *In re Teather and the Poor Law Commissioners*, 19 Law J. Rep. (n.s.) M.C. 70; 1 L. M. & P. 7.

(b) *Creation of Audit District.*

By a local act (the 3 Geo. 4. c. xxiv.) a corporation was constituted for the relief and maintenance of the poor in the different parishes in the city of Bristol out of a common joint fund. The 7 & 8 Vict. c. 101. s. 32. authorizes the Poor Law Commissioners to combine parishes and unions into districts for auditing accounts; and by the 4 & 5 Will. 4. c. 76. s. 109. (incorporated with the 7 & 8 Vict. c. 101.) "parish" includes a city maintaining its own poor, and "union" includes any number of parishes incorporated for the relief of the poor under any local act:—Held, that the Commissioners had power to include Bristol in a district for auditing accounts by the name of "the Corporation of the Poor of the City of Bristol."

The fact of the corporation having also the collection and administration of funds not applicable to the relief of the poor does not affect the power of appointing an auditor under the 7 & 8 Vict. c. 101.

A mandamus recited an order of the Poor Law Commissioners creating an audit district, and directing the auditor to be appointed to audit the accounts of the said corporation, according to the laws in force for the administration of the relief of the poor, and then commanded the corporation to produce to the auditor an account of monies, &c. received, held, or expended by them:—Held, that the writ was correct, as all accounts must be produced, but that the order which was recited shewed that the auditor's duty was confined to items relating to the relief and maintenance of the poor. *Regina v. Governor, &c. of the Poor of the City of*

Bristol, 18 Law J. Rep. (N.S.) M.C. 132; 13 Q.B. Rep. 405: affirmed, 19 Law J. Rep. (N.S.) M.C. 116.

(c) *Order to build Workhouse.*

The parish of M was, by virtue of an order of the Poor Law Commissioners, governed by a distinct board of guardians:—Held, that the Commissioners had authority to order the purchase of land, and the building of a workhouse thereon for such parish, with the consent of the majority of the guardians, as directed by the 4 & 5 Will. 4. c. 76, s. 23. *In re the Parish of St. Mary Abbott's, Kensington*, 16 Law J. Rep. (N.S.) M.C. 29.

(B) BOARD OF GUARDIANS.

(a) *Contracts with.*

The Poor Law Commissioners, upon the representation of the board of guardians of the union, made at the request of the parish officers of C, one of the parishes of the S union, ordered the guardians to have a survey and plan made of the parish of C, for the purpose of the statute 6 & 7 Will. 4. c. 96. The board of guardians contracted under seal with the plaintiff to execute the survey and plan for 500*l.* After its completion they verbally ordered him to prepare a reduced plan as a key to the larger plan. It was executed accordingly and delivered to the board of guardians:—Held, as the contract for the reduced plan was not under the seal of the board of guardians, nor incident to the purposes for which they were incorporated, that it was not binding on them.

Such guardians cannot bind themselves by contract without seal (if they can in any manner contract) to remunerate a surveyor for attending as a witness on an appeal against a parochial assessment within the union. *Paine v. Guardians of Strand Union*, 15 Law J. Rep. (N.S.) M.C. 89; 8 Q.B. Rep. 326.

The guardians of a union verbally directed their officer to have gates made for the union workhouse. The plaintiff furnished the gates, which were erected at the workhouse, and the jury found that they were necessaries:—Held, that the guardians were liable to the plaintiff for the price of the gates. *Sanders v. Guardians of St. Neot's Union*, 15 Law J. Rep. (N.S.) M.C. 104; 8 Q.B. Rep. 810.

The plaintiff, a builder, covenanted by deed with the defendants, a corporation, to do certain specified work for the sum of 5,500*l.*, and that if their architects should require any alterations or additions in the progress of the works, the architects should give to the plaintiff written instructions signed by them, and that he should not be considered as having authority for the same without such written instructions. The defendants covenanted to pay the plaintiff 5,500*l.* and the value of the additional work, if any. The declaration, after stating the deed, averred that the plaintiff executed all the works to be done for the sum of 5,500*l.*, that the architects required him to make certain additions by means of written instructions, signed, &c., and that he executed all the additional works, and that the defendants took possession of all the works. Breach, the non-payment of the 5,500*l.*, and of the sum due for the additions. The defendants, after setting out the deed on oyer, pleaded, amongst other

pleas, to the sum of 5,500*l.*, payment before action brought; as to the non-payment by the defendants, in respect of the additions, &c., that the architects did not give the plaintiff written instructions signed by them, *modo et forma*; and eleventhly, as to the supposed non-payment of any sum of money in respect of the additions, &c., payment before action brought. The plaintiff, having proceeded with the works, *during their progress* received from the architects from time to time certificates in the form of letters, signed by them, and addressed to the clerk of the board of guardians, stating that the board might safely advance 500*l.* to the plaintiff on account of the works executed. Certificates in this form, to the amount of 5,000*l.*, were given. No other written authority was given by the architects to the plaintiff. Payments were made to the plaintiff to the amount of 6,300*l.* The payments were made generally in respect of the work actually done, without distinguishing the one description from the other. The defendants took possession of all the works:—Held, first, that the meaning of the declaration being that a *previous* written authority had been given by the architects to the plaintiff, the letters written by them did not amount to such previous authority. Secondly, that the sums advanced by the defendants were to be treated as sums paid on account of whatever amount the plaintiff might eventually be entitled to recover, namely, the sum of 5,500*l.*, and that the plaintiff was not at liberty to apply so much of the 6,300*l.* as was necessary in satisfaction of what was due for the additional works, leaving the balance only to be applied in part discharge of the 5,500*l.*; the doctrine of the creditor's right of applying indefinite payments to whichever of two debts he may prefer, not applying to the present case. Lastly, that the plaintiff was not entitled to be paid on a *quantum meruit* in respect of the additional works, as the defendants being a corporate body were incapable of making a new contract by parol. *Lamprell v. the Guardians of the Billericay Union*, 18 Law J. Rep. (N.S.) Exch. 282; 3 Exch. Rep. 283.

(b) *Dissolution of Incorporation.*

In replevin for taking goods in the workhouse of the W Union, against the guardians of C (incorporated by a local act) the defendants avowed as landlords for rent in arrear, and the tenancy was put in issue by a plea in bar. It appeared in evidence that by an order of the Poor Law Commissioners, made on the 16th of September 1835, which purported to be founded on the consent of two-thirds of the guardians of C, such union was ordered to be dissolved; and on the 17th of September another order of the Commissioners was made under the provisions of the 4 & 5 Will. 4. c. 76, that the parishes comprised in the union of C should, together with others, be formed into the union of W. From the date of the latter order the guardians of the W Union used the union house formerly belonging to the C Union for the poor of their union, and payments expressed to be for rent had been made by the guardians of the W Union to the treasurer of the C Union until September 1838, when the payments were made generally, but receipts were given by the treasurer as for rent. On that day a sum of money was paid by the W Union

to the C Union as a balance for the furniture, &c. in the workhouse. In January 1841 the Poor Law Commissioners made an order, which recited that the premises in question had, under the order of the 17th of September, become convertible to the use of the W Union, and had since been used and occupied by the poor of such union, and directed the guardians of the W Union to pay to the treasurer of the C Union a yearly rent as compensation for the use of the premises. This order appeared to have been acted on by both parties.

Held, first, that the plaintiffs were not estopped, by having sued the defendants as a corporation, from giving in evidence the order of the 16th of September 1835. Secondly, that the effect of that order was not *ipso facto* to dissolve the incorporation for all purposes. Thirdly, that this order was admissible in evidence, without proof of the consent of two-thirds of the guardians of the C Union, as that corporation had since ceased to perform the duty of providing for and taking care of the poor, and that a jury might rightly presume that it operated as a valid dissolution. Fourthly, that supposing upon the dissolution of the C Union the property in the workhouse was divested from it (of which *quære*), yet that if the guardians of W had contracted with them as owners expressly or impliedly, the mere want of legal ownership would not take away their right to distrain. Fifthly, that under the circumstances the occupation of the workhouse by the W Union must be referred to the order of the Commissioners, which must be presumed to have been communicated to the C Union, and not to any contract creating the relation of landlord and tenant between the parties. *The Guardians of the Woodbridge Union v. the Corporation of the Guardians of the Hundreds of Colneis and Carlford*, 18 Law J. Rep. (N.S.) Q.B. 126; 13 Q.B. Rep. 269.

(C) CHARGEABILITY.

Where the relieving officer of a union stated that he had paid the paupers parish relief upwards of a year, during which time he had given them 2s. 6d. weekly, on account of the township of S, out of money in his hands belonging to the said township, —Held, not a sufficient statement of chargeability to S. *Regina v. the Inhabitants of Bradford (Wilts)*, 15 Law J. Rep. (N.S.) M.C. 117; 8 Q.B. Rep. 571.

A copy of a certificate of chargeability (in the form given by the 7 & 8 Vict. c. 101. s. 69.) was sent with an order of removal, and at the foot of the copy was a note, that "this certificate was received in evidence by us, two of Her Majesty's Justices," &c. The dates and names of the paupers in the certificate agreed with those in the order, and the names of the Justices who signed the order and the note were the same:—Held, sufficient for the Court to presume the identity of the paupers, and that the certificate had been produced before the removing Justices. *Regina v. the Inhabitants of High Bickington*, 15 Law J. Rep. (N.S.) M.C. 157; 8 Q.B. Rep. 889.

A notice of chargeability, signed by three overseers, subscribing themselves as such, is *prima facie* a good notice, though it does not purport to come from a majority of the parish officers.

Whether the parish officers sending such notice

do or do not constitute the majority, is matter of evidence. *Regina v. the Inhabitants of Colerne*, 17 Law J. Rep. (N.S.) M.C. 121; 11 Q.B. Rep. 909.

A notice of chargeability should state the names of the paupers; and a notice stating that "the persons named in the order hereunto annexed," have become chargeable, &c., written on one side of a piece of paper, on the other side of which was a counterpart of the order of removal,—Held, insufficient. *Regina v. the Inhabitants of Gomersal*, 17 Law J. Rep. (N.S.) M.C. 163; 12 Q.B. Rep. 76.

(D) SETTLEMENT.

(a) Effect of Alteration in District.

The parish of Gresford, previous to 1833, consisted of the township of G and seven other townships in Denbighshire, and of two townships in Flintshire. The latter always maintained their own poor separately. Churchwardens were appointed for the whole parish, who acted only in ecclesiastical matters. The number of overseers appointed for the Denbighshire townships had varied from time to time since 1816; but from 1737 to 1816 one was appointed for G and three other townships. An equal poor-rate was always agreed to at a general vestry; but separate rates were made, allowed, and collected by the overseers in the townships for which they were appointed. The accounts of the overseers for all the Denbighshire townships were settled yearly, when those who were deficient received what was due to them from those who had a surplus, and the general balance was paid over to the new overseers, for the general expenses of the ensuing year. In 1833 the Justices, in obedience to a mandamus, appointed two overseers for each of the Denbighshire townships, which from that time had each maintained their own poor separately:—Held, that no settlement could be gained in G as a distinct township prior to 1833, and that regular relief given to a pauper by the overseers of G from 1815 to 1844, in respect of a supposed settlement acquired by hiring and service in G in 1771, did not estop the present overseers of G from denying such settlement.

Held also, that notice of grounds of appeal was properly signed by the overseers of G only, and not by either of the churchwardens of Gresford. *Regina v. the Inhabitants of Acton*, 15 Law J. Rep. (N.S.) M.C. 21; 8 Q.B. Rep. 108.

By an act of parliament, 4 Will. 4. c. xxiii, the parishes of A and B, two distinct parishes, in all respects, were united for all purposes whatsoever (except ecclesiastical matters):—Held, that a pauper, who, previous to the passing of that act, had gained a settlement in parish A, might be removed to the united parishes of A and B. *Regina v. the Inhabitants of St. Martin, New Sarum*, 15 Law J. Rep. (N.S.) M.C. 123; 9 Q.B. Rep. 241.

(b) By Birth and Parentage.

[*Regina v. the Inhabitants of Brighthelmstone*, 5 Law J. Dig. 552; 7 Q.B. Rep. 549.]

It appeared on the face of the examinations that the pauper was fifty-three years of age, that he married in 1812, and had never done any act to gain a settlement. That in 1824 the pauper's father, whilst residing in parish B, was relieved by

parish L:—Held, not a sufficient statement of evidence of a derivative settlement of pauper in L, and that the case was not helped by evidence given at the Sessions, that in fact the father before 1812 and always afterwards had resided out of parish L. *Regina v. the Inhabitants of Bangor*, 16 Law J. Rep. (n.s.) M.C. 121; 11 Q.B. Rep. 399, n.

The examinations stated that the pauper's father resided in H up to the year 1826, when he removed to another parish; that the pauper resided with his parents in H as part of their family, and was then under twenty-one; and that in 1816 the father acquired a settlement in H:—Held that, nothing appearing to the contrary, it was to be presumed that the pauper was unemancipated in 1816, and took his father's settlement. *Regina v. Hammer-smith*, 17 Law J. Rep. (n.s.) M.C. 47; 11 Q.B. Rep. 391.

[See *post*, (d) *By Renting a Tenement*—(E) *Removal*, (a) (4) *To Maiden Settlement*.]

(c) *By Rating*.

A person entering into the occupation of a house in the parish of St. Marylebone at Midsummer, and paying the subsequent half-year's poor-rate, due at Christmas in the same year, gains a settlement under the 3 Will. & M. c. 11. s. 6, although the name of the tenant whom he succeeded, and not his name, appears in the rate-books of that year as the occupier of the house; the 35 Geo. 3. c. lxxiii. for the better relief of the poor of St. Marylebone, providing that, in case of change in the occupation of a house, &c., the person entering shall be liable to the payment of a proportion of the rate in like manner as if he had been originally rated or assessed. *Regina v. the Inhabitants of St. Marylebone*, 19 Law J. Rep. (n.s.) M.C. 201; 15 Q.B. Rep. 399.

(d) *By Renting a Tenement*.

On the trial of an appeal it was proved that A, the pauper's father, hired from C, his master, a cow, which was kept in the pasture season on the pasture lands of C's farm, in the appellant parish, and in the winter season in the straw-yard; that A put the cow where there was feed for her, but nothing was said, either by his master or himself, as to the manner, or on what particular lands, the cow was to be fed:—Held, that there was no evidence from which a contract could be inferred that the cow was to be fed on the growing produce of the land. *Regina v. the Inhabitants of Mendham*, 16 Law J. Rep. (n.s.) M.C. 67; 9 Q.B. Rep. 971.

It is wholly unnecessary that an examination which states a marriage and the time it took place should also state the place.

The examination shewed a certificate granted to the pauper's father by the appellant to the respondent township in 1812, and a continuous residence in the respondent township from that time to the present. One of the grounds of appeal stated that the pauper's father in 1821, 1822, 1823 gained a settlement in the respondent township, by settling upon, renting, and occupying certain tenements in that township (which, with the names of the owners, were specifically stated in the ground of appeal):—Held, that such statement did not sufficiently shew a compliance with the 9 & 10 Will. 3.

c. 11; and that the Sessions were right in refusing to go into evidence of such settlement.

The Court will only entertain cases from the Sessions which raise a question the decision of which will decide the appeal, and will not act on a direction by the Sessions, that in a particular event the case is to be sent back to them to be re-heard. *Regina v. the Inhabitants of Marton-cum-Grafton*, 16 Law J. Rep. (n.s.) M.C. 159; 10 Q.B. Rep. 971.

(e) *By Estate*.

The words "within ten miles thereof," in the statute 4 & 5 Will. 4. c. 76. s. 68, mean within ten miles measured in a straight line from the house where the person inhabits to the boundary of the parish in which the estate, which conferred his settlement, is situate. *Regina v. the Inhabitants of Saffron Walden*, 15 Law J. Rep. (n.s.) M.C. 115; 9 Q.B. Rep. 76.

By the rules of a building society, the members were to pay a certain weekly sum until the shares were all paid up, and a plot of land was to be purchased by the society, on which houses were to be built and allotted among the members, who were to pay rent to the society for their occupation during the continuance of the society, and at the end of that time were to be entitled to a conveyance of the house allotted to them. In 1822 the club contracted to purchase a plot of freehold land, on which they began to build, and before any conveyance to the club, the land and the houses were conveyed by way of mortgage to A by the club, to secure the purchase-money which he had paid, and which did not amount to 30*l*. for each member. In 1825 the pauper had a house built for him on the ground allotted him, and entered into possession, and paid rent for it until 1838, when the club ended. At that time he had made payments to the amount of 80*l*. In 1839, A being paid off, conveyed the land, with the houses built thereon, to the several members, and the house occupied by the pauper was conveyed to him:—Held, that the pauper gained a settlement by the purchase of an estate in land of the value of 30*l*. *Regina v. the Inhabitants of Carlton*, 19 Law J. Rep. (n.s.) M.C. 100.

(f) *By Office*.

A ground of appeal stated that the pauper had for many years, to wit, the years 1832, 1833, and 1834, and afterwards, served the offices of assessor and collector of land tax and assessed taxes in the parish of C, to which offices he was duly and legally appointed, and during which years he was an inhabitant and resident in the said parish of C:—Held, sufficient, as shewing a settlement by serving an office under the 3 Will. & M. c. 11. s. 6. *Regina v. the Inhabitants of Anderson*, 16 Law J. Rep. (n.s.) M.C. 25; 9 Q.B. Rep. 663.

(g) *By Apprenticeship*.

[*Regina v. the Inhabitants of Wooldale*, 5 Law J. Dig. 553; 6 Q.B. Rep. 549.]

Two Justices made an order for binding an apprentice under the 56 Geo. 3. c. 139. In this order they described themselves as "Justices of the Peace of the county of D." By their allowance of the indenture of the same date, and which indenture

referred to the order, they signed their names and described themselves as "Justices of the Peace":—Held, that as the statute required that the Justices who allow should be the same as those who order, and the names and dates being the same, it must be taken that the Justices who allowed were Justices of the Peace of the county of D, and that the allowance was therefore sufficient. *Regina v. the Inhabitants of Ashburton*, 15 Law J. Rep. (N.S.) M.C. 97; 8 Q.B. Rep. 871.

The examinations set up a settlement by apprenticeship, and, the indenture being lost, secondary evidence of it was given by the production of the register of parish apprentices, which was regularly kept under the provisions of the statute 42 Geo. 3. c. 46, and contained the entry of the assent of two Justices to the binding. The Sessions found that it appeared from the examinations that two Justices had allowed, by signing and sealing, an indenture, which recited an order under the 56 Geo. 3. c. 139, for binding the apprentice; but they also held that the examinations did not disclose sufficient legal evidence that such an order had been made:—Held, that the Sessions were right in so deciding. *Regina v. the Inhabitants of East Stonehouse*, 16 Law J. Rep. (N.S.) M.C. 49; 10 Q.B. Rep. 230.

A parish apprentice was bound by indenture executed by A B, churchwarden of the township of L, and by C D, one of the overseers of the same township:—Held, sufficient under the 54 Geo. 3. c. 107. s. 2.

The indenture, which was duly allowed by two Justices under the 56 Geo. 3. c. 139. s. 1, recited that it was made by virtue of an order under the hands and seals of A L and J N C, Justices of the Peace in and for the county, &c., made in pursuance of the statute in such case made and provided, and bearing date, &c.:—Held, to be good primary evidence of the order for binding, which was not produced.

The allowance of an indenture of apprenticeship by Justices under the 56 Geo. 3. c. 139. s. 1, need not appear on the face of it to be made within their jurisdiction. *Regina v. the Inhabitants of Stainforth*, 17 Law J. Rep. (N.S.) M.C. 25; 11 Q.B. Rep. 66.

The allowance of an indenture of apprenticeship should appear on the face of it to be locally made within the jurisdiction of the allowing Justices, except in cases where such jurisdiction appears in the order for binding, and the allowance is made by the same Justices.

Two Justices of the borough of T, in the county of D, made an order for binding a child apprentice in the parish of H, also in the county of D. The indenture of apprenticeship purported to be allowed by the two Justices of the borough, and also by G P A and R H F, "two of Her Majesty's Justices of the Peace for the county of D."—Held, that there being two jurisdictions shewn, and the allowance being a judicial act, it was void for not being shewn to have been done within the county into which the apprentice was bound. *Regina v. the Inhabitants of Toines*, 18 Law J. Rep. (N.S.) M.C. 46; 11 Q.B. Rep. 80.

Where an indenture of parish apprenticeship stated in the body of it that the binding was with the approbation of two Justices whose names were

thereunto subscribed, and the allowance at the foot of the indenture purported to be signed by the Justices before the indenture was executed by any of the parties, and referred by date and the names of the Justices to the order for binding, such a reference is a compliance with the 56 Geo. 3. c. 139, as the allowance is in such case part of the indenture.

The allowance purported to be made by A and B, "Justices in and for the West Riding of the county of Y, &c."—Held, that this sufficiently appeared to be made within their jurisdiction. *Regina v. the Inhabitants of Aldborough*, 18 Law J. Rep. (N.S.) M.C. 81; 13 Q.B. Rep. 190.

[See (E) Removal, (b) (3) *Sending Documents*.

(h) *By Hiring and Service*.

It is not a rule of law, that a general hiring is a hiring for a year, but a question for the jury, depending upon the facts of each particular case—*per Tindal, C.J. Baxter v. Nurse*, 13 Law J. Rep. (N.S.) C.P. 82.

By agreement between A, B, and C, A agreed to hire B, and B agreed to be hired by A for the term of three years to dress silk, for 10s. a week for the first three months, and afterwards in proportion to the work done, provided B did a certain quantity per week. It was further agreed, that C should receive from A so much per week for superintending and teaching B, to make him a competent workman:—Held, confirming the order of Sessions, that a settlement by hiring and service might be gained by B under this agreement. *Regina v. the Inhabitants of Northowram*, 15 Law J. Rep. (N.S.) M.C. 149; 9 Q.B. Rep. 24.

Pauper was hired by agreement in writing, from the 5th of April 1826 to the 5th of April 1827, to hew and work coals, and it was provided that the hewers were to be allowed, during the whole period of their hiring, save for one fortnight at Christmas, and in case of accident as thereafter provided, not less work than would yield them 28s. in each fortnight; but the owners were empowered if they thought it expedient for the parties hired to work no more than nine days in each fortnight, to "lay the pits off work" for the other days; also that the owners might lay the pits off work, at or about Christmas, for any time not exceeding ten working days, but that "the parties hired should nevertheless continue during such time, and during all other times that the pits should be laid off work the servants of the owners" also that "the parties hired should do and perform a full day's work on each and every working day, or a quantity of work equal to a day's work, and should not leave their work until such day's work or quantity of work; should be fully performed":—Held, an exceptive hiring. *Regina v. the Inhabitants of Walbottle*, 16 Law J. Rep. (N.S.) M.C. 153; 9 Q.B. Rep. 248.

(i) *Evidence of by Relief*.

Where the relieving officer of a union, including the parishes of M & W, stated that he had for three years relieved the paupers while resident in M, and charged such relief in his account to the parish of W,—Held, that this statement furnished no *prima facie* evidence of relief given by the parish of W.

Regina v. the Inhabitants of Little Marlow, 16 Law J. Rep. (N.S.) M.C. 70; 10 Q.B. Rep. 223.

The clerk to the board of guardians of an union is an officer having authority to order the giving of relief, so as to establish a settlement by admission in a township within such union.

Where, therefore, a letter was written by the clerk to the guardians of the union within which the appellant township was contained, to the guardians of the poor of the union containing the respondent township, requesting relief to be given on account of his union to a pauper resident in the respondent township, but whose settlement was stated in the letter to be in the appellant township; which relief was afterwards given and repaid,—Held, that it amounted to some evidence of a settlement by admission in the appellant township. *Regina v. the Inhabitants of Wigan*, 19 Law J. Rep. (N.S.) M.C. 18.

The examinations upon which an order of removal from B to W was made, shewed that the pauper was born a bastard in C, where his mother went to reside during her pregnancy; that shortly before her confinement the parish officers of C threatened to remove her to W unless she procured a certificate from that parish in respect of herself and child. The mother and child remained in C, and the parish officers of W paid weekly sums for relief to the grandmother of the child for his maintenance, after the mother had gone abroad:—Held, that the examinations contained evidence of admission by conduct of a certificate, and that the Sessions were wrong in refusing to allow the respondents to give any evidence in support of a settlement in W. *Regina v. the Inhabitants of Basingstoke*, 19 Law J. Rep. (N.S.) M.C. 97.

[See (D) (a) *Effect of Alteration of District*—(E) Removal, (b) (3) *Sending Documents*.]

(k) *Order of Removal unappealed against.*

[*Regina v. the Guardians of St. Mary, Lambeth*, 5 Law J. Dig. 555; 7 Q.B. Rep. 587.]

[*Regina v. the Inhabitants of Ellal*, 5 Law J. Dig. 555; 7 Q.B. Rep. 593.]

The examinations on which an order of removal was made stated that G was employed by the overseers of the respondent parish to remove the paupers to the appellant parish, under a prior order of 1826, and that after he returned from removing them he signed this indorsement on the order—"Delivered to Mr. W, overseer of D, by T G;" that G was dead, and his handwriting was proved. On the trial of the appeal, it appeared that G was not an overseer, but had been employed by the overseers to remove the paupers, and that they had been seen on the morning in question leaving the respondent parish with G, and that they returned the same night with 4s. The appellants objected to the admissibility of the indorsement in evidence; and also contended that the respondents were estopped by a prior order of removal in 1844, which was quashed without entering into the merits of the settlement, "by reason of the informality and insufficiency of the examinations." The Sessions held this decision not conclusive:—Held, that the examinations contained evidence of the removal under the prior order of 1826; and—

Semble, that the indorsement was evidence, as

being made by a person deceased, in the course of duty.

Held, also, that the Sessions having decided on the effect of the quashing of the order of 1844, this Court would not interfere with their decision. *Regina v. the Inhabitants of Dukinfield*, 17 Law J. Rep. (N.S.) M.C. 113; 11 Q.B. Rep. 678.

(E) REMOVAL.

(a) *Pending Appeal.*

It is not an indictable offence if an overseer (without fraud or menace) remove a pauper under an order after it has been confirmed on appeal by the Sessions, subject to the opinion of the Queen's Bench, and before its final determination by that Court. *Regina v. Cooper*, 18 Law J. Rep. (N.S.) M.C. 16.

(b) *Removability.*

(1) *Of Widows and Married Women.*

Residence by a pauper for five years next before the application for the warrant, partly as wife and partly as widow, is sufficient to render her irremovable, under the 9 & 10 Vict. c. 66.

The 9 & 10 Vict. c. 66. does not give an appeal against an order made prior to its passing, on the ground of five years' residence in the respondent parish, where there has been no actual removal of the pauper. *Regina v. the Inhabitants of Glossop*, 17 Law J. Rep. (N.S.) M.C. 171; 12 Q.B. Rep. 117.

By the 9 & 10 Vict. c. 66. s. 2. no woman residing in any parish with her husband at the time of his death shall be removed, nor shall any warrant be granted for her removal for twelve calendar months next after his death, if she so long continue a widow:—Held, that this provision renders irremovable widows whose husbands died before the passing of the act.

The order of removal was made prior to, but the pauper was removed subsequent to, the 9 & 10 Vict. c. 66:—Held, that irremovability under that statute was a good ground of appeal against the order. *Regina v. the Inhabitants of St. Mary, Whitechapel*, 17 Law J. Rep. (N.S.) M.C. 172; 12 Q.B. Rep. 120.

The wife of a marine had resided in parish A from February 1841 to October 1846, when she became chargeable. At this time her husband, who had only occasionally resided with her during the above period, had been absent for six months serving at sea,—*Quære*, if she was removable under the 8 & 9 Vict. c. 66. *Regina v. the Inhabitants of East Stonehouse*, 17 Law J. Rep. (N.S.) M.C. 166; 12 Q.B. Rep. 72.

The second proviso in the statute 9 & 10 Vict. c. 66. s. 1, that the wife or children are to be removable whenever the husband or parent is removable, and *vice versa*, must be construed with reference to cases where such husband or parent is removable by law, and does not render a wife or children irremovable in cases where the husband or parent cannot practically be removed, by reason of absence from the parish or other cause; and therefore, where a husband who had not resided five years in a parish deserted his wife and children, and they became chargeable,—Held, that the circumstance of his absence did not prevent their being removable to the place of his settlement.

Regina v. the Inhabitants of St. Ebbe, Oxford, 18 Law J. Rep. (N.S.) M.C. 14; 12 Q.B. Rep. 137.

(2) *Residence under the 9 & 10 Vict. c. 66.*

Pauper became chargeable to the parish of H on the 9th of December 1846, having resided ten years in that parish. During the year 1844 he received relief from R. The 9 & 10 Vict. c. 66, passed on the 26th of August 1846:—Held, that the residence before and after the year 1844 were to be added together, so as to make up the period of five years, the one year of relief (on the supposition that the proviso was retrospective) being only excluded from the computation of the entire time, and not defeating the effect of a previous residence. *Regina v. the Inhabitants of Harrow-on-the-Hill*, 17 Law J. Rep. (N.S.) M.C. 148; 12 Q.B. Rep. 103.

It is not an objection to an order of removal that the place at which it is made is not stated in it.

Nor is it an objection that it does not appear on the face of the order or on the examinations, that the pauper did not become chargeable in respect of relief made necessary by sickness or accident.

A pauper, after residing thirteen years in H, was, by an order which was unappealed against, on the 1st of March 1845, removed to A, where she remained, receiving relief out of the workhouse there until the 19th of March, when, on being promised 7s. 6d. a week by the guardians of A, she returned to H, where her friends lived, and where she had always been desirous of returning. On her return to H she took possession of a house which she had rented before her removal to A and of which she had kept the key, and in which she had left her furniture whilst she remained at A. The guardians of A discontinuing the promised allowance, she again became chargeable to H on the 4th of November 1846, and another order was made for her removal to A:—Held, that she was properly removable, notwithstanding the 9 & 10 Vict. c. 66, as the first removal to A entirely put an end to the residence at H. *Regina v. the Inhabitants of Halifax (Halifax and Atwick)*, 17 Law J. Rep. (N.S.) M.C. 158; 12 Q.B. Rep. 111.

The statute 9 & 10 Vict. c. 66, s. 1. does not apply where there has been a residence by the pauper out of the parish at any time during the five years preceding the order of removal.

Quære—if the statute applies to an order which has not been appealed against, or which has been confirmed on appeal, before the passing of the statute. *Regina v. the Inhabitants of Salford*, 17 Law J. Rep. (N.S.) M.C. 170; 12 Q.B. Rep. 106.

An order of removal, unappealed against, and acted upon, puts an end to the residence of the pauper in the parish from which he is removed, however short the residence may be in the parish to which he is removed.

Under an order of removal a pauper was, in May 1842, removed from S, where she had resided twenty years in a house rented by herself, to C. She left one daughter in her house at S; and her other children, who had been removed with her, returned on the day of the removal to S, and she herself returned there seven days after such removal, and resided in the said house at S till February 1847:—Held, that she was removable under the 9 & 10 Vict. c. 66, s. 1. *Regina v. the Inhabitants of the*

Chapelry of Seend, 18 Law J. Rep. (N.S.) M.C. 12; 12 Q.B. Rep. 133.

The provisos in the first section of the 9 & 10 Vict. c. 66, though worded in the future tense, have a retrospective operation, as well as the enacting part of the section; and, therefore, where a pauper had resided from April 1839 till May 1847 in parish A, but had been relieved by parish B from March 1843 to September 1846,—Held, that she was removable. *Regina v. the Inhabitants of Christchurch*, 18 Law J. Rep. (N.S.) M.C. 28; 12 Q.B. Rep. 149.

The pauper resided in the respondent township, with her husband, from June 1841 till April 1846, when he was committed to a prison out of that township, where he remained until he was transported. The pauper continued to reside in the respondent township until September 1846, when she was taken, under an order of removal dated the 25th of August 1846, to the appellant township:—Held, that the pauper was removable.

The effect of the proviso in the 9 & 10 Vict. c. 66, s. 1. is to render a wife removable whenever her husband, if he had returned to her and become chargeable, would be removable. *Regina v. the Inhabitants of Pott Shrigley*, 18 Law J. Rep. (N.S.) M.C. 33; 12 Q.B. Rep. 143.

A pauper was settled in parish T. He was a weaver, and had resided in parish M for more than five years next before January 1841, when, being out of work, he left his wife and family in two rooms, which he had hired by the quarter in parish N, and went to parish T for the purpose of obtaining work or relief. He was there employed by the overseer of T for six or seven weeks, during which time he was lodged in the workhouse, and paid wages by his employer. At the end of that term he returned to his wife and family at N, having maintained them there during his absence, and he continued to reside with them there till December 1846, when an order of removal was applied for. For four years before the passing of the statute 9 & 10 Vict. c. 66, he had been in receipt of relief from parish T:—Held, that there was no disruption of the five years' residence at N, and that the pauper was irremovable on the facts as stated, as it was clearly to be inferred from them that there was an *animus revertendi* to N, during his residence at T.

The question, whether there has been an *animus revertendi* in cases of this sort, is a question of fact which should be decided by the Sessions. *Regina v. the Inhabitants of Tacolnstone*, 18 Law J. Rep. (N.S.) M.C. 44; 12 Q.B. Rep. 157.

By a local act, the governor and guardians of the poor of the city of Norwich were incorporated, and were invested with all the powers of overseers in all matters touching or concerning the maintenance, relief, management, removal or employment of the poor, and were empowered to institute and defend appeals against rates and orders of removal, and to assess and apportion the share to be paid by each parish in the city for the relief of the poor. An order was applied for by the governor and guardians for the removal of a pauper from the parish of S, within the city, to a parish without the city. The pauper had resided two years in parish S, and twenty years immediately preceding those two years in another parish within the city:—Held, that Nor-

wich being a city maintaining its own poor, was a "parish," within the 4 & 5 Vict. c. 76. s. 109, and that the pauper was rendered irremovable by the statute 9 & 10 Vict. c. 66. *Regina v. the Inhabitants of Forncett St. Mary, Norwich*, 18 Law J. Rep. (n.s.) M.C. 125; 12 Q.B. Rep. 160.

(3) *To Birth Settlement.*

Children born in England, of Irish parents who have not gained a settlement in England, may when deserted by their father after the death of their mother, be removed to the place of their birth settlement.

Under the 8 & 9 Vict. c. 117. s. 2, a valid order for the removal of such children to Ireland can only be made where at the time of the order they form part of the father's family, and as such can be removed with him. *Regina v. the Inhabitants of All Saints, Derby*, 19 Law J. Rep. (n.s.) M.C. 14.

(4) *To Maiden Settlement.*

An order for the removal of A B, a widow, and her four children, to the place of her maiden settlement, was founded on examinations which shewed a hiring and service, by the widow, in the appellat parish before her marriage. It appeared, by the examinations, that one of the children was illegitimate. The following were the grounds of appeal (*inter alia*):—First, that the order and examinations were bad on the face thereof. Secondly, that the examinations did not shew relief given to the pauper. Thirdly, that the examinations did not shew any inquiry or endeavour by the respondents to discover the settlement of the pauper's husband:—Held, that having stated these specific objections, the appellants could not, under their first general ground of appeal, object that the examinations were defective in other respects; viz., in not shewing a residence in the appellat parish; in not purporting to be taken by Justices having jurisdiction; and in not stating that the examination of the pauper (a markswoman) was read over to her.

Semble—Every examination should, before it is signed, be read over to the examinant; but it need not appear, on the face of the examination, that this has been done.

Held, also, that the order was bad as regarded the illegitimate child.

A married woman, or a widow, may be removed to her maiden settlement, the husband's settlement not appearing, without any proof that inquiry has been made by the removing parish into the settlement of the husband. *Regina v. the Churchwardens of Birmingham*, 15 Law J. Rep. (n.s.) M.C. 65; 8 Q.B. Rep. 410.

Under a ground of appeal stating that the examinations were defective, for not shewing by sufficient statement of facts that the pauper at the time the order of removal was made was chargeable to the respondent parish,—Held, that the appellants were not entitled to object that the examinations did not shew the residence of the pauper in the respondent parish.

A birth settlement does not require a residence of forty days to complete it.

An order of removal (made upon the complaint of the overseers of S) described the pauper as the widow of J L, and removed her to W, which the

examinations shewed to be the place of her maiden settlement,—Held, that the examinations supported the order of removal, the latter furnishing no evidence of the settlement of J L the husband, and that no inquiry into the place of his settlement was necessary.

Held, also, that the statement of the complaint was sufficient. *Regina v. the Inhabitants of Watford*, 16 Law J. Rep. (n.s.) M.C. 1; 9 Q.B. Rep. 626.

(c) *Order of Removal.*

(1) *Examinations.*

[*Regina v. the Inhabitants of East Rainton*, 5 Law J. Dig. 559; 11 Q.B. Rep. 62, n.]

[*Regina v. the Inhabitants of St. Margaret's, Westminster*, 5 Law J. Dig. 559; 7 Q.B. Rep. 569.]

[*Regina v. the Inhabitants of Great Bolton*, 5 Law J. Dig. 559; 7 Q.B. Rep. 387.]

[*Regina v. the Inhabitants of Tolley*, 5 Law J. Dig. 559; 7 Q.B. Rep. 596.]

[*Regina v. the Inhabitants of St. Anne's, Westminster*, 5 Law J. Dig. 559; 7 Q.B. Rep. 245.]

A pauper, in his examination, stated, "When I was about fifteen years of age, I went to work at Messrs. C & D's factory, called Ringley Mills, in O, in the township of P. It was about the latter end of the year 1828. There was a custom in the mill, requiring the work-people to give a fortnight's notice before leaving their employment. I remained in the employment more than two years, during the whole of which time I resided in O, in the said township of P, and slept there: I worked under the custom as to giving notice. The works consisted of two mills, adjoining each other. When I wanted to leave the first mill (in which I had been working for about a year) to go to the other mill, I was compelled to serve [*sic*] a fortnight's notice before leaving. The second mill was under a similar custom; and after I had worked in it better than a year, I had a dispute with the overlooker, and wanted to leave at once, but was not allowed. The overlooker afterwards gave me a fortnight's notice, at the end of which time I left the factory," &c.

The grounds of appeal were, first, that the examination does not shew any settlement in the township of P; secondly, that it does not contain any legal evidence of the settlement of the person removed; thirdly, that it is bad upon the face of it, and does not warrant any order of removal; fourthly, that it does not state sufficient facts to shew that the pauper gained a settlement by hiring and service in P; fifthly, that there was no such hiring and service at Messrs. C & D's factory, or residence in the township of P, as in the examination is alleged; sixthly, that the pauper was not legally settled in the township of P.

It was objected at the Sessions, that the examination was insufficient, as no general or yearly hiring was stated, or could be implied from it; that it did not state that the party was hired at all, nor with whom he purported to make a contract, nor that he made any contract at all; and that there was no allegation in the examination that the paupers were settled in the appellat township:—Held, with reference to these objections, that the examination was sufficient.

The Court of Quarter Sessions ought not simply to state facts, and ask the opinion of this Court, as a jury, upon them; but, having drawn their own conclusions from the facts, they may ask whether, in the opinion of this Court, the facts will warrant their finding. *Regina v. the Inhabitants of Pilkington*, 13 Law J. Rep. (n.s.) M.C. 61.

A statement in the examination of the pauper, that "whilst residing in the parish of A, she has received monthly relief from B" (another parish), is sufficient to allow the respondent parish, on an appeal, to go into evidence of an acknowledgment of a settlement in B by relief. *Regina v. the Inhabitants of Hartpury*, 16 Law J. Rep. (n.s.) M.C. 105; 8 Q.B. Rep. 566.

The captions of the examinations on which an order of removal is founded, must shew that they were taken upon the complaint of the parish officers who apply for the order. *Regina v. the Inhabitants of Molesworth*, 15 Law J. Rep. (n.s.) M.C. 108.

Every examination on which an order of removal is founded must appear to be, in itself, perfect and complete, and must shew, without reference to any other examination, that it was taken before Justices having jurisdiction to take it. *Regina v. the Inhabitants of Ratcliffe Culey*, 15 Law J. Rep. (n.s.) M.C. 109; 9 Q.B. Rep. 18.

A statement in an examination that "in or about" the year 1832, the pauper was hired as a yearly servant by W, and served him under such yearly hiring, &c.,—Held, insufficient, for not shewing with sufficient certainty that such hiring and service was completed at the time of the passing of the Poor Law Amendment Act.

A statement that the pauper about the year 1827 (being unmarried, &c.) was hired as a yearly servant by S, and that she served S at his residence, at &c., under such yearly hiring, for about four years or more, and lived and lodged in the house of her master, the said S, at his residence, at &c., for more than forty days next preceding the termination of the said service, and on the last day thereof,—Held, insufficient, for not shewing that the pauper was unmarried at the time of the contract, express or implied, for the last year's service with S, that being the only year in which the forty days' residence was alleged. *Regina v. the Inhabitants of St. Anne, Westminster*, 15 Law J. Rep. (n.s.) M.C. 119; 7 Q.B. Rep. 124.

Where the examination stated a marriage in B, there being two churches of B, the Sessions refused to hear the respondents, and the Court holding it to be a point as to which the Sessions were the sole judges, affirmed the order of Sessions. *Regina v. the Inhabitants of Bakewell*, 7 Q.B. Rep. 601, n.

In an order for the removal of a widow, the pauper's examination set out a renting of a house by her late husband, and that he was assessed to and paid the poor-rates of the appellant parish for the said house for one whole year, and she produced the receipts for the rates, copies of which were exhibited and sent to the appellants. The vestry clerk of the appellant parish was examined, and produced the rate-books for the year in question before the removing Justices, but no extracts from them were sent by the respondents with the copies of the examinations:—Held, (*dubitante Coleridge, J.*) that it was to be presumed that the

removing Justices had inspected and decided on the accuracy of the rate-book, and that this being a document belonging to the appellant parish extracts from it need not be sent with the examinations. *Regina v. St. Pancras*, 17 Law J. Rep. (n.s.) M.C. 123; 12 Q.B. Rep. 4.

It is not sufficient that the caption of examinations, on which an order of removal is founded, shews that they are taken touching the settlement of the pauper and on the complaint of the overseers. The caption should also shew what such complaint is. *Regina v. the Inhabitants of Sheffield*, 17 Law J. Rep. (n.s.) M.C. 155; 12 Q.B. Rep. 93.

It is not necessary that each examination should have a distinct caption; it is sufficient to state in the first caption the names of each of the witnesses. *Regina v. the Inhabitants of St. Michael's, Coventry*, 17 Law J. Rep. (n.s.) M.C. 156; 12 Q.B. Rep. 96.

The caption of an examination which purports to be taken upon the complaint of the overseer, "touching the place of residence, chargeability, and last place of lawful settlement of the pauper,"—Held, insufficient. *Regina v. the Inhabitants of Gomersal*, 17 Law J. Rep. (n.s.) M.C. 163; 12 Q.B. Rep. 76.

The caption of an examination stated that the examination was taken "touching the legal settlement" of the pauper (not stating any complaint):—Held, insufficient. *Regina v. the Inhabitants of St. Thomas, New Sarum*, 17 Law J. Rep. (n.s.) M.C. 164; 12 Q.B. Rep. 55.

The caption of the examinations stated that they were taken on oath "upon the complaint of the churchwardens and overseers of the parish of A":—Held, insufficient. *Regina v. the Inhabitants of East Stonehouse*, 17 Law J. Rep. (n.s.) M.C. 166; 12 Q.B. Rep. 72.

It is sufficient if the caption of an examination states a complaint that the pauper has come to inhabit, and is actually chargeable to the removing parish, and it need not further state (as in the case of orders of removal) that the pauper has not gained a settlement in such parish. *Regina v. the Inhabitants of Addingham*, 17 Law J. Rep. (n.s.) M.C. 175; 12 Q.B. Rep. 63.

The caption of examinations stated that they were taken on the complaint of the overseers of the respondent township (not specifying the subject-matter of the complaint). Under grounds of appeal denying that the order was made on the complaint of the overseers, and that the examinations were bad on the face thereof, the appellants were not permitted to rely on the insufficient statement of the subject of complaint.

The examination of the relieving officer stated that the pauper is now resident in and receiving relief from the respondent township. The evidence on the trial shewed that the relieving officer relieved the pauper on behalf of the respondent township on the application of one of the overseers; that the matter was brought before the guardians of the union, and the relief ordered to be and was accordingly continued. The order book was produced:—Held, that there was a sufficient statement and proof of chargeability. *Regina v. the Inhabitants of Pott Shrigley*, 18 Law J. Rep. (n.s.) M.C. 33; 12 Q.B. Rep. 143.

Examination of T P, "taken before us A B and

C D, two of Her Majesty's Justices, &c. in and for, &c. on complaint, &c. touching the place of the last legal settlement of, &c." "The said T P, upon his oath, saith, &c." "Taken and sworn at, &c. this 25th day of January, A B & C D":—Held, that the examination sufficiently appeared to have been taken on oath before two Justices. *Regina v. the Inhabitants of Ellesmere*, 18 Law J. Rep. (N.S.) M.C. 181; 12 Q.B. Rep. 19.

A pauper inhabiting and receiving relief in one of several parishes incorporated under a local act for the support of the poor, is chargeable to such parish, and may be removed to another parish not within the act, although the relief is given out of the common fund provided by the local act. *Regina v. St. Mary in Bungay*, 19 Law J. Rep. (N.S.) M.C. 39; 12 Q.B. Rep. 38.

Where examinations, on which an order of removal is founded, shew no complaint, either in the body or by way of caption, the order must be quashed on appeal if the objection be properly taken. Although the order itself shew a complaint, and recite that the Justices have examined witnesses of the same names as those subscribed to the written examinations. *Regina v. the Inhabitants of Holywell*, 12 Q.B. Rep. 61, n.

In the caption, the recited complaint of the overseers held sufficient, where it stated the pauper's coming to inhabit, and his chargeability, without adding his not being settled or certificated. *Regina v. the Inhabitants of Addingham*, 12 Q.B. Rep. 63.

Where there was no complaint in the caption, but it was mixed up in the examination:—Held, that the want of it in the caption was not supplied, as the complaint must precede the examination. *Regina v. Inhabitants of Monk Bretton*, 12 Q.B. Rep. 83.

Where the caption only stated "the examination to be touching the place of settlement," and not mentioning any complaint,—Held, insufficient, and to shew no jurisdiction, although the order purported to be made on due proof of the complaint, as well by the examination of the overseer and pauper on oath as otherwise, and that the objection might be taken on a ground of appeal stating only "that the said examinations and order were bad on the face of them." *Regina v. the Inhabitants of Witham*, 12 Q.B. Rep. 88.

The examination purported to be taken before Justices in and for, &c., on the 24th of April, on the complaint, &c., that H now is inhabiting and is now chargeable:—Held, that it sufficiently appeared that the complaint was made on the 24th of April, when the examinations were taken. *Regina v. the Inhabitants of Goole*, 12 Q.B. Rep. 172.

[Statement of Marriage, see (D) Settlement, (d) *By Renting a Tenement*.]

(2) Form and Requisites of the Order.

[*Regina v. Willatts*, 5 Law J. Dig. 557; 7 Q.B. Rep. 516.]

[*Regina v. the Inhabitants of Worthenbury*, 5 Law J. Dig. 557; 7 Q.B. Rep. 555.]

An order of removal purported to be made by two of Her Majesty's Justices of the Peace, acting in and for the S division of the county of Gloucester, and after reciting a complaint of the churchwardens and overseers of the parish of C S, and that the

paupers were inhabiting in and chargeable to the parish of C S, in the said county of Gloucester, required the churchwardens and overseers of C S to remove the paupers to A, if no notice of appeal should be given within twenty-one days after service of the order, notice of chargeability and examinations, upon the parish of A, or if notice of appeal should be given within twenty-one days, then forthwith after the time for prosecuting such appeal should have expired (if the same be not duly prosecuted), or in case the same should be prosecuted, then forthwith after the final determination of the same, if the order should be confirmed; and concluded, "Given under our hands and seals at O S, in the said county of Gloucester." It was admitted that the above order was defective. *Regina v. Blathwayte*, 15 Law J. Rep. (N.S.) M.C. 48; 3 Dowl. & L. P.C. 542.

An order of removal was in the following form:—"Borough of L. On the complaint of the churchwardens, &c. of the parish of M, in the borough of L aforesaid, unto us, whose names and seals are hereunto set, two of Her Majesty's Justices of the Peace in and for the said borough, that S W, &c. (the paupers), now inhabit in the said parish of M, not having gained a legal settlement, and are now actually chargeable to the said parish: we, the said Justices, upon due proof made thereof, as well on the examination of the said S W, upon oath, as otherwise, and likewise upon due consideration had of the premises, do adjudge the same to be true; and we do likewise adjudge that the lawful settlement of the said S W is in the township of B, &c." "Given under our hands and seals, this 18th day of August 1845":—Held, first, that it sufficiently appeared that the adjudication, as to the settlement was made upon proper evidence; secondly, that the words, "as otherwise," did not import that evidence not upon oath had been received by the Justices; thirdly, that it sufficiently appeared that the order was made by the Justices within their jurisdiction. *Regina v. the Recorder of King's Lynn*, 15 Law J. Rep. (N.S.) M.C. 93; 3 Dowl. & L. P.C. 725.

An order of removal ran as follows:—"Whereas complaint has been made to me, A B, one of the police magistrates of the metropolis, sitting at the police court, at &c., by the churchwardens and overseers of the parish of G, that J J and E J had lately come into the said parish, endeavouring to settle there; and it appeareth to me, and I adjudge, that they are become chargeable; and, upon examination of the premises taken upon oath, and other circumstances, it further appeareth unto me, and I adjudge, that the parish of P is the last legal settlement of the said J J and E J":—Held, first, that the description of "police magistrate," sitting, &c., was sufficient to shew the jurisdiction of the single magistrate to make the order under the 2 & 3 Vict. c. 71. s. 14. Secondly, that the order was bad, for not stating a complaint of the actual chargeability of the pauper. *Regina v. the Inhabitants of St. Giles in the Fields*, 15 Law J. Rep. (N.S.) M.C. 122; 7 Q.B. Rep. 529.

An order of removal recited a complaint "made unto us, two of Her Majesty's Justices acting in and for the county of," &c., that the pauper "intradued and came into the parish of M, and hath actually become chargeable to, and is now inhabit-

ing in the same parish." After adjudicating the settlement, the order directed the removal of the pauper "on sight hereof;"—Held, that it sufficiently appeared that the complaint was made to the Justices, and the order made by them within their jurisdiction.

That the order was not bad for not directing the removal "on sight hereof."

And lastly, that the statement of the inhabitaney of the pauper was sufficient to justify the order of removal, under the statute 35 Geo. 3. c. 101. *Regina v. the Inhabitants of St. Paul's, Covent Garden*, 16 Law J. Rep. (N.S.) M.C. 11; 7 Q.B. Rep. 533.

An order of removal purported to be made by B C, "one of the magistrates of the police courts of the metropolis, sitting at the Clerkenwell Police Court, within the metropolitan police district":—Held, that this sufficiently shewed that the Clerkenwell Police Court was a court appointed under the provisions of the 3 & 4 Vict. c. 84. *Regina v. Hammersmith*, 17 Law J. Rep. (N.S.) M.C. 47; 11 Q.B. Rep. 391.

Where the order was made by Justices of a borough, and stated that they had jurisdiction therein, but did not shew where the complaint or order was made,—Held, that it could not be supported; and the Court upon a *certiorari*, granted in the first instance, quashed it, as well as the order of Sessions affirming it, upon the fiat of a Judge at chambers, without any rule to shew cause. *Regina v. the Inhabitants of Newton Ferrers*, 9 Q.B. Rep. 32.

An order of removal commenced "County of C," and purported to be made by "A and B, Justices acting in and for the said county of C." Indorsed on it and bearing date the same day was an order suspending its execution and commencing "County of C," and purporting to be made by "A and B the Justices within mentioned." There was also indorsed on the order of removal two orders, both bearing date two years later than it. The one purported to be made by "A and D, two of Her Majesty's Justices of the Peace for the said county of C," and directed the suspension to be taken off; and the other purported to be made by "A and D the Justices whose names are hereunto subscribed," and was an order for payment of the expenses incurred by the suspension, and was expressed to be made "in pursuance of the statute in such case made and provided." These last two orders bore date the same day, but neither of them had any marginal venue:—Held, that they were void as not shewing jurisdiction.

The 12 & 13 Vict. c. 45. s. 7. (which came into operation on the 1st of November 1849) provides that no objection on account of any omission or mistake in an order brought up on return to a *certiorari* shall be allowed, unless such omission or mistake shall have been specified in the rule for the *certiorari*:—Held, that this provision does not apply to rules obtained before the 1st of November 1849.

Quære—Whether the effect of this provision is to prevent substantial as well as formal objections to the order being taken, unless specified in the rule for the *certiorari*. *Regina v. the Inhabitants of Crown*, 19 Law J. Rep. (N.S.) M.C. 20.

[See (D) Settlement, (b) By Birth and Parentage.]

(3) Sending Documents.

One of the examinations, sent with an order of removal, stated, "I produce a covenant indenture of apprenticeship, bearing date, &c., between, &c., by which A B (the pauper) was bound to serve C D as his apprentice, &c. The indenture is duly stamped, and a premium of 6*l.* is stated in the indenture to be paid with the apprentice." A copy of the indenture was also sent with the examinations, but such copy did not, in any manner, shew whether any or what stamp was impressed on the indenture, and the examination contained no other evidence of premium, or consideration, or stamp:—Held, that the stamp was no part of the indenture, and that the examinations were sufficient in this respect. *Regina v. the Inhabitants of Keighley*, 15 Law J. Rep. (N.S.) M.C. 102; 8 Q.B. Rep. 877.

Justices examined witnesses at the request of the parish upon whom they were about to make an order of removal. Their evidence was not reduced into writing, and the order was made entirely upon the examination of the witnesses produced on the part of the removing parish, a copy of which was sent with the copy of the order:—Held, that it was unnecessary that the evidence of the witnesses examined on the other side should be reduced into writing, or a copy of it sent.

Under the statute 56 Geo. 3. c. 139. s. 2, notice of an intended binding of an apprentice from one parish into another is sufficiently given if served upon one of the overseers of the latter, and addressed to the whole body of parish officers. *Regina v. the Inhabitants of Holne*, 15 Law J. Rep. (N.S.) M.C. 125; 9 Q.B. Rep. 70.

The examinations on which an order of removal was made, stated that the pauper was, with his own consent (his parents being dead), bound apprentice by indenture, dated, &c., which was duly stamped and executed by the parties thereto. The indenture was shewn to be lost:—Held, that it sufficiently appeared that the binding was not a parish binding.

Under a ground of appeal, stating that notice of chargeability accompanied by a copy of the order and examinations, had not been sent to the appellant parish, in conformity with the statute, an objection that the notice of chargeability sent was accompanied by an imperfect copy of the order cannot be raised.

Where a case is granted by the Sessions, the party taking it must rely on the objections there stated, or may abandon the case and rely on such other objections as may be raised on a *certiorari*, but he cannot do both. *Regina v. the Inhabitants of St. Anne, Westminster*, 16 Law J. Rep. (N.S.) M.C. 33; 8 Q.B. Rep. 561.

Where application for relief is made by a pauper to the relieving officer of an union, and, in consequence, the board of guardians order relief to be given on account of one of the parishes within the union, which is accordingly administered by the relieving officer, that is evidence of the relief having been given by the authority of that parish.

In the examinations, on which an order of removal was made, the pauper stated instances of relief to her husband by parish C, and also that she, after his death, applied to and was relieved by the relieving officer of H Union while living in

parish E, which was within that union. The relieving officer of W Union (in which the parish of C was comprised) set out a letter received from the relieving officer of H Union, containing an account of relief given to the pauper, and applying for repayment; and stated that he reported the application to the board of guardians of W Union, who made an order for payment of the amount (which was produced, properly signed, &c.); that he forwarded the amount in a letter to the relieving officer of H Union; and that the relief so given was charged in his weekly relief list (produced) to the parish of C. The relieving officer of the H Union stated an application by the pauper for relief while living in E, stating that C was his parish; that in pursuance of an order by the guardians of H Union to give him relief and to charge it to C parish, in the W Union, he relieved the pauper and sent an account to the relieving officer of W Union, who repaid the amount. This was held to be legal evidence, from which it might be inferred by the removing Justices that the relief was given by the authority of the parish of C.

The pauper was sworn and examined as to her settlement on the 27th of February, and her statement was then taken down in writing and signed by the pauper, but not by the Justices, and had no jurat: it was indorsed: "Draft examination of M C, February 27, 1845, retaken afterwards:" the pauper was again examined on the 6th of March, and the examination taken on the second occasion was the only one sent with the copy of the order of removal.

Quære—Whether the former examination ought also to have been sent. *Regina v. the Inhabitants of Crondall*, 16 Law J. Rep. (n.s.) M.C. 175; 10 Q.B. Rep. 812.

Where the examination, on which an order of removal was made, set up two distinct grounds of removal, and a document applying exclusively to one of them referred to in the examination, and produced before the removing Justices, was omitted to be sent by the removing parish, together with the copy of the order, the respondents were precluded from giving evidence at the Sessions in support of either of the grounds of removal. *Regina v. the Inhabitants of Mylor*, 17 Law J. Rep. (n.s.) M.C. 6; 11 Q.B. Rep. 55.

Where the parish applying to remove a pauper proves before the Justices a former removal, acquiesced in, to the parish now about to be charged, and produces the order of removal, such order, or a copy, must be sent to the latter parish, under the statute 4 & 5 Will. 4. c. 76. s. 79. *Regina v. the Inhabitants of Wellington*, 11 Q.B. Rep. 65, n.

(d) Appeal.

(1) At what time.

An order of removal was made from parish A to parish B, and the notice of chargeability and copies of the order and examination were sent to parish B in sufficient time to enable them to appeal at the next following Sessions. There was no appeal to those Sessions; and the paupers were afterwards removed to parish B:—Held, that parish A might treat the removal as the grievance, and appeal to the Sessions next after such removal. *Regina v. the*

Recorder of Leeds (Easingwold v. Leeds), 15 Law J. Rep. (n.s.) M.C. 153; 8 Q.B. Rep. 623.

On the 22nd of April G G was removed alone from M to D, on an order for the removal of himself and family. There was no appeal entered against the order or the removal. G G returned to M; and on the 23rd of December, being again chargeable, he was removed with his family to D, under the same order. The overseers of D entered an appeal against the removal, at the next January Sessions:—Held, that they were too late, and should have appealed to the first Sessions after the order, or after the first removal of G G. *Regina v. the Justices of Durham*, 16 Law J. Rep. (n.s.) M.C. 112; 5 Dowl. & L.P.C. 82.

At the hearing of an appeal against the removal of a pauper the respondents objected that the appellants could not be heard, the original order not being produced, and no notice to produce it having been served. The Sessions dismissed the appeal. Subsequently the pauper was removed, and the appellants appealed to the next Quarter Sessions, but the Court refused to entertain the appeal. Upon motion for a mandamus,—Held, first, that the first appeal was properly dismissed; the practice of the Court requiring the production of the original order: and, secondly, that there was no right of appeal upon the subsequent removal of the pauper. *Regina v. the Justices of Peterborough*, 18 Law J. Rep. (n.s.) M.C. 79; 6 Dowl. & L.P.C. 517.

A notice of appeal was given for the next sessions after the service of an order of removal, but in consequence of the grounds of appeal not having been served fourteen days before those sessions the Court made a special entry "Order confirmed, not on the merits, no due notice having been given." The pauper being afterwards removed, a fresh appeal was entered against the order:—Held, that the right to appeal against the actual removal was not lost by reason of the previous proceedings.

Semble—that the appeal should have been adjourned by the first Sessions. *Regina v. the Inhabitants of Macclesfield*, 19 Law J. Rep. (n.s.) M.C. 38.

Previously to the making and service of an order of removal, and the suspension of its execution on the 7th of April 1843, the pauper had resided five years in the parish obtaining such order of removal, and on the 29th of September 1847, a second order of Justices was made directing the execution of the first order, and the payment of a certain sum for the maintenance of the pauper to be made by the parish to which under such second order the pauper was actually removed:—Held, (both orders being appealed against) first, that the appeal against the suspended order of removal was too late; secondly, that the removal under the second order was rendered illegal under the 9 & 10 Vict. c. 66, and, therefore, that the costs of the pauper's maintenance during the suspension could not be recovered. *Regina v. the Inhabitants of Chedgrave*, 19 Law J. Rep. (n.s.) M.C. 54; 12 Q.B. Rep. 206.

(2) Notice and Grounds of Appeal.

In the examination on which an order of removal from the township of L to the parish of C was founded, M S stated that she was the widow of A S, who was born at C of parents settled there, as she

believed; and J S stated that he was an elder brother of A S, who was born in C. The grounds of appeal alleged that the order, notice of chargeability, and examinations were bad on the faces thereof, and that the examinations contained no legal evidence of the pauper's settlement in C, or of their having come to settle in, or being chargeable to L. At the trial of the appeal, the appellants contended that the examinations did not shew that the A S mentioned by the widow was the same A S mentioned by J S. The respondents objected that this point was not raised by the grounds of appeal. The Sessions quashed the order on the point raised by the appellants. A rule *nisi* for a mandamus having been obtained, this Court held that the objection was sufficiently raised by the grounds of appeal, and that the decision of the Justices was final. *Regina v. the Justices of Staffordshire*, 16 Law J. Rep. (N.S.) M.C. 53; 4 Dowl. & L. P.C. 624.

An appeal against an order of removal was entered at the Midsummer Sessions. The attorney for the appellants served a notice on the respondents in due time, "to enter" and try at the Michaelmas Sessions; but fearing that the insertion of the words "to enter" might invalidate the notice, he took it back and erased those words, and at the same time inserted a sentence withdrawing the former notice, and then caused the notice, so altered, to be served on the respondents, without having it signed afresh by the parish officers of the appellant parish. At the trial these facts appeared, but the person who served the second notice not being present to prove that it was served in time, the Sessions dismissed the appeal, on the ground that "the notice was not sufficiently proved":—Held, that the insertion of the words "to enter" did not vitiate the first notice; that the alterations made by the attorney after the notice was signed were such as he was justified in making; that the second notice was a sufficient abandonment of the first, but that as the time of service was not proved, the Sessions decided rightly on a preliminary question of fact, with which this Court could not interfere. *Regina v. the Justices of Somersetshire*, 16 Law J. Rep. (N.S.) M.C. 86; 4 Dowl. & L. P.C. 741.

The only settlement disclosed by the examinations was the birth settlement of the pauper's late husband:—Held, that, under a ground of appeal which stated generally that "the pauper was not at the time of the order, nor was the late husband at the time of his decease, legally settled" in the appellant parish, the respondents were bound to give evidence of the birth of the pauper's late husband in the appellant parish, though there was no ground of appeal traversing the fact of his being born there, or alleging that he was born elsewhere. *Regina v. the Inhabitants of St. Giles, Colchester*, 17 Law J. Rep. (N.S.) M.C. 148; 12 Q.B. Rep. 13.

Where the poor of a parish are under the management of certain governors and directors appointed under a local act, such governors and directors are the parties aggrieved by an order of removal, within the statute 13 & 14 Car. 2. c. 12, and any three of such governors and directors may give a valid notice of appeal under the statute 4 & 5 Will. 4. c. 76.

By a local act, 7 Geo. 4. c. cxxi., the vestry of a parish were empowered to appoint twenty house-

holders, who, together with the rector, churchwardens, and overseers for the time being were to be the governors and directors of the poor of the said parish, and to have the sole care and management of the said poor, with power to bind parish apprentices, to take bastardy bonds, to superintend and repair workhouses, &c. An order of removal was addressed to the churchwardens and overseers of this parish, and a notice of appeal against the order was given, signed by three of the governors and directors:—Held, first, that the governors and directors were the parties aggrieved, and therefore the proper persons to appeal.

Secondly, that the signature of the notice by three of the guardians was sufficient within the statute 4 & 5 Will. 4. c. 76. ss. 81, 109. *Regina v. the Inhabitants of St. George's, Hanover Square*, 18 Law J. Rep. (N.S.) M.C. 160.

Though it does not appear on the order or examinations that the chargeability of a pauper was occasioned by relief given on account of sickness, yet it is a good ground of appeal that such was the case, and that such sickness was not shewn to be likely to produce permanent disability.

Paupers became chargeable by sickness on the 20th of April 1846. Shortly after the passing of the 9 & 10 Vict. c. 66. (the 26th of August 1846), they were removed by an order which did not state the sickness, or that the Justices were satisfied that it would not produce permanent disability:—Held, that such omission was a good ground of appeal. *Regina v. the Inhabitants of Priors Hardwick*, 18 Law J. Rep. (N.S.) M.C. 177; 12 Q.B. Rep. 181.

The ground of appeal against an order for the removal of a widow stated that the pauper's late husband, "in or about the year 1810, was born in the parish of P, in the county of S":—Held, on a case reserved, that such statement was sufficient. *Regina v. the Inhabitants of Ealing*, 18 Law J. Rep. (N.S.) M.C. 185; 12 Q.B. Rep. 178, n.

The pauper's examination upon which an order of removal was founded, stated a settlement by apprenticeship in the appellant parish under a covenant of indenture executed in the year 1804. One ground of appeal was that the said pauper "was not in the year 1834 legally bound apprentice to," &c. (following the words of the examination) "as stated in the said examination of the said pauper taken in this cause," &c.:—Held, that such ground of appeal was a sufficient traverse of the settlement by apprenticeship stated in the examination, and that the decision of the Sessions upon the question was one which this Court might properly review. *Regina v. the Inhabitants of Aston-nigh-Birmingham*, 19 Law J. Rep. (N.S.) M.C. 17; 12 Q.B. Rep. 26.

The examinations in support of an order of removal alleged, as evidence of a settlement, relief given to the pauper's late husband and the pauper in the appellant parish, and the former order acted upon and unappealed against, for the removal of the pauper and her children from the respondent to the appellant parish as the place of her late husband's settlement. The appellants' first ground of appeal stated that J S, the late deceased husband of the pauper, "had not at the time of his decease nor ever had any settlement in our said parish." There were eight other grounds of appeal, all except the

fifth raising questions as to the relief set up, the pauper's chargeability, the sufficiency of the jurat of the examinations, the statement of inhabitancy in the order, the marriage of the pauper and the legitimacy of her children, and setting up a five years' residence in the respondent parish. The fifth ground objected that no copy of the former order unappealed against had been sent:—Held, *dubitante Erle, J.*, that under the first ground of appeal the fact of the existence of such former order was not traversed, and that the Sessions had properly refused to call upon the respondents to produce and prove it at the hearing.

Quere—Whether, if the first ground of appeal had denied the existence of the former order, it would have been rendered unavailable for that purpose by reason of the other special grounds of appeal. *Regina v. St. Mary in Bungay*, 19 Law J. Rep. (n.s.) M.C. 39; 12 Q.B. Rep. 38.

(3) Entry and Respite.

Where a pauper was removed, under an order of removal in March, within fourteen days of the Easter Sessions, and the appellants entered and respited an appeal *ex parte*, without giving notice to the respondents, at the Midsummer Sessions, and served notice and grounds of appeal for the October Sessions, it was held, that as the Midsummer Sessions had jurisdiction to receive the appeal, the propriety of their adjournment could not be considered.

Semble—that for all purposes, the first practicable sessions are the first sessions within the meaning of the 9 Geo. 1. c. 7. s. 8; and that the Justices would be bound to respite an appeal entered at such sessions if no notice of appeal were given. *Regina v. the Justices of Surrey*, 15 Law J. Rep. (n.s.) M.C. 1; 3 Dowl. & L. P.C. 343.

An order of removal had been served, and notice and grounds of appeal sent in time for trial at the October Sessions, but in consequence of an arrangement made with the attorney for the appellants, by the agent of the attorney for the respondents, it was agreed that the trial of the appeal should be postponed until the Epiphany Sessions. The attorney for the respondents, being in ignorance of this arrangement, and on a certificate by the clerk of the peace that no appeal was entered, filed the order of removal, and had it confirmed at the October Sessions, and immediately afterwards the pauper was removed under the order. On an application by the appellants to enter and respite an appeal against the same order at the Epiphany Sessions, the clerk of the peace refused to do so, as there was already an order confirming it on the files of the court. On a mandamus to erase the entry of the order made at the October Sessions, the Court refused the rule, as the Sessions had jurisdiction by the entry of the appeal. *Regina v. the Justices of Glamorganshire*, 15 Law J. Rep. (n.s.) M.C. 110.

Justices at Quarter Sessions refused to hear an appeal against an order of removal, which had been entered and respited at a former Sessions, on the ground that the appellants had not complied with a rule of practice of the Sessions, requiring notice of the previous entry and respite to be given to the respondents eight days before the sessions next after such entry and respite:—Held, that the Ses-

sions had no power to make a rule of practice of that kind, and, therefore, as all the notices required by the general law had been given, that a mandamus lay to compel the Justices to enter continuances and hear the appeal. *Regina v. the Justices of Surrey*, 18 Law J. Rep. (n.s.) M.C. 175; 6 Dowl. & L. P.C. 735.

(4) Hearing of Appeal—Jurisdiction.

Upon an appeal against an order of removal coming on to be tried, the respondents admitted that the examinations were defective, as not containing evidence of chargeability. The objection had been pointed out by one of the grounds of appeal. The appellants stated that they waived the objection, and applied to have the appeal heard on the merits; but the Sessions quashed the order, at the request of the respondents, with a special entry "for want of proof of chargeability in the examinations." An application, on the part of the appellants, for a mandamus to the Sessions, to hear the appeal, was refused by the Court. *Ex parte the Inhabitants of Wellingborough*, 15 Law J. Rep. (n.s.) M.C. 20; 8 Q.B. Rep. 123.

A notice and grounds of appeal signed by a majority of the officers of the parish, and stating, "We, being a majority of, and acting for and on behalf of the churchwardens and overseers, &c." and also "that the following are the grounds of our appeal," is sufficient.

Where upon an appeal being called on at the Sessions, the respondents required the appellants to prove their notice of appeal, and a witness was accordingly examined, who proved service of a notice of appeal, which was objected to as improperly signed, and the Sessions accordingly dismissed the appeal,—Held, that a mandamus might issue, commanding the Justices to hear the appeal, as the decision on the validity of the notice of appeal was only preliminary to the right of the appellants to be heard. *Regina v. the Justices of Surrey (St. Anne, Westminster v. St. Mary Magdalen, Bermondsey)*, 15 Law J. Rep. (n.s.) M.C. 46; 3 Dowl. & L. P.C. 573.

An order of removal was made by A B and Josiah Wilson, and a duplicate copy served, in which the name of the latter Justice was illegibly written. In the copy of the examinations sent with the order the names of both Justices were clearly written. A petition of appeal was presented against the order, describing it as made by A B and Jonah Walters, and the appeal was entered as against an order made by A B and John Walter; notice of appeal was also sent describing it in the same way. At the Sessions the original order was produced, and the Sessions dismissed the appeal, on the ground that there was no order in existence against which it was entered:—Held, that if the Sessions were of opinion that the appeal was meant to be entered against the real order, they would have jurisdiction, and a mandamus was issued to compel them to enter continuances and hear the appeal. *Regina v. the Justices of Middlesex (St. Pancras v. St. John, Hackney)*, 16 Law J. Rep. (n.s.) M.C. 100; 3 Dowl. & L. P.C. 745.

An order of removal was directed to a parish which contained several townships, one of which bore the same name as the parish. The officers of the township appealed against the order. At the

trial, the respondents took a preliminary objection that the churchwardens of the parish should have joined in the appeal. A witness stated, that the township maintained its own poor, but the Sessions, not believing that statement, held the objection good, and dismissed the appeal. A mandamus was refused because the Justices had decided on a question of fact, and their decision was therefore final. *Regina v. the Justices of Flintshire*, 16 Law J. Rep. (n.s.) M.C. 55; 4 Dowl. & L. P.C. 644.

An appeal against an order of removal having been entered and respited after notice of appeal given to the respondents, was abandoned by the appellants, and notice thereof given to the respondents. At a subsequent sessions, the respondents after notice to the appellants appeared and obtained an order of Sessions confirming the order of removal, and adjudging a certain sum for their costs, charges and expenses in supporting the latter order:—Held, that the confirming of the order of removal was an excess of jurisdiction on the part of the Sessions; but that as the rights of the parties did not appear to be affected by such confirmation, and the costs would have been the same had the appeal been, as it properly ought to have been, dismissed, the order of Sessions ought to be confirmed. *Regina v. the Inhabitants of Over*, 19 Law J. Rep. (n.s.) M.C. 57.

(5) Trial and Evidence.

An order of removal of a pauper from parish P to parish A was quashed on appeal, with a special entry of "not on the merits, and without prejudice to the making of any other order for the removal of the pauper," &c.

A subsequent order of removal from P to A (no new settlement having been gained) was made and appealed against, and the grounds of appeal set up the quashing of the former order:—Held, on a case reserved, first, that the special entry prevented the former order from operating as an estoppel between the parishes. Secondly, that the appellants could not give evidence to shew that, notwithstanding such special entry, the question decided by the Sessions affected the merits of the settlement. *Regina v. the Inhabitants of St. Anne's, Westminster*, 16 Law J. Rep. (n.s.) M.C. 41.

The examination set up two grounds of settlement in the appellant parish: first, birth; second, hiring and service. The grounds of appeal set up a former order of removal between the same parishes quashed by the Sessions, and a settlement by parentage, and also traversed the hiring and service, and further alleged that the paupers were not settled in the appellant parish "in any manner whatever." At the trial it appeared by the minute book of the clerk of the peace that the former order of removal (mentioned in the grounds of appeal) was quashed, "on the ground that the examinations were insufficient to support the order."—Held, that parol evidence was admissible to explain the entry in the minute book, and to shew that the order was not quashed on the merits.

The appellants tendered evidence to shew that the pauper was not born in their parish:—Held, that such evidence was not admissible under the grounds of appeal.

The examination of a prisoner, confined in gaol

under sentence of transportation, was taken on the 1st of January 1845, touching his settlement, under the 59 Geo. 3. c. 12. s. 28:—Held, not admissible, at the trial of the appeal, in June 1845, without evidence that he was a prisoner at the time it was so tendered. *Regina v. the Inhabitants of Widdecombe-in-the-Moor*, 16 Law J. Rep. (n.s.) M.C. 44; 9 Q.B. Rep. 894.

After an appeal against an order of removal had been entered and respited, the respondents on the 22nd of March, gave notice to the appellants that they abandoned the order, and intended to appear at the next Quarter Sessions only for the purpose of quashing it, and obtaining a special entry; "that such order was quashed not upon the merits," and also undertook and offered to pay all costs incurred up to the time of the service of the notice. At the Sessions, held on the 8th of April, the application for such special entry was opposed by the appellants, and the entry made was, "order quashed without any special entry, as the Court has no evidence before them to enable them to make such special entry."

On appeal against a subsequent order, made on examinations setting forth the same facts as those on which the former order was made, and no other,—Held, that the former order was not conclusive as to the settlement, but that evidence was admissible to shew that the former order had not been quashed on the merits. *Regina v. the Inhabitants of Landkey*, 16 Law J. Rep. (n.s.) M.C. 81.

An order of removal from P to L was founded on examinations, which stated that the pauper rented a tenement of above 10l. for a year, and paid rent during his tenancy. On appeal, the Sessions confirmed this order, subject to a case on the point, whether the examinations were defective for not shewing that "the" rent was paid by the pauper. The case directed that if this Court should consider the objection to the examinations fatal, the order was to be quashed "for deficiency of the examination" whereon it was founded. The Court of Queen's Bench, after argument, quashed the order of Sessions and order of removal.

On appeal against a subsequent order removing the same pauper from P to L upon the same settlement, the appellants objected that the respondents were estopped by the decision on the former case, (which was set out in the examinations,) and rested their objection upon production and proof of a copy of the record in the Crown Office, shewing that the former order had been quashed. The respondents did not offer any evidence to shew that the judgment did not proceed on the point of settlement. The Sessions held that the respondents were not estopped.

The appellants then tendered evidence to shew that the decision of the Court of Queen's Bench proceeded on the ground that the former examinations were insufficient in the point of shewing a settlement, which the Sessions held to be inadmissible (subject to the opinion of this Court); but it being admitted, that if this evidence could be received the decision did proceed on that ground, they further asked, whether such a decision was conclusive:—Held, first, that the quashing of the prior order "for deficiency of the examinations" was equivalent to a general quashing, and that the

respondents were not estopped by the former judgment, either party being at liberty to shew the grounds on which it proceeded.

Secondly, that evidence of the grounds of the decision of this Court was admissible.

Thirdly, that the decision in the former case was on a point of settlement, and conclusive. *Regina v. the Inhabitants of Leeds*, 17 Law J. Rep. (n.s.) M.C. 1.

The examination stated that the pauper was born in the appellant parish, and had gained no settlement in his own right, and then proceeded to shew a settlement acquired by the pauper's father, by renting a tenement in the appellant parish. The grounds of appeal only denied this derivative settlement:—Held, that the respondents, at the trial of the appeal, might fall back upon the birth settlement. *Regina v. the Inhabitants of Ellesmere*, 18 Law J. Rep. (n.s.) M.C. 181; 12 Q.B. Rep. 19.

Under the general ground of appeal "that the statements contained in the said examinations are not true," the appellants are entitled to call upon the respondents to prove the settlement relied upon in the examinations.

It is for the Sessions to consider any question of inconvenience arising from such general ground of appeal, and if it amount to a frivolous and vexatious statement, to award costs under the 4 & 5 Will. 4. c. 76, and 11 & 12 Vict. c. 31. *Regina v. the Inhabitants of St. Pancras*, 19 Law J. Rep. (n.s.) M.C. 23.

If the ground of appeal against an order of removal be merely that it does not appear on the face of the "examinations" that it was made upon a proper complaint, the objection is sufficiently answered by shewing that such a complaint appears in the body of the examinations, although no caption shews it. *Regina v. the Inhabitants of St. Margaret, Leicester*, 12 Q.B. Rep. 98.

(F) PAUPER LUNATIC.

(a) Adjudication of Settlement and Expenses.

Two Justices of the county of R made an order for the removal of a lunatic pauper to a licensed house in the county of S. The pauper was removed accordingly, his settlement not being then adjudicated on, though the Justices of R had, at the time of making the order, made inquiry into and received some evidence respecting his settlement:—Held, that, after the removal of the pauper to S, the order adjudicating his settlement could be made only by Justices of the county of S, under the 9 Geo. 4. c. 40. s. 42. *Regina v. Heyop*, 15 Law J. Rep. (n.s.) M.C. 70; 8 Q.B. Rep. 547.

Two Justices made an order, directing the removal of a pauper lunatic to an asylum, his settlement being then unascertained. In this order they gave no directions as to the expense of his maintenance. They subsequently made an order, adjudicating his settlement to be in H, and directing H to pay for his maintenance. This second order was confirmed by the Sessions on appeal, but quashed by the Court of Queen's Bench, together with the order of Sessions confirming it, on a case granted by the Sessions. H paid for the maintenance of the pauper under the second order.

The Court refused a mandamus to the Justices

of the county, to repay to the parish officers of H the sum so paid by them. *Regina v. the Justices of Radnorshire*, 15 Law J. Rep. (n.s.) M.C. 151; 9 Q.B. Rep. 159.

An order of settlement and maintenance, under the 9 Geo. 4. c. 40, on parish A, of a lunatic pauper, confined in an asylum in parish D, was made in April 1841, and quashed by consent, on appeal.

In September 1841 another order of two Justices was made between the same parishes adjudging the pauper's settlement to be in parish A, and directing the overseers of that parish to repay to the overseers of parish D the sum of 14*l.* 2*s.* for the removal, maintenance, care, &c. of the pauper. This order was appealed against, and confirmed at the Sessions, but the order of Sessions was, on a case reserved, quashed by the Court of Queen's Bench, on the ground that the statute did not empower the Justices to order the reimbursement to be made to the overseers. In January 1845 another order of two Justices was made, adjudging the pauper's settlement to be in parish A, and directing the overseers of that parish to pay to the keepers of the asylum a weekly sum, for the maintenance, &c. of the pauper. This order having been quashed on appeal by the Sessions, on the ground that the previous order was conclusive between the parishes as to the settlement of the pauper:—Held, that the Sessions were wrong in so deciding, as the judgment of the Court of Queen's Bench, the reasons of which must be taken to be adopted by the Sessions, did not turn on the question of settlement. *Regina v. the Inhabitants of St. Peter's, Droitwich*, 16 Law J. Rep. (n.s.) M.C. 38; 9 Q.B. Rep. 886.

It is no ground of objection to an order of Justices adjudicating the settlement of a pauper lunatic, or to an order for the costs of his maintenance, made under the statute 8 & 9 Vict. c. 126, that the proceedings before the Justices were taken *ex parte*, and without notice to the parish sought to be affected by the orders.

Semble—that upon appeal against an order of maintenance made under the above statute, the settlement of the pauper may be put in issue. *Ex parte Monkleigh*, 17 Law J. Rep. (n.s.) M.C. 76; 5 Dowl. & L. P.C. 404.

The adjudication of the settlement of a lunatic pauper, under the 8 & 9 Vict. c. 126. ss. 58, 62, may properly be comprehended in the order for payment of the costs of his maintenance.

Such order may be made on the overseers of the parish where he is adjudged to be settled, though such parish form part of a union. *Regina v. Tyrwhitt*, 17 Law J. Rep. (n.s.) M.C. 141; 12 Q.B. Rep. 292.

By an order of Justices, the settlement of a pauper lunatic was adjudged to be in S, and the overseers of that parish were thereby ordered to pay to the treasurer of the M union, within which the parish of C was included, the expenses incurred by C in and about the examination, conveyance, maintenance, &c. of the lunatic. The parish of S appealed against this order, which was thereupon quashed by the Sessions, and an order made that the parish of C should pay to the parish of S the costs of the appeal:—Held, that the Sessions had jurisdiction to make this order on C, as that parish was substantially the respondent in the appeal, and

that the payment directed to be made to the treasurer of the union by the prior order was merely on behalf of the parish of C.

Held also, that the order of Sessions shewed on the face of it that the parish directed to pay costs was a party to the appeal. *Regina v. the Inhabitants of Chatham*, 17 Law J. Rep. (N.S.) M.C. 161.

Orders of adjudication of settlement and of maintenance of a pauper lunatic in an asylum, under the 8 & 9 Vict. c. 126, do not amount to a removal under the 9 & 10 Vict. c. 66, and may be made on the parish in which the pauper is settled, notwithstanding a previous five years' residence in the parish from which he has been removed to the asylum.

Pauper was settled in the parish of R, and was removed from the parish of L, where she had resided more than five years, to a lunatic asylum in the parish of D, under the 8 & 9 Vict. c. 126. ss. 58. and 62. Two Justices subsequently made orders of settlement and maintenance on the parish of R, under the 8 & 9 Vict. c. 126. ss. 38. and 62:—Held, that such orders were not prohibited by the 9 & 10 Vict. c. 66. s. 1. *Regina v. the Inhabitants of Leaden Roothen*, 18 Law J. Rep. (N.S.) M.C. 187; 12 Q.B. Rep. 181.

An order of Justices for the expenses, &c. of a lunatic under the 8 & 9 Vict. c. 126. s. 62, is valid in a case where the lunatic has been admitted into the asylum under the 8 & 9 Vict. c. 100. s. 48. without any application to a Justice as required by the 8 & 9 Vict. c. 126. s. 48.

It is no objection that the facts essential to authorize an order for the maintenance and expenses of a pauper lunatic are stated in it by way of recital.

An order of maintenance, made under the 8 & 9 Vict. c. 126. s. 48, which directed the treasurer to the guardians of the W Union to pay weekly to the proprietor of a lunatic asylum 11s., "which appears to the Justices a reasonable charge, or such other weekly sum as the proprietor of the said asylum shall hereafter and from time to time reasonably charge" for the future lodging, &c. of the lunatic, is not objectionable. *Regina v. the Inhabitants of Hatfield Peverel*, 18 Law J. Rep. (N.S.) M.C. 225.

Where a lunatic not chargeable to any parish was, at the instance of the officiating minister of H, sent by an order of two Justices to an asylum under the 8 & 9 Vict. c. 126. s. 49,—Held, that he was to be considered as a pauper, and chargeable by virtue of section 57. to the parish from which he was sent.

Held also, that the parish of H in which he resided was to be considered, for the purpose of such chargeability, as the parish from which he was so sent, and not the parish of W in which he happened to be at the time of his capture; and that, therefore, the allowance of the auditor of the district of an account of the guardians of the union which comprised the parishes of H and W, charging the expense of the lunatic's maintenance in the asylum to parish W, was ill; and that the sum so allowed ought to be repaid by the parish of H. *Regina v. the Churchwardens of Winsford*, 18 Law J. Rep. (N.S.) M.C. 231.

The power given by the statute 8 & 9 Vict. c. 126. s. 58. to Justices "at any time to inquire into the last legal settlement of any pauper lunatic confined,

or ordered to be confined" in an asylum, can only be exercised while the lunatic is either actually confined there or while there is an order for his removal thither unexecuted; and there is no power to inquire into the settlement after a pauper lunatic has been discharged from the asylum.

Under section 62. of the same act an order may be made at any time for payment of the expenses incurred in or about the examination of a pauper lunatic, and his conveyance to the asylum; but the repayment of monies paid for maintenance, medicine, &c. must be limited to the expenses incurred within twelve calendar months previous to the date of the order. *Regina v. the Inhabitants of Wolverhampton*, 19 Law J. Rep. (N.S.) M.C. 25.

Where an order has been made upon the treasurer of the W Union, which includes parish A, from which a pauper lunatic had been sent to an asylum, for the payment of the expenses of lodging, maintenance, &c., and the lunatic is afterwards adjudged to be settled in parish B, which is also comprised in W Union, a second order may, under the 8 & 9 Vict. c. 126. s. 62, be made on the treasurer of W Union, directing him on behalf of such parties, and in such manner as the law directs, to pay to himself, so being the treasurer, &c. out of any money which may come to his hands by virtue of his office, the expenses incurred by parish A in and about the examination and conveyance of the lunatic, and the monies paid by him (the treasurer) for the lodging, &c. of the lunatic within twelve months on behalf of A, and also to pay to the treasurer of the asylum a weekly sum for the future lodging, maintenance, &c. of the lunatic in the asylum. *Regina v. East Ardsley*, 19 Law J. Rep. (N.S.) M.C. 133.

The limitation of twelve months mentioned in section 62. of the 8 & 9 Vict. c. 126. refers to the expenses incurred for the maintenance and care of a pauper lunatic, and not to the cost of the examination and conveyance to the asylum of such lunatic.

Where, therefore, an order of Justices under that section directed the payment of 20s. for the examination and conveyance of a pauper lunatic, and 20l. 17s. 2d. for the lodging, maintenance, medicine, clothing, and care of such lunatic, but omitted to shew upon the face of it that the sums so ordered had been "incurred within twelve calendar months previous to the date of the order,"—Held, that as to the payment of the latter sum the order was bad. *Regina v. the Inhabitants of Winster*, 19 Law J. Rep. (N.S.) M.C. 185.

(b) Appeal against Orders of Settlement and Maintenance.

By the 9 Geo. 4. c. 40. s. 54. it is enacted, that the churchwardens, &c. of a parish, in which any insane person shall be adjudged to be settled, may appeal to the Quarter Sessions for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, which appeal the Justices, at the said Quarter Sessions, are authorized and empowered to hear and determine in the same manner as appeals against orders of removal are now heard and determined. An order made by two Justices, adjudging the settlement of a pauper lunatic confined in an asylum, to be in L, was served on the parish of L on the 13th of March. The next Sessions were

held on the 7th of April, at which no appeal was entered. The practice of the Sessions required ten days' notice of appeal in all cases not otherwise provided for by law.

Semble—that the provisions of the 4 & 5 Will. 4. c. 76. s. 79, that no pauper shall be removed until twenty-one days after notice of the order has been served upon the parish to which the removal is ordered to be made, do not apply to this case, and that an appeal entered at a sessions subsequent to those held in April, was out of time; but a mandamus was granted, in order that the question might be discussed on a return. *Regina v. the Justices of the West Riding of Yorkshire, in re Vincent*, 15 Law J. Rep. (n.s.) M.C. 52; 5 Dowl. & L. P.C. 16, n.; 10 Q.B. Rep. 763.

By the 9 Geo. 4. c. 40. s. 54. an appeal is given, against an order adjudging the settlement of a lunatic pauper, to the Quarter Sessions for the county where the order is made "in like manner and under like restrictions and regulations as against any order of removal;" which appeal the Justices are authorized to hear and determine "in the same manner as appeals against orders of removal are now heard and determined.

Held, that the enactment in the 4 & 5 Will. 4. c. 76. s. 79, that no pauper shall be removed until twenty-one days after a copy or counterpart of the order has been served on the parish to which the removal is ordered to be made, is not incorporated in the 9 Geo. 4. c. 40. s. 54, and is inapplicable to the case of lunatic paupers.

Therefore, where an order adjudging the settlement of a lunatic pauper to be in the parish of L was served on the overseers of L on the 13th of March, and the next sessions were held on the 7th of April, at which no appeal was entered, and by the practice of the Sessions ten days' notice for the trial of appeals was required,—it was held, that an appeal entered subsequently to the April sessions was too late.

Section 60. of the 9 Geo. 4. c. 40. applies to cases of penalties under the act, and not to orders of maintenance, &c., which are regulated by section 54. of the same act (overruling *The Queen v. Pixley*, 4 Q.B. Rep. 711; s.c. 12 Law J. Rep. (n.s.) M.C. 87, and confirming *The Queen v. the Recorder of York, ante*, M.C. 22).

A writ of mandamus commanded Justices to hear an appeal by the overseers of L against an order of two Justices adjudging the settlement of a lunatic to be in L, and ordering the overseers of L to pay a sum of money so long as the lunatic should be confined in the asylum under another order made by the same two Justices, and bearing date the same day. The return set out facts relating to "the said order," and justified the refusal to hear:—Held, that it sufficiently appeared that the order referred to in the return was the order addressed to the overseers of L and appealed against by them. *Regina v. the Justices of the West Riding of Yorkshire*, 16 Law J. Rep. (n.s.) M.C. 171; 10 Q.B. Rep. 763.

By the statute 8 & 9 Vict. c. 126. s. 62. guardians of an union, &c. affected by any order for the maintenance of pauper lunatics are authorized to appeal against the same, in like manner as if the same were a warrant of removal, and the persons appealing or defending such appeal are to have all the

same powers, rights, and privileges, and to be subject to the same obligations in all respects as in the case of an appeal against a warrant of removal. The 11 & 12 Vict. c. 31. repeals so much of the 4 & 5 Will. 4. c. 76. as provides that in cases of orders of removal copies of the examinations shall be sent, and section 9. enacts, "that no appeal shall be allowed against an order of removal if notice of appeal be not given within twenty-one days after notice of chargeability and statement of grounds of removal, or within a further period of fourteen days after sending copies of the depositions":—Held, that the provisions in the 11 & 12 Vict. c. 31. extend to appeals against orders for maintenance under the 8 & 9 Vict. c. 126, and that notice of appeal against such orders must be given within twenty-one days after service of notice of chargeability, &c. or within fourteen days from the sending copies of the depositions. *Regina v. the Justices of Glamorganshire*, 18 Law J. Rep. (n.s.) M.C. 118.

Where an order made under the 8 & 9 Vict. c. 126. s. 62. adjudged the settlement of a pauper lunatic to be in the parish of K (which is within the C union), and directed the treasurer of the C union to pay certain sums for his maintenance, &c.—Held, that both the parish officers of K and the guardians of the C union had a right to join in appealing against the order. *Regina v. the Justices of Lancashire*, 18 Law J. Rep. (n.s.) M.C. 121; 12 Q.B. Rep. 305.

The grounds of appeal against an order for the maintenance of a pauper lunatic alleged, that the pauper's mother was legally settled in the parish of R, and that the pauper was legally settled there, her mother's settlement being legally communicated to her; and further, that the said pauper's mother was legally entitled to, and in possession of, a certain freehold tenement, situate in the parish of R, and that she had been resident in the said parish forty days next before the making of the order, and that the pauper was unemancipated:—Held, that such grounds of appeal were not sufficiently explicit to enable the appellants to set up under them a derivative settlement by estate from the pauper's mother.

Under the 8 & 9 Vict. c. 120. the jurisdiction of the Justices to adjudicate on the settlement of a pauper lunatic, and to make an order of maintenance, attaches on their finding the lunatic in the asylum, and for that purpose the regularity of the previous preliminary proceedings is immaterial. In such case it is not necessary, in order to give the Justices jurisdiction, that there should have been an information, under section 48, by the relieving officer, and an order under the hand and seal of the Justice, requiring the relieving officer to bring the pauper before him.

Quære—Whether distinct grounds of appeal may be taken together without some link connecting them. *Regina v. the Inhabitants of Rhyddlan*, 19 Law J. Rep. (n.s.) M.C. 110.

(c) Removal of.

A lunatic who has become chargeable, and who is not shewn to be unfit to be at large, is removable to the place of his settlement under a common order of removal, and it is not imperative on the Justices or overseers to resort to the provisions of the 8 & 9 Vict. c. 126.

An order was made in July 1842 for the removal of C D, his wife, and their idiot son aged 33, from the township of B to the township of T, where they were settled. This order was never appealed against, but its execution was suspended till August 1844, when the paupers were removed under it to the township of T and received by the overseers of T. At the expiration of four days the paupers, under a promise by the overseers of T to pay the parents 3s. 6d. per week for the future maintenance of the son, returned to B, where C D had retained a house in the care of two of his emancipated children, and remained there, receiving such allowance. Another order for the removal of the same paupers from B to T having been made in September 1847,—Held, first, that the lunatic son was removable. Secondly, that there being nothing to shew that the chargeability of the father was occasioned merely by relief given to the son, the father was to be taken to be chargeable on his own account. Thirdly, that the removal to T in 1844 was a break in the five years' residence. *Regina v. the Inhabitants of Barnsley*, 18 Law J. Rep. (N.S.) M.C. 170; 12 Q. B. Rep. 193.

PORT DUTIES.

[See MUNICIPAL CORPORATION.]

James II. by charter granted to the master pilots and seamen of Newcastle certain primage dues to be paid "by all persons being owners of any goods" which should be brought from beyond seas into the River Tyne, and in manner following, "that is to say, aliens and strangers born, and other such persons, who, with their said ships, should arrive within the said port, and not belong to the same, before they depart with their said ships from the said port, should pay the duties aforesaid for and in the name of primage, and every free merchant and other inhabitant of Newcastle arriving with their said ships within the said river of Tyne, should pay the duties aforesaid, within ten days after the landing of the said goods as aforesaid upon lawful demand." The duties had always been paid by the importer:—Held, that the word "owners" meant the persons who imported the goods, and that such a person was liable, although he gratuitously landed, entered and warehoused the goods for the owners, who resided in London. *Master Pilots and Seamen of Newcastle v. Hammond*, 18 Law J. Rep. (N.S.) Exch. 417; 4 Exch. Rep. 285.

PORTIONS.

Testator devised his estates in B to the same uses as those to which the estates comprised in his eldest son's marriage settlement were limited, and devised his estates in M to trustees in trust by sale or mortgage to raise portions for his youngest children, and from and after performance of that trust, and subject thereto in the first instance, and subject to the payment of such of his debts as his personal estate should be insufficient to satisfy, he devised those estates to his eldest son in fee, and appointed him executor.

The testator died indebted by specialty as well as

simple contract, and his personal estate being insufficient to pay his debts, his eldest son, with the concurrence of the trustees of the estates at M, sold those estates, and exhausted the proceeds in making good the deficiency of the personal estate to pay the debts:—Held, that the youngest children were entitled in respect of their portions to a charge on the estate in B, equal in amount to the proceeds of the estates in M, which had been applied to pay the specialty debts. *Legh v. Legh*, 15 Sim. 135.

POST OFFICE.

[See LARCENY.]

Laws relating to sending letters by post, and postage altered by the 10 & 11 Vict. c. 85; 25 Law J. Stat. 243.

The Money Order department of the Post Office regulated by the 11 & 12 Vict. c. 88; 26 Law J. Stat. 226.

Newspapers from the Channel Islands and Isle of Man rendered liable to postage by the 11 & 12 Vict. c. 117; 26 Law J. Stat. 309.

POWER.

[See DEVISE—LEASE.]

- (A) CONSTRUCTION OF POWERS IN GENERAL.
- (B) EXECUTION OF, GENERALLY.
 - (a) *Instrument of Execution.*
 - (b) *Reference to Power.*
 - (c) *Form of Execution and Attestation.*
 - (d) *Aider of informal Execution.*
- (C) POWER OF APPOINTMENT.
 - (a) *Construction of.*
 - (b) *Execution of.*
 - (c) *Release of.*
- (D) TO GRANT LEASES.
- (E) OF SALE.

(A) CONSTRUCTION OF POWERS IN GENERAL.

A will, after restraining each tenant for life from cutting timber and underwood, declared that it should be lawful for the executors of the testator at their discretion, at any time afterwards, "until some person entitled in possession to an estate tail, under the limitations of the will, should attain twenty-one years," to enter and cut timber and underwood, and to invest the proceeds thereof in the purchase of lands, to be settled to the uses of the testator's will:—Held, that the power was void as a whole, as tending to a perpetuity, and that, whether it was to be construed as imperative, or permissive only, being in derogation of the rights of the infant tenant in tail; also, that the power could not be apportioned.

But, *semble*, there appears no sound reason why a power should not be apportioned, where each act to be done from time to time is complete and lawful in itself, and which act, when done, completely fulfils the intention of the testator.

With respect to the law as to perpetuities, there is no distinction between a trust to accumulate the

proceeds of timber cut from time to time, and a trust to accumulate the annual rents and profits of an estate.

Tenant for life may work open mines, but cannot open new mines. *Quære*—Whether he can work a new mine through or by means of an old shaft. *Ferrand v. Wilson*, 15 Law J. Rep. (N.S.) Chanc. 41; 4 Hare, 344.

(B) EXECUTION OF, GENERALLY.

(a) Instrument of Execution.

T H gave and bequeathed the residue of his estate to J S and his brother equally between them. J S made his will and disposed of all the effects due to him from the estate of T H, amongst his nine children; and subsequently executed a deed of settlement, by which it was agreed that a certain sum should be considered as his share of the property of T H, and the said property was conveyed to such uses as J S should appoint. Under the 1 Vict. c. 26, the will of J S was held a good execution of the power limited in the deed of settlement. *Stillman v. Weedon*, 18 Law J. Rep. (N.S.) Chanc. 46; 16 Sim. 26.

By a deed made since the 7 Will. 4. & 1 Vict. c. 26, a fund was vested in trustees in trust for such persons, &c. as A should by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and attested by one witness or more, direct or appoint. A afterwards made a will duly executed and attested, according to the Wills Act, bequeathing part of the trust fund:—Held, that the will was a writing within the terms of the power. *Buckell v. Blenkorn*, 5 Hare, 131.

By deed of settlement, a power of appointment over certain sums of stock was given to husband and wife jointly, and in case of the death of the husband during the life of the wife, the property was settled upon the wife absolutely. The wife executed the power alone during her husband's lifetime. The husband died first, and upon the death of the wife, probate of her will was granted, so far as concerned the interest which the deceased, by virtue of the settlement, had power to appoint:—Held, that the wife having executed the will during her husband's lifetime, when she had no separate power of appointment, the will was invalid; and that although the 24th section of the Wills Act directed that every will should speak from the death of the testator, it could not be construed to apply to wills which were void *ab initio*, nor could the probate which was granted of the will, in respect of an invalid appointment, have the effect of rendering it valid. *Price v. Parker*, 17 Law J. Rep. (N.S.) Chanc. 398; 16 Sim. 198.

The execution of a power appointing a sum of stock standing in the name of the Accountant General, must be verified by affidavit, notwithstanding the probate of the will in the ecclesiastical court. *Smith v. Lord Somers*, 19 Law J. Rep. (N.S.) Chanc. 148.

(b) Reference to Power.

The sum of 1,000*l.* was given by will to trustees, upon trust (after a life interest given to A) for such

persons as A should by will appoint. A made a will, whereby she gave legacies amounting exactly to 1,000*l.*, but did not notice either the power or the property subject to it. A had no property of her own at the date of her will or at her death:—Held, that A's will was not an execution of the power. *Davies v. Thorns*, 18 Law J. Rep. (N.S.) Chanc. 212; 3 De Gex & S. 347.

(c) Form of Execution and Attestation.

If the attestation to a document executed under a power expresses in any form of words an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it is sufficient; but when the terms of the power require two or more such acts to be done, then, if the attestation expresses only the doing of one of them, even though from it all persons would clearly infer that the other act had also taken place, the power is not well executed.

Therefore, where an indenture gave to S I a power to appoint by her last will, "to be by her signed and published in the presence of and attested by two or more credible witnesses," and S I made her will, and signed and sealed it in the presence of two witnesses, the attestation being in these terms, "Signed and sealed in the presence of H P, of &c., and M E," &c.,—Held, that the power was well executed, as the sealing amounted to a publication. *Vincent v. the Bishop of Sodor and Man*, 19 Law J. Rep. (N.S.) Exch. 366; 5 Com. B. Rep. 683.

By a settlement of 1813, stock was settled on trust, in an event which happened, for such persons as a married woman should, during and notwithstanding her coverture, by will, or writing in the nature of a will, to be by her duly signed, sealed and delivered in the presence of and to be attested by two or more credible witnesses, appoint. The husband of the donee died in 1819, and the donee in 1840. After her death a writing was found in the form of a letter and sealed on the outside only, purporting to bear date August 20th, 1816, and to be made in execution of the power, and concluding thus, "As witness my hand and seal," with a signature purporting to be that of the donee and two other names in other handwriting, but with no memorandum of attestation. On a reference to the Master in 1847, as to the form and manner of the execution of this paper, no evidence could be produced, but such as was afforded by the document,—Held, that the document was not shewn to be a due execution of the power. *Burnham v. Bennett*, 1 De Gex & S. 513.

Under a marriage settlement a power was given to the husband to appoint among children by his last will and testament "to be signed and published by him in the presence of three witnesses." The power was executed by will, and the "signature" of the testator was witnessed by three witnesses:—Held, that the will was signed and published in the presence of the witnesses, and was a good execution of the power. *In re Wrey's Trust*, 19 Law J. Rep. (N.S.) Chanc. 183.

(d) Aider of Informal Execution.

If the intention to exercise a power be clearly shewn, a court of equity will, in favour of a charity,

give effect to an informal or defective execution of the power. Therefore where a power to dispose of personalty was directed to be exercised, amongst other modes, by the last will and testament, &c. of the donee, signed, sealed, published, and declared in the presence of two or more witnesses, and the donee, in exercise of the power, bequeathed part of the personalty to certain charities by an unattested will (executed before the passing of the New Wills Act), signed and sealed by the donee, but not in the presence of witnesses, and not published or declared, it was held to be a valid execution.

Evidence of the state of the property is admissible on a question whether a power has been executed by will, so far as it is material to the question whether a particular part of the property is or is not described in the will; but unless the circumstances of the property exclude the primary and strict sense of the words used, such strict sense must be adhered to, independently of any probability that the words were used in another sense.

Stock over which testatrix had a power of appointment held to pass by a will not referring to the power. *Innes v. Sayer*, 18 Law J. Rep. (N.S.) Chanc. 274; 7 Hare, 377.

The mere fact that a party, having a power by deed to revoke and make a new appointment, has attempted to do so by will owing to her having forgotten the terms of the power, and being unable to procure the deeds, is no ground for supplying the formal execution of the power, or for giving the will the effect of a deed, or for converting the trustees of the property into trustees for the persons who would be appointees in case the will were a good execution of the power. *Buckell v. Blenkorn*, 5 Hare, 131.

(C) POWER OF APPOINTMENT.

(a) Construction of.

R P, being entitled to one-third share of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened) over one-third part thereof, by deed or will, and over the other two third parts by will, subject to the husband's life interest therein, and in default of issue of the marriage. R P becoming entitled to a moiety of another third share of the same estates, settled it to such uses as she should appoint, subject to the husband's life interest. There was one child of the marriage. R P by her will devised, bequeathed, and appointed "all that one-third part of her real and personal estates over which she had a disposing power," upon trust, immediately after her death to raise a sum of 500*l.*; and "as to the residue of the said one-third part, and the remaining two third parts," she gave the same to her husband for life, remainder to her infant son, and his heirs; but in case he should die under twenty-one, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will,—the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold;—and as to the remaining two third parts, subject to her husband's life interest, she gave and appointed them to her sister absolutely. The son survived the testatrix, and died under twenty-one without issue:—Held, that the appointment of the

"one-third part" for payment of the annuity and legacies, extended only to one-ninth of R P's original third share, and to one-third of her moiety of the other third share.

Secondly, that the annuity and legacies became payable on the death of the son, with interest on the legacies from that time.

Thirdly, that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. *Saward v. M'Donnell*, 2 H.L. Cas. 88.

By the marriage settlement of M S, a copyhold of which she was seised in fee was settled on her husband J B for life, and after his death to the use of M S for life, and after her death to the use of such child or children of the marriage, and for such estate or interest, and in such parts and proportions as M S by deed might appoint, and for want of such appointment to the use of all the children of the marriage as tenants in common in tail, and in default to M S in fee.

M S, in the lifetime of her husband, and then having two sons, made a will, by which she appointed the estate to her elder son J B and his heirs and assigns for ever, on condition that he should pay 200*l.* to W B her second son, within a year of her husband's decease, or on W B's attaining the age of twenty-one; but in case neither of the sons should be living at the decease of J B her husband, then she gave the estate to her father-in-law, in trust to sell and pay legacies.

After the date of the will, four other children were born of the marriage. M S died in the lifetime of her husband; J B the eldest son died in his father's lifetime leaving the lessor of the plaintiff his youngest son and customary heir; and W B the second son died before his father.

Held, in affirmance of the judgment of the Court of Common Pleas, that the lessor of the plaintiff was not entitled to recover. That there was an implied dispensation of coverture in the power given to M S. That, although the appointment was not altogether void, but gave a vested defeasible estate in fee to J B the eldest son, and the appointment over to the father-in-law alone was void, yet that the event which happened defeated and put an end to the estate of J B the son. *Doe d. Bloomfield v. Eyre*, 18 Law J. Rep. (N.S.) C.P. 284; 5 Com. B. Rep. 713; affirming s.c. 16 Law J. Rep. (N.S.) C.P. 64; 3 Com. B. Rep. 557.

A power was given to a tenant for life to charge real estate with any sum not exceeding 2,000*l.*, for the portions of his younger children, to be paid to them at such times as he should appoint:—Held, that he had the power of making an unequal division of the 2,000*l.* among his younger children. *Cotgreave v. Cotgreave*, 16 Law J. Rep. (N.S.) Chanc. 145; 1 De Gex & S. 38.

(b) Execution of.

A testatrix, having personal property of her own, and a power of appointment by will over portions of two sums of stock, in the first place directed payment of her debts and certain expenses out of her personal estate, and bequeathed several legacies; and then, without any reference to the power, bequeathed parts of the said portions of stock to, or in trust for persons, objects of the said power, and

afterwards bequeathed the residue of her personal estate and effects, after payment of her debts, expenses, and legacies aforesaid, to other persons, also objects of the power:—Held, that by the residuary clause passed, as by a valid exercise of the power, so much of the stock, over which the testatrix had the power of appointment, as she had not previously disposed of by her said will, as well as the surplus of her general personal estate. *Elliott v. Elliott*, 15 Law J. Rep. (n.s.) Chanc. 393; 15 Sim. 321.

A donee of a power, affecting two sums of stock, appointed a gross amount, exceeding one-fourth of one of them. She afterwards made successive appointments of aliquot parts of both funds as one subject (without noticing the previous gross sum) among all the parties entitled. The aliquot parts so appointed amounted to four-fifths, exceeding, with the first appointment, the entirety of one of the funds:—Held, first, that the latest appointees were not entitled to put the earlier to their election, so that the excess might be made good out of the unappointed one-fifth of the unexhausted fund.

Secondly, that the successive appointments of aliquot parts operated upon the whole fund, and that, therefore, the loss arising from the deficiency fell on the last appointees.

Tenant for life of a trust fund, with power to appoint the reversion to a child, appointed a portion of the fund to a daughter absolutely by a deed to which the daughter, daughter's husband, and the trustees of the fund were parties, and, by the same deed, assigned her life interest in the appointed portion to the daughter absolutely. By a subsequent witnessing part, it was expressed to be agreed and declared by all the parties that the appointed portion should be for the daughter's separate use for life, and afterwards in trust for her husband and children:—Held, that (independently of any question of merger of the life estate), the trust for the separate use was good. But, *quære*, whether the subsequent limitations were effectual.

The rule that costs arising from difficulties of construction fall on the residuary estate does not apply to the unappointed portion of a fund. *Trollope v. Routledge*, 1 De Gex & S. 662.

A term was limited by a marriage settlement, in trust to raise 1,000*l.* on the death of the survivor of husband and wife, in case there should be no issue of the marriage, and to pay the same to such person as the wife should at any time or times thereafter during her coverture by deed or will appoint, and in default of appointment to the executors, administrators, and assigns of the wife's mother. There was no issue of the marriage, and the wife survived without having appointed during her first coverture. She then married again, and had issue, and died, leaving such issue, her second husband, and her mother surviving:—Held, that the power of appointment could only be exercised during her first coverture, and that the 1,000*l.* and interest passed to the executors of the mother as part of her residuary personal estate. *Morris v. Howes*, 16 Law J. Rep. (n.s.) Chanc. 121; 4 Hare, 599.

A testatrix, in exercise of a power, directed and appointed that her trustees should pay, assign, or transfer a sum of 500*l.* unto A B upon trust for his daughter, to be vested in her on attaining twenty-one years or day of marriage, which should first

happen; and she directed the interest and dividends of the said sum to accumulate for her benefit, and be paid to her with the principal, at the time before mentioned. The daughter of A B died under twenty-one, and unmarried:—Held, that the representatives of the daughter took neither principal nor accumulations, and that the fund would go as if no appointment had been made. *In re Thruston's Estate*, 18 Law J. Rep. (n.s.) Chanc. 437; 17 Sim. 21.

By a settlement a fund was limited to the husband for life, remainder to the wife absolutely, if she survived, but if she pre-deceased him, for all the children of the marriage in such shares as she should appoint; and if there should be no issue of the marriage living at her death, upon trust, as she should appoint generally, and in default to the husband absolutely; but there was no express gift to the children in default of appointment. The husband survived, and there were children living:—Held, that they were entitled to the fund, though the mother never appointed. *Fenwick v. Greenwell*, 10 Beav. 412.

An appointment, under a power in a settlement, was made, directing the trustees after the death of the tenant for life to stand possessed of 6,000*l.*, to pay the dividends to S M for life, and after his decease to permit T M to receive the dividends for his life, and after the decease of the survivor for all and every the child and children of T M and S M, equally to be divided between them, share and share alike, the shares of sons to be paid, assigned or transferred at the age of twenty-one, and the shares of daughters at twenty-one or marriage, which should respectively first happen, with benefit of survivorship among the children surviving, in case any of them should die before he, she, or they should, by virtue of the trusts, become entitled to payment, assignment or transfer of his, her or their respective parts. At the time of executing the deed T M and S M had seven children, the eldest of whom was forty-three, and the youngest twenty-six years of age. One of the children died in the lifetime of the tenants for life:—Held, that the personal representative of the deceased child was entitled to her share, and not the surviving brothers and sisters. *In re Williams*, 19 Law J. Rep. (n.s.) Chanc. 46; 12 Beav. 317.

A married woman, having power to appoint a fund to her children, appointed it to an only child of tender years, who died four months afterwards. Her husband attested the deed of appointment as witness, twenty-four years afterwards; the wife died in the lifetime of her husband, who then claimed the fund as administrator of the child. The Court directed issues to try whether the power had been exercised without fraud on the part of the husband and wife. *Gee v. Gurney*, 2 Coll. C.C. 486.

A deed, dated April 2, 1813, between a mother and her two illegitimate children, recited, that, by a prior deed of November 28, 1804, a trust fund had been appointed by the mother to one of such children, subject to a power of revocation, which was thereby expressed to be exercised as to one moiety in favour of the other child. The recited deed was not produced, and no evidence of it given beyond the recital. The deed of April 2, 1813 was, in another suit, declared not to be a valid appointment,

not being in favour of proper objects of the power reserved in the recited deed. In a suit by other persons, claiming under legitimate children, and appointees of the same mother, by an instrument later in date than April 1813, the Court decreed the transfer of the fund to the parties representing such legitimate children, and refused to direct any inquiry as to the recited appointment of November 1804.

As to the effect of the recital, if the title of the plaintiff had been founded on or derived under or through the deed of April 2, 1813, *quære*. *Bell v. Alexander*, 6 Hare, 543.

Testator, by his will, dated in 1778, gave all his real estates to his son-in-law, J R, for life, with remainder to his daughter M R, for life, with remainder to the first and every other son of his daughter in tail male, with remainder to the daughters of his daughter in tail general, with cross-remainders between them; and for default of "such" issue, he gave his daughter an absolute power of appointment over the whole property. In 1841, the daughter, M R, by deed-poll, duly executed according to the power, reciting accurately the limitations of the will, and that there was no issue of her body, and that she was desirous of exercising the power given her by the will, appointed that the devised property should go, "subject to the life estate of J R and M R therein, and there being a failure of issue of the said M R," to the use of the plaintiff in fee.—Held, that this was a valid appointment to the plaintiff; the words "failure of issue" being, with reference to the previous recital that she had no issue of her body, to be construed as a failure of "such issue." The same rule of construction would prevail as well in a deed as in a will. *Eno v. Eno*, 16 Law J. Rep. (N.S.) Chanc. 358; 6 Hare, 171.

A father had a power of appointing to any of his children. Having, in breach of trust, obtained possession of part of the trust funds, he, in 1834, appointed that part to his daughters, in exclusion of his son, under an agreement that that part should be afterwards conveyed to him in exchange for an estate of less value. In 1844 he executed a second appointment, reciting the previous dealing with the fund, and thereby appointed the remainder of the trust property "and all other" the property comprised in the settlement to his daughters:—Held, that the first appointment was void, and secondly, that the portion of the property comprised therein was not appointed by the second deed. *Askham v. Barker*, 12 Beav. 499.

By a marriage settlement certain property was vested in trustees, upon trust, during the life of the wife, to pay and apply the proceeds as she should from time to time by any writing appoint, and in default of appointment into her own hands for her separate use, and after her decease to pay an annuity out of the trust property to the husband, and, subject thereto, all the trust monies and all annual produce and yearly rents which might be unapplied were to remain upon the trusts thereby declared. The wife died before the husband, and by her will gave all the money which might be in the house at her decease, as well as any other savings which she might have made out of her separate estate, to her husband:—Held, that 888l.

found in the house at the death of the wife, and being portion of the income of the settled property, would go to the husband, but that 2,049l. other portion of the same income, and which was in the hands of the bankers in the names of the trustees, did not pass to the husband, but was subject to the ulterior trusts of the settlement. *Johnstone v. Lumb*, 15 Law J. Rep. (N.S.) Chanc. 386; 15 Sim. 308.

A power to appoint amongst children is not within section 27. of the Wills Act, and a mere general devise or bequest to a child will not operate as an execution of such a power. *Clowes v. Audry*, 12 Beav. 604.

The donee of a power of appointment over personal estate exercised the same and reserved a power of revocation merely:—Held, that the power of revocation included in it the power of limiting new uses.

A and B, his wife, resident abroad, had a life interest in government stock, with a joint power of appointment by deed in favour of their children; and B was tenant for life of other stock, with remainder to the children of the marriage. The dividends on both sums of stock were transmitted through the banking firm of C & Co. to A & B, who had no other account with that firm. In 1830 A & B appointed, by deed, one-half of the first fund to their eldest son, and the remainder among their younger sons equally, reserving a power of revocation as to the shares of the younger sons. In 1839 and 1843, on the respective marriages of two of the younger sons, A & B executed joint instruments (unattested), by which they disposed that the two sons respectively should receive from the survivor of them a capital property of 7,000 dollars, "which stand in the English bank of C & Co."—Held, that, in point of construction, the words, "which stand in the English bank of C & Co.," described both funds; and that each of the two sons was entitled, under the two latter instruments, to receive only from the fund, over which the power of appointment extended, so much money as, with the share he was entitled to out of the other fund, would make up the sum thereby provided for him. *Sheffield v. Von Donop*, 17 Law J. Rep. (N.S.) Chanc. 481; 7 Hare, 42.

The sum of 5,000l. stock was settled upon A for life, with remainder for her children as she should by deed or will appoint, and in default of appointment for her children equally. A had two children—E R an unmarried lady, and M S the wife of R S. By a deed dated in June 1839, A appointed 4,800l. stock to E R absolutely; and by a deed dated the following day, E R settled 2,300l. on M S and her children. The latter deed was not communicated to M S until 1845, and evidence was given that the former deed was executed with an understanding that E R should execute the latter. In a suit instituted by R S, both deeds were set aside, as being a fraud upon the power. *Salmon v. Gibbs*, 18 Law J. Rep. (N.S.) Chanc. 177; 3 De Gex & S. 343.

(c) Release of.

By a marriage settlement certain real property was settled upon the husband and wife for life, and afterwards to such of the children of the marriage as they should jointly appoint; in default of joint

appointment, as the survivor should appoint; and in default of such appointment to the children equally, as tenants in common. The wife died without having joined in any appointment. The husband subsequently executed a deed-poll, by which he absolutely released his power of appointment given by the settlement, and afterwards by his will, professed to execute the power of selection, without taking notice of the deed of release, and divided the property in unequal shares among his children:—Held, that the deed-poll releasing the power was valid, that the children took as tenants in common, and that the will was inoperative as an execution of the power. *Smith v. Plummer*, 17 Law J. Rep. (N.S.) Chanc. 145.

A sum of stock was held in trust for a lady for life, then for any husband for life, in case she should appoint to him, and subject thereto, in trust for her children; and in default of children, to such uses as she should appoint. The lady, at the age of sixty-eight, having never been married, appointed the fund to herself, and released her power of appointment in favour of her husband and children:—Held, that she was entitled to a transfer of the capital. *Miles v. Knight*, 17 Law J. Rep. (N.S.) Chanc. 458.

(D) TO GRANT LEASES.

[See LEASE.]

Lands were devised to trustees, in trust to pay rents to C for life, but impeachable for waste, "for digging or getting any coal opened or to be opened, otherwise than under the power thereafter given," remainder to D for life, with other remainders over; with power to the person or persons (except C) who by virtue of the limitations should, for the time being, be seised of or entitled to the actual freehold of the premises thereby devised, or to the rents thereof, to grant leases of the mines:—Held, that the trustees (who had the legal estate during C's life) could, during his life, grant leases of the coal mines. *Leigh v. the Earl of Balcarres*, 6 Com. B. Rep. 849.

(E) OF SALE.

A reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession, and the intended husband and wife covenanted that if they should acquire any other share or interest in the farm they would convey it to the trustees on the trusts, &c. of the settled moiety. After the moiety had fallen into possession a moiety of the other moiety descended on the wife, but subject to a life interest therein:—Held, that it, as well as the settled moiety, was saleable under the power. *Giles v. Homes*, 15 Sim. 359.

Testator devised estates to trustees in trust for his brother's first and other sons successively in fee, but so that the estate and interest of each should cease in favour of the next brother on his dying under twenty-one and without leaving issue living at his death, and if all of them should die under twenty-one and without issue living at their deaths, in trust for the person who should then be his heir absolutely, and he empowered the trustees to sell the estates at any time after his decease and at their sole discretion:—Held, that the power of sale was valid. *Nelson v. Callow*, 15 Sim. 353.

A testator devised, in 1835, all his real estate to his wife for life, with remainder as to part to two joint tenants for life, and directed the same to be sold on the death of the survivor. He bequeathed the monies arising from the sale to such individuals of a certain class as should be then living, and appointed his wife and others executrix and executors. The will contained no power other than the direction to sell, nor was any donee named:—Held, that the power of sale was vested, by implication, in the surviving executors. *Curtis v. Fulbrook*, 19 Law J. Rep. (N.S.) Chanc. 65; 8 Hare, 25.

PRACTICE, AT LAW.

(A) PROCESS.

- (a) *Description of Parties and Indorsements.*
- (b) *Service.*
- (c) *Altering and Amending.*
- (d) *Setting aside.* [See (N) Proceedings.]
- (e) *Filing.*

(B) APPEARANCE.

- (a) *Entering and Striking out.*
- (b) *Distringas to compel.*

(C) DECLARATION.

- (a) *Time to declare.*
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- (c) *Notice of Declaration.*

(D) PLEA.

- (a) *Rule to plead.*
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- (c) *Issuable Plea.*
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- (e) *Adding and Striking out Pleas.*
- (f) *Puis darrein continuance.*

(E) DEMURRER.

- (a) *Marginal Statement.*
- (b) *Special.*
- (c) *Assessment of Damages on.*
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(F) REJOINING GRATIS.

(G) PARTICULARS OF DEMAND.

(H) ISSUE.

(I) NOTICE TO PRODUCE. [See BILL OF EXCHANGE AND PRODUCTION AND INSPECTION OF DOCUMENTS.]

(K) TRIAL.

- (a) *At Bar.*
- (b) *Notice of Trial.*
 - (1) *Form and Time of.*
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- (c) *Postponing.*
- (d) *Proceedings at the Trial.*
 - (1) *In general.*
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(L) NEW TRIAL.

(M) DISCONTINUING ACTION.

(N) PROCEEDINGS.

- (a) *Disclosing Plaintiff's Residence.*
- (b) *Staying.*
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- (O) MOTIONS, RULES, AND ORDERS.
- (P) JUDGE AT CHAMBERS.
- (Q) SPECIAL CASE.
- (R) BILL OF EXCEPTIONS.
- (S) JUDGMENTS.
- (T) EXECUTIONS.

(A) PROCESS.

(a) Description of Parties and Indorsements.

A writ of summons issued, directing the defendant to cause an appearance to be entered at the suit of "Henry Walker & Co." with a notice that in default of his so doing, "the said Henry Walker & Co." might enter an appearance for him. The writ was indorsed, "The plaintiff claims 20l. 1s." The Court refused to set the writ aside, as it did not appear upon the face of it that "Henry Walker & Co." necessarily meant more than one person. *Walker v. Parkins*, 14 Law J. Rep. (N.S.) Q.B. 214; 2 Dowl. & L. P.C. 982.

A writ of summons directed to a defendant as of Bristol in the county of Gloucester, only a part of Bristol being in that county, is void. *Levi v. Perratt*, 15 Law J. Rep. (N.S.) C.P. 4; 2 Com. B. Rep. 345.

The Court refused to set aside a writ of summons which described a defendant as "The Right Honourable Baron Suffield," his true description being "The Right Honourable Edward Vernon Harbom Baron Suffield."

Where a *præcipe* had been granted for an *alias* writ, and by mistake a *pluries* writ had been issued, the Court refused to set aside the writ. *Wells v. Lord Suffield*, 16 Law J. Rep. (N.S.) C.P. 234; 5 Dowl. & L. P.C. 177; 4 Com. B. Rep. 750.

A copy of a writ of summons was directed to "J S, late of B, in the county of York, but now in the Castle of York, of the city of York, merchant." The affidavit stated, "that the said Castle of York was not situate in the city of York, but was wholly situate in the county of York." On a motion to set aside the copy of the writ, on the ground of its not stating correctly the place where the debtor was "supposed to be," pursuant to the 2 & 3 Will. 4. c. 39, the Court refused a rule, as the affidavit did not sufficiently negative the existence in the city of York of a place called "the Castle." *Balman v. Sharp*, 16 Law J. Rep. (N.S.) Exch. 39; 16 Mee. & W. 93.

The omission of a county in the description of a defendant in a writ of summons is an irregularity which is waived if the plaintiff does not apply to the Court in a reasonable time after notice. *Ross v. Gandell*, 18 Law J. Rep. (N.S.) C.P. 224; 7 Com. B. Rep. 766.

The copy of a writ of summons served on the defendant was indorsed "The plaintiff claims 150l. and interest for debt." The writ, copy and service were set aside for irregularity. *Chapman v. Becke*, 15 Law J. Rep. (N.S.) Q.B. 5; 3 Dowl. & L. P.C. 350.

A writ of summons was indorsed "This writ was issued by A & B, of, &c. agents for J T, of the city of Exeter, in the county of Devon, the plaintiff within named." The Court set aside the copy and service for irregularity, as it did not appear to be

issued either by the plaintiff in person or by an attorney for him. *Toby v. Hancock*, 16 Law J. Rep. (N.S.) Q.B. 33; 4 Dowl. & L. P.C. 385.

Where a copy of a writ of summons was indorsed with a claim of interest from the 31st of March, without saying of what year, the copy and service of it were set aside for irregularity. *Bardell v. Miller*, 18 Law J. Rep. (N.S.) C.P. 249; 7 Com. B. Rep. 753.

The indorsement of the time of service of a writ of summons, pursuant to the 2 Will. 4. c. 39. s. 1. and rule 3 of Michaelmas term, 3 Will. 4. may be made by a marksman. *Baker v. Coghlan*, 7 Com. B. Rep. 131.

Where upon service of a writ of summons on a defendant he denies that he is the party named therein, and the person serving the writ consequently omits to make the indorsement on the writ within the time required by the Reg. Gen. Mich. term, 3 Will. 4. r. 3; the Court will, upon affidavit of these facts, permit him to make the indorsement, notwithstanding the lapse of the specified time, so as to enable the plaintiff to enter an appearance for the defendant, according to the statute. *Burrows v. Gabriel*, 4 Dowl. & L. P.C. 107.

A writ of summons was indorsed "The plaintiffs claim 35l. 3s. 6d. and interest thereon, from the 8th of September 1846, until payment, for debt, and 2l. 10s. for costs."—Held, sufficient, and that it need not state what rate of interest is claimed. *Allen v. Bussey*, 4 Dowl. & L. P.C. 430.

(b) Service.

A writ of summons described the defendants as "Pilbrow's Atmospheric Railway and Canal Propulsion Company, now or late carrying on business in King William Street, in the city of London." The company had been completely registered pursuant to the statute 7 & 8 Vict. c. 110, and No. 6, King William Street, London, was registered as their place of business. They afterwards discharged their secretary and clerks, and gave up their place of business, but no other place of business was taken or registered by them, and there were no means of serving the writ but upon a director:—Held, that the description of the residence of the defendant was uncertain and insufficient under the statute 2 Will. 4. c. 39, and also that the service of the writ upon a director, in the county of Middlesex, was bad, and that the person on whom it was served might avail himself of these grounds for setting it and the service of it aside. *Pilbrow v. Pilbrow's Atmospheric Railway and Canal Propulsion Company*, 16 Law J. Rep. (N.S.) C.P. 11; 4 Dowl. & L. P.C. 450; 3 Com. B. Rep. 730.

Service of a writ of summons on a clerk in the office of the secretary of a corporation aggregate, is not sufficient service on the "clerk or secretary," under the 2 Will. 4. c. 39. s. 13, so as to authorize a motion for a *distingas*, or to enter an appearance for the defendants. *Walton v. the Universal Salvage Co.*, 16 Mee. & W. 438.

The defendant was a lunatic, and was confined in a lunatic asylum, and the party going there to serve him with a writ of summons, was told, on several occasions, by the proprietor of the asylum, and by his wife and daughter, that it was against the rules of the establishment that the lunatic could

be seen. The proper number of calls were made; and, on the last occasion, a copy of the writ left with the daughter of the proprietor. The Court granted a *distringas* to compel an appearance, directing the writ to be served on the wife of the lunatic, or at his last place of residence, as well as at the asylum. *Mutter v. Foulkes*, 5 Dowl. & L. P.C. 557.

(c) *Altering and Amending.*

A defendant having been arrested upon a *capias* directed to the sheriffs, instead of to the sheriff of Middlesex, applied to a Judge for his discharge. The Judge refused to discharge him, and, on the application of the plaintiff, made an order for amending the writ and copy. The defendant, having applied to the Court to rescind the Judge's order,—Held, that the writ was properly amended; that neither the Court nor the Judge had power to amend the copy; and that the defendant was entitled to his discharge on the ground of the variance between the writ as amended and the copy.

Quære—Whether the defendant could be again arrested upon the writ so amended by the Judge. *Moore v. Magan*, or *M'Ghan*, 16 Law J. Rep. (N.S.) Exch. 57; 16 Mee. & W. 95; 4 Dowl. & L. P.C. 267.

The plaintiff applied for a rule to alter the date in the first and *alias* writ of summons from the day on which they were respectively issued to a later date, in order that a *pluries* writ might issue within a month after the date of the *alias* as amended, for the purpose of saving the Statute of Limitations:—Held, that the Court will not authorize any alteration in the date of a writ of summons; though without such alteration the Statute of Limitations will be a bar to the action. *Campbell v. Smart*, 17 Law J. Rep. (N.S.) C.P. 63; 5 Dowl. & L. P.C. 335; 5 Com. B. Rep. 196.

The defendant was arrested under a writ of *capias*, the copy of which served contained no direction to the sheriff, and no day or year in the teste. The defendant was served with a copy of the writ of summons, by which the action was commenced, directed to the defendant in the wrong county, and tested in 1840, but which was not served until 1844. On an application to discharge the defendant out of custody, for irregularity,—Held, that it was not necessary to apply to set aside the writs or copies, and also that the grounds of the irregularity need not be stated in the rule.

Held also, that it was necessary that a summons should have issued before proceeding to the arrest, under 1 & 2 Vict. c. 110. s. 5, and the writ of summons and copy being defective, the Court had no power to render them valid by amendment, as there was nothing by which to amend the writ itself; and even if the Court had power to deal with the copy, it could only be by permitting a fresh copy to be served, which would not remedy the defect in the original service. *Rennie v. Bruce*, 14 Law J. Rep. (N.S.) Q.B. 207; 2 Dowl. & L. P.C. 946.

[See AMENDMENT.]

(d) *Setting aside.* [See (N) Proceedings.]

(e) *Filing.*

Though the 2 & 3 Will. 4. c. 39. s. 10. does not in terms require that writs issued and continued for

the purpose of preventing the operation of the Statute of Limitations should be "filed," yet it being necessary that such writs should be brought to the officer of the court when returned, in order in each instance to warrant the issuing of a continuing writ, the filing must be taken to be a necessary part of the returning and entering of record required by the act. *Hunter v. Caldwell*, 16 Law J. Rep. (N.S.) Q.B. 274; 10 Q.B. Rep. 69.

(B) APPEARANCE.

(a) *Entering and Striking out.*

When the last of the eight days after the service of a writ of summons falls on any day between the Thursday before and the Wednesday after Easter-day, then the Wednesday after Easter-day is considered the last of such eight days, and the plaintiff may enter an appearance for the defendant on the Thursday. *Harris v. Robinson*, 15 Law J. Rep. (N.S.) C.P. 208; 3 Dowl. & L. P.C. 813; 2 Com. B. Rep. 908.

Where a writ of summons issued into Middlesex had been sent by post to a defendant, an attorney, in London, who afterwards admitted the receipt, and said he would enter an appearance,—Held, insufficient to entitle the defendant to a rule absolute in the first instance to enter an appearance, but sufficient for a rule nisi. *Grand Junction Waterworks Co. v. Roy*, 16 Law J. Rep. (N.S.) C.P. 200.

A plaintiff, in person, may enter an appearance for the defendant according to the statute. *Smith v. Wedderburne*, 16 Law J. Rep. (N.S.) Exch. 14; 16 Mee. & W. 104; 4 Dowl. & L. P.C. 296.

A Judge having made an order (opposed by the defendant) to set aside an appearance, the plaintiff took the order to the clerk of appearances, who thereupon struck out the appearance, but the plaintiff omitted to serve the order on the defendant:—Held, that the plaintiff could derive no benefit from the order. *Belcher v. Goodered*, 16 Law J. Rep. (N.S.) C.P. 176; 4 Dowl. & L. P.C. 814; 4 Com. B. Rep. 472.

Where after a *distringas* had issued, the defendant took out a summons to stay proceedings, on payment of debt and costs, but drew up no rule, the Court allowed an appearance to be entered for him under the statute. *Watkins v. Hayward*, 15 Law J. Rep. (N.S.) Q.B. 46.

(b) *Distringas to compel.*

The affidavit for a *distringas* should state where the residence of the defendant is situated. *Crofts v. Brown*, 14 Law J. Rep. (N.S.) Q.B. 232; 2 Dowl. & L. P.C. 935.

The Court granted a *distringas* where it appeared that the answer given on each of the three calls for the purpose of serving the writ was, that the defendant was ill in bed, and could not be seen, the nature of the visit being explained to the servant, without any statement that the defendant was keeping out of the way to avoid process. *Wilkins v. Jones*, 15 Law J. Rep. (N.S.) Q.B. 226; 3 Dowl. & L. P.C. 747.

A service upon a clerk at a party's place of business, when his residence cannot be found, may be sufficient for a *distringas* to proceed to outlawry. *Quære*—Whether it is sufficient for a *distringas* to

compel an appearance. *Rock v. Adam*, 15 Law J. Rep. (n.s.) C.P. 192; 3 Dowl. & L. P.C. 817.

A *distringas* may issue within a reasonable time after the expiration of four months from the issuing of the writ of summons. *Peyton v. Wood*, 15 Law J. Rep. (n.s.) Exch. 317; 15 Mee. & W. 608; 4 Dowl. & L. P.C. 19.

To obtain a *distringas* it is sufficient if the appointments and calls are made at the defendant's place of business, if it also appears that his residence is unknown. *Baker v. Coe*, 16 Law J. Rep. (n.s.) Exch. 256; 1 Exch. Rep. 153.

If a *distringas* to compel an appearance issues against a person who was abroad at the time when service of the writ of summons was attempted, it is irregular, but unless the defendant applies promptly after he is aware of the proceedings against him, he will be taken to have waived the irregularity. *Brough v. Eisenberg*, 19 Law J. Rep. (n.s.) Q.B. 22; 7 Dowl. & L. P.C. 338.

A Judge at chambers made an order for a *distringas*, upon affidavits which were sufficient, if true. The defendant applied to the Court for a rule *nisi* to set aside the order, upon affidavits contradicting the facts stated in the original affidavits produced before the Judge. The affidavits of the defendant stated that a paper, which was described to him, and which he concluded was a copy of a writ of summons, had been left at his house, and destroyed by mistake in his absence, and that he had no other knowledge of an action having been commenced against him:—Held, that a defendant who seeks to set aside the order for a *distringas* granted by a Judge at chambers, must shew that the original affidavits on which the order was granted are defective. The Court will not set aside a *distringas* upon affidavits contradicting the facts upon which the order for a *distringas* was made. *Lewis v. Padwick*, 19 Law J. Rep. (n.s.) C.P. 140.

Upon a motion for a *distringas*, it is not enough that the affidavit negatives the appearance of the defendant, "according to the exigency of the writ" of summons. *M'Alpin v. Gregory*, 1 Com. B. Rep. 299.

The affidavit in support of a *distringas* must shew that the party explained the nature and object of his call. *Dubois v. Lowther*, 4 Com. B. Rep. 228.

The affidavit in support of a *distringas*, stating the making of calls, &c., at the place of residence of the defendant, or stating merely the non-appearance of the defendant, without adverting to any search, or when, where, or whether the copy of the writ reached his hands, is sufficient; and where no objection was made to the writ describing the defendant by initials, no objection can be made to the *distringas*. *Batho v. Dickman*, 6 Com. B. Rep. 260.

Rule for a *distringas* not discharged, on the ground of mis-statement in the affidavit. *Ensor v. Griffin*, 7 Com. B. Rep. 781.

(C) DECLARATION.

(a) Time to declare.

The defendant, before declaration, obtained an order for particulars of demand, with a stay of proceedings until delivery; and the plaintiff having, for two terms, neglected to deliver the parti-

culars, the defendant got an order rescinding his first order, served it with demand of declaration on the plaintiff, and after four days signed judgment of *non pros*. On motion to set aside the judgment,—Held, that the non-delivery of the particulars being a default of the plaintiff, he was not entitled to the same time to declare, after the rescinding of the order to stay the proceedings, as he was at the time when that order was made; and, therefore, that the judgment was regular. *Johns v. Sanders*, 16 Law J. Rep. (n.s.) Q.B. 340; 5 Dowl. & L. P.C. 49.

A defendant having, on the 11th of August, served a summons on the plaintiff to shew cause why the declaration should not be set aside, on the ground, as stated in the summons, of "four terms" (instead of "a year") having elapsed between the writ and declaration, the Judge, on the 14th of August, dismissed the summons for this defect. The defendant having, on the 27th of October, applied to another learned Judge, who refused to interfere, obtained a similar rule in this Court, in Michaelmas term:—Held, that the Judge was right in dismissing the summons, and that the defendant was too late in his application to the Court. *Chaplin v. Showler*, 18 Law J. Rep. (n.s.) Exch. 34; 6 Dowl. & L. P.C. 227.

(b) Allowing and Striking out Counts.

Where the plaintiff declared on an agreement by which he undertook to survey a line of railway, and was to be paid 250*l.* on the 22nd of October on commencing the work, 300*l.* more on the 15th of November, 250*l.* on the plans being deposited, and 300*l.* when the Standing Orders were complied with,—Held, that a special count for the first two instalments was properly joined with a count for work and labour. *Bulmer v. Bousfield*, 16 Law J. Rep. (n.s.) Q.B. 237; 9 Q.B. Rep. 986.

The defendant, on the 6th of November, obtained a Judge's order for a week's time to plead; on the 12th he took out a summons to strike out one of two counts in the declaration, which, on the 14th, was dismissed, with costs, and at the same time an order was made giving him three days' time to plead. On the 19th he obtained a rule for striking out the first or second count:—Held, that the application was too late, and that the rule must be discharged.

Semble—that an appeal lies to the Court, when a Judge has refused to make an order. *Chapman v. King*, 16 Law J. Rep. (n.s.) Exch. 15; 4 Dowl. & L. P.C. 311.

A count on a charter-party for demurrage and detention of the ship, and an *indebitatus* count for demurrage are "in apparent violation" of the Pleading Rules of Hilary term, 4 Will. 4. s. 5, and ought not to be allowed; *Platt, B. dissentiente*. *Matheuson v. Ray*, 16 Law J. Rep. (n.s.) Exch. 288; 16 Mee. & W. 329.

Where two counts appearing to be on the same agreement are introduced into a declaration for the evident purpose of removing a difficulty as to the legal effect of the agreement, one of the counts ought to be struck out.

The first count was upon an agreement by which the defendant undertook to take the plaintiff into his service for six months, and at the expiration thereof, if no just cause was shewn, to enter into

a fresh agreement for two years. First breach, that though no just cause was shewn at the expiration of the six months, the defendant would not enter into a further agreement for two years.

The second count stated that whereas the plaintiff had been six months in the defendant's service, the defendant agreed to continue him in the service for two years. Breach, that the defendant would not continue him in the service.

A rule *nisi* to rescind an order for striking out so much of the first count as related to the first breach, as being in violation of rule of Hil. term, 4 Will. 4. No. 5, was discharged. *Smith v. Thompson*, 17 Law J. Rep. (n.s.) C.P. 159; 5 Dowl. & L. P.C. 524; 5 Com. B. Rep. 486.

A declaration in trespass contained two counts, the first in the usual form for breaking and entering the plaintiff's rooms, the second, under the statute 2 Will. & Mary, session 1. c. 5. s. 5, for distraining goods for rent pretended to be due, and selling them, and claiming their double value, &c. There was only one act of trespass committed:—Held, that the plaintiff was not entitled to more than the second count of the declaration, under which he could recover damages, though proof of a simple act of trespass only were given. *Hoare v. Lee*, 17 Law J. Rep. (n.s.) C.P. 196; 5 Dowl. & L. P.C. 765; 5 Com. B. Rep. 754.

In assumption, a count for money paid was pleaded with a special count, which stated in substance, that in consideration of the plaintiff having, at the defendant's request, contracted to sell to a third party on his own credit and responsibility certain shares in a railway company, of which the defendant was the registered holder, the defendant promised to deliver to him all new shares allotted in respect of such shares while he continued the registered holder thereof, on payment to him of all payments made by him to the company in respect of such new shares, and to indemnify the plaintiff from all loss which might arise by reason of the non-performance of his said promise; alleging the non-delivery to the plaintiff of certain new shares so allotted to the defendant, and that by reason thereof the plaintiff had necessarily expended a large sum of money in the purchase of other shares, in order to perform his said contract of sale:—Held, not to be in violation of the pleading rules of Hilary term, 4 Will. 4. r. 5, whereby several counts are not to be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each. *Simpson v. Rand*, 17 Law J. Rep. (n.s.) Exch. 146; 1 Exch. Rep. 688; 5 Dowl. & L. P.C. 389.

Where a Judge at chambers has declined to make an order, upon an application under the 5th and 6th rules of Hilary term, 4 Will. 4, to strike out counts as being in apparent violation of the former rule,—it is competent to the Court to entertain the matter.

A count for goods sold and delivered was not allowed together with a count upon a special contract apparently for the price of the same goods, unless the plaintiff could satisfy a Judge at chambers, that he *bond fide* intended to establish a distinct subject-matter of complaint in respect of each count; *disentente Cresswell, J.*, as to the application of the rule. *Grissell v. James*, 4 Com. B. Rep. 768.

A declaration by the assignees of two bankrupts

contained four counts. First count, trover for a ship and cargo in the possession of J H converted before the bankruptcy. Second count, trover for a ship and cargo in the possession of the assignees converted after the bankruptcy. Third count, that J H, being sole owner of a ship, executed a deed-poll (set out at length) under seal before his bankruptcy, empowering the defendants to sell the ship; that the deed was delivered to the defendants as a security for certain bills of exchange drawn by the said J H and by A M on the defendants, which they were to accept; that they refused to accept the said bills, but nevertheless, contrary to the purpose for which the deed-poll was delivered to them and under colour thereof, sold the ship before the bankruptcy, whereby the plaintiffs as assignees of the said J H and A M have been deprived of the possession of the said ship, and have lost a large sum of money which would have been payable to them, as assignees, for freight. Fourth count, that J H, being sole owner of a ship, executed a deed-poll (as in the third count), and that J H and A M, before the bankruptcy, wrote a letter to the defendants, instructing them not to sell the ship; that the deed-poll and letter were delivered to the defendants, who always held the said deed-poll subject to the terms of the said letter, but nevertheless, contrary to the said purpose and contrary to the instructions contained in the said letter; and under colour of the deed-poll, sold the said ship before the bankruptcy, &c. (concluding as in the third count):—Held, that the plaintiffs must elect between the first and third, and second and fourth counts, or amend the first and second counts by confining the same to the cargo; such counts being founded on the same principal matter of complaint, and in violation of Reg. Gen. Hil. term, 4 Will. 4. r. 5. *Dearie v. Henderson*, 18 Law J. Rep. (n.s.) C.P. 149; 7 Com. B. Rep. 71.

The first count of a declaration stated, that the defendants agreed to sell twenty tons of sal exixon at 11*l.* per ton, and to deliver it at a certain time and place, &c. Breach, that the defendants did not deliver the sal exixon or any part thereof, and that the plaintiff was obliged to purchase elsewhere, to the plaintiff's damage, &c. The second count stated that after the agreement as aforesaid, the defendants delivered and were paid by the plaintiff for a certain article which they warranted was sal exixon. Breach, that the said article was not sal exixon, but was nitrate of soda cake, whereby special damage accrued to the plaintiff. On motion for a rule to shew cause why the order of a Judge striking out one of the above counts should not be rescinded,—Held, that the two counts were founded on the same subject-matter of complaint, and that one of them was properly disallowed pursuant to Reg. Gen. Hil. term, 4 Will. 4. r. 6. *Ramsden v. Gray*, 18 Law J. Rep. (n.s.) C.P. 277; 7 Com. B. Rep. 961.

(c) Notice of Declaration.

In an action, commenced by writ of summons, a *capias* was taken out under the 1 & 2 Vict. c. 110. s. 3, and the defendant arrested under it. The plaintiff subsequently entered an appearance for the defendant, and filed a declaration with the Masters, and served the defendant with notice of the decla-

ration:—Held, that this was regular, and that it was not necessary to serve the defendant with the copy of the declaration. *Neale v. Snodell or Snoulten*, 15 Law J. Rep. (n.s.) C.P. 22; 3 Dowl. & L. P.C. 422; 2 Com. B. Rep. 322.

(D) PLEA.

(a) Rule to plead.

Semble—that it is no part of the plaintiff's duty to see that the precipe for the rule to plead has been entered by the Master in the book kept for that purpose; and therefore where judgment has been signed for want of a plea, the Court will not set it aside upon the ground that no such entry has been made in the book. *Wright v. Woodroffe*, 18 Law J. Rep. (n.s.) Exch. 168.

(b) Time to plead.

Where a summons for particulars is dismissed after the time for pleading has expired, the defendant is entitled only to a reasonable time to deliver his pleas, and not to the same time as he had when the summons was returnable. The rest of the day is a reasonable time for this purpose. *Mengens v. Perry*, 15 Law J. Rep. (n.s.) Exch. 307; 15 Mee. & W. 537.

A summons for further time to plead after an order for time to plead *peremptory*, is regular; and if returnable at the opening of the office, on the day after the order expires, it operates as a stay of proceedings till disposed of. *Beazley v. Bailey*, 16 Law J. Rep. (n.s.) Exch. 1; 16 Mee. & W. 58; 4 Dowl. & L. P.C. 271.

The declaration was delivered along with a rule to plead in which the name of the cause was incorrectly stated; and the defendant afterwards asked, and obtained from the plaintiff, time to plead, without taking out a summons. No plea having been delivered, the plaintiff signed judgment:—Held, that the judgment was regular, the defendant having waived the irregularity in the rule by obtaining time to plead. *Carpenter v. Hall*, 18 Law J. Rep. (n.s.) C.P. 279; 8 Com. B. Rep. 84.

A defendant whose time for pleading expired on the 26th, on the 24th took out a summons for further time to plead, returnable on the 25th; this summons not being attended, another summons was taken out, returnable on the 26th, which having been dismissed on the afternoon of that day, the plaintiff on the same day signed judgment:—Held, that the judgment was irregular, the defendant being entitled to the whole of the 26th to deliver his pleas. *Evans v. Senior*, 19 Law J. Rep. (n.s.) Exch. 169; 4 Exch. Rep. 818.

(c) Issuable Plea.

A plea raising a fair question of doubt on a matter of law, the decision of which will determine the legal rights of the parties on the merits, is an issuable plea. Therefore, in an action upon an agreement that M should furnish to Z, within eight months, two steam-engines, of a certain power and description, to be put on board a vessel, for 15,000*l.*, and that Z should pay that sum for them in the following manner, viz., one fourth part on signing the agreement, one fourth part when the engines were half finished, one fourth part when the engines

should be ready to be put on board, and one fourth part when they were completed and put on board, complaining that M did not furnish the engines within eight months; it was held that a plea, stating that although the engines were half finished, according to the agreement, of which Z had notice, yet that he did not nor would pay the one fourth part of the price then due, though requested to do so, raised a fair question of doubt as to his legal right to recover, and was an issuable plea. *Zulueta v. Miller*, 15 Law J. Rep. (n.s.) C.P. 267; 4 Dowl. & L. P.C. 186; 2 Com. B. Rep. 895.

The defendants being under terms to rejoin issuably demurred to the replication, on the ground of duplicity:—Held, that this was a breach of the order to plead issuably, and a rule to set aside judgment signed by the plaintiff was discharged.

An issuable plea is one upon which, if judgment be given, there will be a decision on the merits. *Tagg v. Simmonds*, 16 Law J. Rep. (n.s.) Q.B. 319; 4 Dowl. & L. P.C. 582.

To a declaration on a bill of exchange for 20*l.*, drawn by one L, accepted by the defendant, and indorsed by L to the plaintiffs, the defendant, being under terms of pleading issuably, pleaded that before the indorsement by L, L was indebted to the defendant in 1*l.* 13*s.* 1*d.*, and that L held the bill on the terms that the said debt should be set off against the sum due from the defendant to L upon the bill. That L, in order to deprive the defendant of his right to the set-off in respect of the 1*l.* 13*s.* 1*d.*, and in fraud of defendant, and in collusion with the plaintiffs, indorsed the bill to the plaintiffs, who were suing as agents for L:—Held, that this was not an issuable plea. *Mayew or Mayhew v. Blafeld*, 17 Law J. Rep. (n.s.) Exch. 28; 1 Exch. Rep. 469.

Declaration contained a count by indorsee against indorser of a bill of exchange and a count on an account stated. Plea, that the defendant did not indorse the said bill in the said first count mentioned in manner and form as in the said first count mentioned. The defendant being under terms to plead issuably, the plaintiff signed judgment on the ground that the plea being pleaded to the whole declaration, and containing no answer to the last count, was not an issuable plea:—Held, that the judgment was irregular.

A plea is not non-issuable which is only bad on special demurrer. *Bousfield v. Edge*, 17 Law J. Rep. (n.s.) Exch. 169; 1 Exch. Rep. 89; 5 Dowl. & L. P.C. 99.

The declaration stated that E J was indebted to the plaintiff, and that the plaintiff had brought an action for the debt, and had given notice of trial; that the defendant, who was E J's attorney, having applied to the plaintiff to stay proceedings, E J delivered to the defendant a picture, accompanied by a letter, requesting the defendant to use his best endeavours to find a purchaser for it at forty guineas or more, and stating that the defendant should pay 40*l.* out of the purchase-money to the plaintiff on her (E J's) account; and that in consideration that the plaintiff promised to abide by the terms of the letter, and to countermand his notice of trial and stay proceedings in the action, and accept the 40*l.* out of the purchase-money in full satisfaction of his claim, the defendant promised to fulfil the conditions of the

letter; and although the plaintiff did countermand his notice of trial, and stayed proceedings, and was ready and willing to accept the 40*l.* in full satisfaction, yet the defendant did not within a reasonable time use his best endeavours to find a purchaser for the picture. To this the defendant, who was under terms to plead issuable, pleaded a special traverse, alleging a fresh notice of trial, and concluding *absque hoc* that the plaintiff stayed the proceedings:—Held, that this was not a non-issuable plea which entitled the plaintiff to sign judgment.

The defendant afterwards pleaded that the plaintiff was not ready and willing to accept and receive the sum of 40*l.* out of the said purchase-money *modo et formâ*:—Held, on demurrer, that the plea was bad as an immaterial traverse, the readiness to receive the money being a condition subsequent to the performance by the plaintiff. *Hudson v. Haslam*, 18 Law J. Rep. (N.S.) C.P. 260; 7 Com. B. Rep. 825, 833.

A declaration in covenant, by the administratrix of M L, stated that by an indenture made by the defendant, Eliza S, his wife, and M L, the intestate, the defendant covenanted to pay to M L, during the life of Eliza S, an annuity of 52*l.* Breach, non-payment. Plea, setting out the indenture on oyer, which stated that M L did declare that he would stand possessed of the annuity in trust to pay the same to Eliza S for her own use. The indenture was executed by the defendant and Eliza S, but not by M L. The plea then averred that M L never executed the indenture nor declared that he would stand possessed of the annuity in trust to pay it to Eliza S for her own use, nor did he ever become nor was the plaintiff a trustee under the deed:—Held, an issuable plea. *Linwood v. Squire*, 19 Law J. Rep. (N.S.) Exch. 237; 5 Exch. Rep. 234.

(d) Several Pleas.

To a declaration containing three counts, the defendant, who had appeared by attorney, obtained a rule generally to plead coverture and the Statute of Limitations, and, accordingly, pleaded those pleas to the whole declaration. The pleas were set aside by a Judge at chambers, on the ground that a defendant could not appear by attorney and plead coverture. The defendant then, without obtaining a fresh rule to plead, pleaded to the first two counts, coverture, and to the whole declaration the Statute of Limitations, whereupon the defendant signed judgment:—Held, that the judgment was irregular, for as the rule to plead had not been set aside, the defendant was at liberty to plead the pleas in question, and was not bound by the terms of the rule to plead them to the whole of the declaration. *Fryer v. Andrews*, 17 Law J. Rep. (N.S.) Exch. 25; 1 Exch. Rep. 471.

The defendant obtained a rule to plead four pleas, describing the last plea in the rule thus: "that as to the sum of 100*l.*, parcel, &c. the defendant, before the commencement of the action, indorsed and delivered to the plaintiffs a certain bill of exchange for 100*l.*, which the plaintiffs received in satisfaction of the said sum of 100*l.*" The plea pleaded was: "as to the said sum of 100*l.*, parcel, &c., that, before the commencement of the suit, the defendant, for and on account of the said sum of 100*l.*, indorsed and delivered to the plaintiffs a certain bill of ex-

change for 100*l.*, drawn by the defendant and accepted by one T J, and the said plaintiffs took and received the said bill of exchange for and on account of the said sum, parcel," &c. Averment, that the defendant had not due notice of the non-payment of the said bill of exchange:—Held, that the plaintiffs were entitled to sign judgment, on account of the variance between the rule to plead and the plea pleaded. *Hills v. Haymen*, 17 Law J. Rep. (N.S.) Exch. 206; 2 Exch. Rep. 323; 5 Dowl. & L. P.C. 742.

Where a defendant has obtained leave to plead several matters, if the pleas delivered differ substantially from the abstract, the plaintiff may sign judgment. *Gabardi v. Harmer*, 18 Law J. Rep. (N.S.) Exch. 168; 3 Exch. Rep. 239.

To a declaration containing a count on a promissory note and the common counts, the defendant, without having obtained a rule to plead several matters, pleaded, to the first count, that he did not make the note, "and for a further plea to the whole declaration," non assumpsit:—Held, that the plaintiff was entitled to sign judgment. *Harney or Harvey v. Hamilton*, 18 Law J. Rep. (N.S.) Exch. 377; 4 Exch. Rep. 43.

A defendant sued as executor (on an affidavit that he was advised that he would be put to great difficulty if he were not permitted to do so) was allowed to plead *ne unques executor*, and also *plene administravit*. *Tyson v. Kendall*, 19 Law J. Rep. (N.S.) Q.B. 434.

Where pleas are pleaded which do not correspond with the abstract delivered with the summons to plead several matters, the proper mode of taking the objection is by motion to strike out the pleas. *Flight v. Smale*, 4 Com. B. Rep. 766.

In case for waste, a count alleged that beech trees were reckoned timber trees; plea, traversing the allegation, was allowed, in addition to not guilty. *Mathews v. Mathews*, 7 Com. B. Rep. 1018.

The Court refused to allow a defendant to plead a plea in bar of the further maintenance of the action, together with a plea in bar of the action generally. *Suckling v. Wilson*, 4 Dowl. & L. P.C. 167.

[See LIBEL.]

(e) Adding and Striking out Pleas.

Where an action had been brought against a surety under the 1 & 2 Vict. c. 110, for not rendering his principal, and a plea intended as an excuse for the render had been held bad on demurrer, the Court, in the following term, allowed a plea similar in substance to be added, counsel not having been present to ask to amend when judgment was delivered. *Hayward v. Bennett*, 16 Law J. Rep. (N.S.) C.P. 95; 3 Com. B. Rep. 418.

After issue joined, and notice of trial, the Court allowed the defendant to add a plea, that the plaintiff was not a sworn broker of the city of London, it appearing that the trial of the cause would not be thereby delayed. *Field v. Sawyer*, 17 Law J. Rep. (N.S.) C.P. 211; 5 Dowl. & L. P.C. 777; 5 Com. B. Rep. 844.

Debt for the amount of compensation assessed by a jury before the sheriff, under the Lands Clauses Consolidation Act, the 8 & 9 Vict. c. 18. The defendants pleaded, amongst other pleas, two

pleas alleging in substance that a jury was duly sworn to assess the compensation alleged in the declaration, without this, that J A, one of the jurors named in the declaration, was so chosen and sworn. The facts were that a jury having been duly sworn, the holding of the inquisition was adjourned; and on the adjournment day, one of the jury being absent from illness, the sheriff, with the assent of the parties, swore J A, another of the jurymen who had been regularly summoned, in his stead, and the jury so constituted assessed the compensation.

Held, that such pleas were vexatious in their nature, and beside the merits, and the defendants were therefore bound to elect between them and the others pleaded. *Cooling v. the Great Northern Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 529; 15 Q.B. Rep. 486.

(f) *Puis darrein continuance.*

A plea of a release *puis darrein continuance* having been delivered on the 22nd of April, an application to set it aside on the 8th of June held not too late. *Wright v. Burroughs*, 15 Law J. Rep. (N.S.) C.P. 277; 3 Com. B. Rep. 344.

Where a cause was entered for trial at the first sittings in term, which commenced the 3rd of November, but was not in fact tried until the following day, and on the 3rd of November the defendant's attorney delivered to the plaintiffs' attorney in court a plea, in the nature of a plea *puis darrein continuance*, pleaded as in banc, accompanied by an affidavit that the subject-matter thereof arose within eight days,—Held, that it was irregular, as such a plea, if pleaded after the commencement of the sittings, ought to have been pleaded at Nisi Prius and delivered to the Judge. *Payne v. Shenson*, 16 Law J. Rep. (N.S.) Q.B. 61; 4 Dowl. & L. P.C. 396.

(E) DEMURRER.

(a) *Marginal Statement.*

To an action of trover the defendant pleaded, first, that the grievance was committed after the passing of the 7 Vict. c. 19, for regulating the bailiffs of inferior courts, and within the jurisdiction of the inferior court thereafter mentioned; that before and at the time of the grievance he had been duly appointed to act as bailiff in execution of the process of the Tolsey Court of Bristol, which court then and at the passing of the act had and still has, by charter, jurisdiction in personal actions, within the said city; that the defendant, until and at, &c., was a bailiff of the said court, and that the supposed grievance was a thing done by him in pursuance of his duty as such bailiff, and that no notice of action had been given to him. The fourth plea resembled the foregoing, except in stating that the cause of action did not accrue to the plaintiff three months before action brought. The plaintiff demurred specially to the third plea, assigning causes. He also demurred to the fourth plea, assigning for causes, in the demurrer and in the margin, that the plea was insufficient, upon the like grounds of objection as had been taken to the third plea:—Held, first, that the demurrer to the fourth plea was a sufficient compliance with the Reg. Gen. Hil. term, 4 Will. 4. pl. 2, which requires the statement of some matter of law in the margin of demurrers;

secondly, that it was sufficient to state that the defendant was a bailiff *de facto*, and that the pleas were good. *Braham v. Watkins*, 16 Law J. Rep. (N.S.) Exch. 9; 16 Mee. & W. 77; 4 Dowl. & L. P.C. 42.

(b) *Special.*

The addition of causes of demurrer after signature of counsel thereto does not make the demurrer special. *Clarke v. Allatt*, 4 Com. B. Rep. 335.

(c) *Assessment of Damages on.*

In an action on the case, the declaration stated that the plaintiff was about to become an actor, and to use and exercise the profession and occupation of an actor for reward, and that the defendants conspired to prevent him from performing in public as such actor, and to prevent him from exercising his said profession or occupation of an actor; that the defendants, in pursuance of the conspiracy, hired divers persons to attend, and they did attend, to hiss and hoot the plaintiff during the performance. It then proceeded to aver that the plaintiff did appear and perform as such actor for reward, and that while he was so appearing and performing, &c., the defendants, in pursuance of the said conspiracy, &c., did, together with divers others of the persons so hired, hoot and hiss the plaintiff, so that the plaintiff was, in consequence thereof, obliged to desist from performing; and alleged special damage. The defendants pleaded, first, not guilty; second, that the plaintiff was not about to become an actor, as alleged, &c.; third, that the plaintiff did not become such actor, or appear or perform as such actor, for reward, &c.; and, fourth, as to part of the grievances, a special plea, which was demurred to. Issues in fact were joined on the first three pleas, and judgment given for the plaintiff on the demurrer to the fourth plea. A *venire* was awarded to try the issues in fact, and to assess damages on the demurrer, and the jury found the three issues for the defendants, but did not assess any damages on the judgment on demurrer, and final judgment was given for the defendants, with costs, but no judgment entered on the record for the plaintiff on the demurrer. Upon writ of error—

Semble—that the second and third issues were immaterial; but

Held, that a replender could not be awarded, as the first plea was good, and decided the case on the merits.

Held, also (affirming the judgment below, 13 Law J. Rep. (N.S.) C.P. 34; 6 Man. & G. 205), that the neglect to assess damages for the plaintiff on the demurrer was not ground of error, as the first issue was found for the defendants.

Held, also, that the plaintiff was entitled to have judgment to recover his costs on the demurrer to the fourth plea, under the 3 & 4 Will. 4. c. 42.s. 34.

Held, also, that the judgment ought not to be simply reversed for this defect, but given for the plaintiff for the costs of the demurrer, and for the defendants on the issues found for them. *Gregory v. Duke of Brunswick*, 16 Law J. Rep. (N.S.) C.P. 35; 3 Com. B. Rep. 481.

(d) *Frivolous.*

The declaration, after alleging the employment

of one of the defendants as auctioneer, to sell goods of A B, and the printing and publishing by the defendants of advertisements announcing the sale by auction of choice and valuable wines, the property of A B, proceeded to allege a conspiring by the defendants to bring to the sale and induce the plaintiff to purchase wines of no value as and for the wines of A B. The defendants, who pleaded separately, after obtaining several successive orders for time to plead on terms, pleaded, in addition to not guilty, pleas traversing in the terms of the declaration the publishing of the advertisements and the announcement of the sale of the wines. The plaintiff demurred to these pleas. The defendants, after obtaining time to join in demurrer, obtained an order from a Judge at chambers for setting aside the demurrer as frivolous, or for striking out the allegations in the declaration, of which the pleas demurred to were traverses, as being immaterial and surplusage, and calculated to entrap the defendants:—Held, first, that an order for setting aside a demurrer to a plea, as frivolous, fell within the provisions of Reg. Gen. Hil. term, 4 Will. 4; secondly, that a frivolous demurrer was not an irregularity, so as to be waived by the defendants' obtaining time to join in demurrer; thirdly, that the order was one which ought to be made. *Cutis v. Surridge*, 16 Law J. Rep. (N.S.) Q.B. 193; 4 Dowl. & L. P.C. 642; 9 Q.B. Rep. 1015.

A demurrer to one of several replications being clearly frivolous, the Court set it aside for irregularity, giving the plaintiff leave to sign judgment on the whole record, as for want of a plea, unless the defendant consented to strike out the pleadings ending with the demurrer, to pay the costs of the application of preparing for trial, and to take short notice of trial. *Tucker v. Barnesley*, 16 Law J. Rep. (N.S.) Exch. 65; s.c. 16 Mee. & W. 54; 4 Dowl. & L. P.C. 292.

In assumpsit by indorsee against drawer, the first count being on the bill, and a second upon an account stated, concluding with the promise of defendant to pay "the said several last-mentioned monies respectively to the plaintiff on request;" a demurrer, on the ground of the consideration of the promise being incorrectly stated, or if including the money in the first count, being bad for duplicity:—Held, frivolous, and set aside. *Lomax v. Wilson*, 3 Com. B. Rep. 763.

Where a declaration was demurred to on the ground that the defendant was therein described as "William Henry W. Collier," the initial letter W being used for an unexpressed name, the Court held that the demurrer was not frivolous.

Seemle—that such a demurrer is good. *Nash v. Collier or Calder*, 17 Law J. Rep. (N.S.) C.P. 91; 5 Com. B. Rep. 177.

The Court refused to set aside as frivolous a demurrer to a replication to a plea of *liberum tenementum*, in trespass for mesne profits, setting up the judgment in ejectment by way of estoppel. *Bather v. Brayne*, 7 Com. B. Rep. 815.

In an action on the case for making noises near the plaintiff's premises, the defendants pleaded that they were a registered joint-stock company, incorporated for carrying on communication between ports of England and of France, for the public advantage, and that it was necessary for them to con-

struct and repair steam-boats, and that the place in question was convenient for the purpose, and that it was for the public advantage that the construction and repairs should be carried on near such place, and that the noises complained of were necessarily made in such construction and repairs. Replication, admitting the defendants to be a registered company, *de injuriâ absque residuo causâ*. The plaintiff added the similiter, delivered the issue, and gave notice of trial. The defendants delivered a demurrer to the replication, and gave the plaintiffs notice that they had struck out the similiter. A Judge at chambers ordered that the demurrer should be set aside as frivolous, and that the issue delivered and the notice of trial should stand:—Held, that the demurrer was frivolous, and that the Judge's order was correct. *Higinbotham or Heginbotham v. the Eastern and Continental Packet Company*, 19 Law J. Rep. (N.S.) C.P. 25; 8 Com. B. Rep. 337.

(F) REJOINING GRATIS.

The terms, "rejoining gratis" do not extend to a joinder in demurrer; and therefore where a defendant, who is under terms of rejoining gratis, pleads pleas which are demurred to, he is bound to join in demurrer without a rule for that purpose, but he is not bound to do so without a demand of joinder; and *semble*, per *Alderson, B.*, if under such circumstances a joinder be demanded, the defendant would be bound to join in demurrer within twenty-four hours. *Cooke v. Blake*, 16 Law J. Rep. (N.S.) Exch. 151; 4 Dowl. & L. P.C. 313.

Rejoining gratis means rejoining within four days from the delivery of the replication without a rule for that purpose, and does not mean rejoining within twenty-four hours.

The defendant delivered a rejoinder shortly before nine o'clock in the evening of the 29th of March, being the last day for rejoining, and also the commission day of the assizes. By the practice of the office a cause cannot be tried at the assizes unless the record be passed before three o'clock of the afternoon of the commission day. The plaintiff, without waiting for the defendant's rejoinder (the Statute of Limitations), on the morning of the 29th inserted in the issue a rejoinder similar in substance to the defendant's, and delivered the issue with notice of trial. The defendant did not appear at the trial, and the plaintiff had a verdict;—the Court set aside the issue, *Nisi Prius* record, and trial. *Winterbottom v. Lees*, 17 Law J. Rep. (N.S.) Exch. 217; 2 Exch. Rep. 325; 5 Dowl. & L. P.C. 744.

(G) PARTICULARS OF DEMAND.

In an action for work and labour, as a surveyor, the particulars of demand stated that the action was brought to recover a specified sum for surveying a certain number of miles between two places which were named, at a certain rate per mile, in the year 1845. The defendant having pleaded only the general issue, and notice of trial having been given, a rule for further and better particulars was refused. *Irving v. Baker*, 15 Law J. Rep. (N.S.) Q.B. 322.

In an action brought by a sworn broker for the price of scrip bought for the account for the defendant, the particulars of the plaintiff's demand should state the names of the persons from whom,

and the price at which the scrip was bought, and the date of the purchase within a few days. *Berkley v. De Vere*, 15 Law J. Rep. (N.S.) Q.B. 323; 4 Dowl. & L. P.C. 97.

In an action by an engineer, for work and labour and materials, a bill of particulars giving a general account of the nature of his demand is sufficient, as that he claims in respect of certain surveys, stating the number of miles and branches. *Higgins v. Ede*, 15 Law J. Rep. (N.S.) Exch. 77; 15 Mee. & W. 76; 3 Dowl. & L. P.C. 470.

The object of a bill of particulars is to controul the generality of the declaration; and a defendant is entitled to such particulars of the plaintiff's demand as will give him that information which a reasonable man would require respecting the matters against which he was called upon to defend himself.

In an action by an engineer against a railway company, for surveying their line, &c., and for money paid, a general particular for surveying the country between certain places, including travelling charges and assistance, is sufficient, without specifying the number of fields surveyed, or how much of the charge is for the engineer's skill, time and labour, and how much for travelling expenses and assistance. The particulars should specify the sums paid to the defendant's use. *Rennie v. Beresford*, 15 Law J. Rep. (N.S.) Exch. 78; 15 Mee. & W. 78; 3 Dowl. & L. P.C. 464.

Where the plaintiff in his particulars of demand had stated his claim to be for 450*l.*, for his services as clerk to the defendant, after the rate of 20*l.* per annum:—Held, that he was not entitled to prove a contract to be paid a commission on the amount of business done by the defendant. The question in such a case is not whether the particulars have actually misled the defendant, but whether they were calculated to mislead a reasonable man. *Law v. Thompson*, 15 Law J. Rep. (N.S.) Exch. 334; 15 Mee. & W. 541; 4 Dowl. & L. P.C. 54.

In debt for work and labour, &c. the plaintiff delivered particulars of demand, which gave credit to the defendant for sums paid by him amounting to 30*l.* A further and better particular of some of the items was afterwards delivered under a Judge's order, but which omitted to give credit for these payments. This latter bill of particulars alone was annexed to the record when entered. There was no plea of payment on the record. At the trial the plaintiff proved a demand to the amount of 22*l.*, and it appeared on cross-examination that the defendant had advanced money to the plaintiff to the amount of 27*l.* The defendant called for the first particulars delivered, under a notice to produce, and on non-production tendered a copy in evidence. This was rejected by the under-sheriff. The jury found for the defendant. On a motion for a new trial, on the ground of the rejection of this evidence, the Court discharged the rule, as, supposing the evidence to have been admitted, the verdict ought to have been for the defendant. *Boulton v. Pritchard*, 15 Law J. Rep. (N.S.) Q.B. 356; 4 Dowl. & L. P.C. 117.

In actions against persons on contracts arising out of railway matters, the particulars of demand must be as explicit as possible. *Pritchard v. Nelson*, 16 Law J. Rep. (N.S.) Exch. 207; 16 Mee. & W. 772; 4 Dowl. & L. P.C. 693.

In an action against the defendant for a false re-

presentation of the solvency of a third party, whom the plaintiffs had supplied with goods, the Court refused to compel the plaintiffs to furnish the defendant with a particular of credits consisting of the sums alleged to have been paid by such third party to the plaintiffs on account of the goods supplied. *Luck v. Handley*, 19 Law J. Rep. (N.S.) Exch. 29; 4 Exch. Rep. 486.

In use and occupation to recover 42*l.* 8*s.* 10*d.*, the balance of an account of 64*l.* 0*s.* 10*d.*, the plaintiff in her particulars of demand admitted the receipt of 21*l.* 12*s.* The defendant had occupied the premises under the plaintiff's husband, and subsequently to his death had held them of the plaintiff:—Held, that the plaintiff was entitled to shew that part of the sum for which she had given credit in her particulars was to be ascribed to the debt due to the husband, and not to that which became due to herself since his death. *Mercy v. Galot*, 18 Law J. Rep. (N.S.) Exch. 347; 3 Exch. Rep. 851.

In an action for money had and received, the plaintiff's particulars stated that the action was brought to recover "cash received by the defendant, being 10*s.* in the pound on a debt of 52*l.* 5*s.*, at one time due from the plaintiff to the defendant, and which had been previously paid by the plaintiff to the defendant."

Held, that the plaintiff was not bound by his particulars to prove an actual cash payment of 52*l.* 5*s.* to the defendant; and that he was entitled to succeed on proof of payment of 39*l.* 10*s.*, being the amount of the bill less a large per-centage by way of discount, which the defendant had agreed to deduct.

Letters containing a demand, written to a defendant, and unanswered by him, and in reference to which he has afterwards made unsatisfactory statements, are admissible in evidence against him, although they also state facts shewing how the demand arises. *Gaskill v. Skene*, 19 Law J. Rep. (N.S.) Q.B. 275.

[See SET-OFF, Particulars.]

(H) ISSUE.

Obtaining a *distingas* is equivalent to serving a writ of summons.

Where an issue stated that the action was commenced by writ of summons issued on a day which saved the Statute of Limitations, and it appeared that the writ was not served nor returned *non est inventus* within a month after its expiration, and that a *distingas* was issued after the time of limitation had expired, the Court refused leave to amend the issue by entering therein the date of the *distingas* instead of that of the writ of summons, on the ground that the *distingas* does not come within the 2 Will. 4. c. 39. s. 10. *Jones v. Boxer*, 18 Law J. Rep. (N.S.) C.P. 185; 7 Com. B. Rep. 58.

In the issue the signature of counsel to the pleadings need not be inserted.

In an issue delivered under a Judge's order for a trial before the sheriff, under the statute 3 & 4 Will. 4. c. 42, the date of the teste of the writ of trial should be inserted, though the writ has not, in fact, issued, but it is not necessary to state the day on which it will be returnable.

Where an issue omits to mention the date of the teste of the writ of trial, the proper course is

for the defendant to apply to a Judge to amend the issue at the cost of the plaintiff, and not to apply to the Court to set aside the issue and notice of trial. *Jefferies v. Yablonski*, 15 Law J. Rep. (N.S.) C.P. 213; 3 Dowl. & L. P.C. 807; 2 Com. B. Rep. 924.

(I) NOTICE TO PRODUCE.

[See BILL OF EXCHANGE, and PRODUCTION AND INSPECTION OF DOCUMENTS.]

(K) TRIAL.

(a) At Bar.

The Court will not, on the application of the plaintiff, grant a trial at bar merely because the defendant is the Lord Chancellor, and the plaintiff an attorney of the court, and the cause is stated to be one of importance. *Dimes v. Lord Cottenham*, 19 Law J. Rep. (N.S.) Exch. 290; 5 Exch. Rep. 311.

For defect of jurors on a trial at bar, a rule absolute granted for a writ of *octo vel decem tales*. *Buron v. Denman*, 1 Exch. Rep. 769.

(b) Notice of Trial.

(1) Form and Time of.

Where, by a Judge's order, the defendant is under terms of taking short notice of trial if necessary, he is not bound to take short notice if he puts in a plea sufficiently early to enable the plaintiff to give full notice of trial.

Quære—Whether, in such a case, a defendant is not bound to apply promptly to set aside a notice of trial, on the ground that it is not given in sufficient time. *Nicholl v. Forshall*, 15 Law J. Rep. (N.S.) Q.B. 203.

On the 7th of April the defendant obtained an order for time to plead, taking short notice of trial, but not having pleaded in due time the plaintiff signed judgment, which the Court afterwards set aside. The defendant pleaded on the 1st of May; on the 14th the plaintiff delivered a replication, but afterwards abandoned it, and delivered another on the 19th of May, with a rejoinder added. On the 23rd he delivered the issue indorsed with notice of trial for the 28th, and on that day, the defendant being absent, obtained a verdict. The Court held, that as the effect of the order of the 7th of April was removed by the judgment signed, the notice of trial was irregular, and the verdict must be set aside with costs. *Drake v. Pickford*, 15 Law J. Rep. (N.S.) Exch. 346; 15 Mee. & W. 607.

A notice of trial may be given after a cause is set down for trial.

No particular form is necessary to make a good notice of trial; and, therefore, a notice correct in other respects, but incorrectly stating that the cause had been made a *remanet* from the preceding term, was held a good notice of trial. *Ginger v. Pycroft*, 17 Law J. Rep. (N.S.) Q.B. 182; 5 Dowl. & L. P.C. 554.

Where the plaintiff had proceeded to trial upon an irregular notice of trial, the Court made a rule absolute to set it aside, with costs, the defendant not being bound to return the notice; and the Court cannot take notice of a consent on a sum-

mons not followed in due time by an order drawn up and served. *Wood v. Harding*, 3 Com. B. Rep. 968.

Where the plaintiff's pleading concludes to the country, he may give notice of trial under the Reg. Gen. Hilary term, 2 Will. 4. r. 59, either at the time of delivering the pleading or afterwards, without waiting for the similiter to be added. Where a rule *nisi* has been obtained to set aside a notice of trial, with a stay of proceedings,

Semble—that it is no violation of the rule to countermand the notice of trial. *Mullins v. Ford*, 4 Dowl. & L. P.C. 765.

(2) By Continuance.

A notice of trial by continuance from the sittings in term to the sittings after term, in London, may be given, although the cause cannot be tried until the adjournment day. *Toulmin v. Elgie*, 15 Law J. Rep. (N.S.) Q.B. 128; 3 Dowl. & L. P.C. 558.

In a cause, the venue of which was Middlesex, notice of continuance of the execution of a writ of inquiry was given two clear days before the expiration of the original notice. On a motion to set aside the execution of the writ of inquiry, it appeared that the original notice was a fourteen days' notice, and the defendant's affidavit was headed, "The affidavit of M J, of Ragland," and stated that Ragland was 136 miles from Middlesex:—Held, that there was enough to shew that the cause was a country cause, and therefore that the notice of continuance should have been served six days before the day fixed by the original notice for the execution of the writ of inquiry. *Saunders v. Jones*, 15 Law J. Rep. (N.S.) Q.B. 272; 3 Dowl. & L. P.C. 770.

Notice of trial was given for the second sittings in Michaelmas term, and was continued to the third sittings, and again continued to the sittings after term, and again continued to the first sittings in Hilary term, and still further continued to the second sittings in the last-mentioned term, at which sittings the cause was tried as undefended. The notice of continuance to the first sittings in Hilary term gave the defendant all the information as to the time and place of trial requisite in an original notice, and was served as long before the first sittings as an original notice should be served.

Held, that the last-mentioned notice, which was bad as a continuance (only one continuance being allowed in a term), was good as an original notice of trial; that it was properly continued to the second sittings; and that the trial was regular. *Cory v. Hotson*, 19 Law J. Rep. (N.S.) Q.B. 250; 1 L. M. & P. 23.

[See JUDGMENT, as in case of Nonsuit.]

(c) Postponing.

The postponement of a trial upon affidavit is within the discretion of the Judge at Nisi Prius. *Turner v. Merywether*, 18 Law J. Rep. (N.S.) C.P. 155; 7 Com. B. Rep. 251.

Where a trial is postponed by a Judge's order, on payment of the costs of the day, unless the order is accompanied by an appointment to tax the costs, the opposite party may treat it as a nullity, and proceed to try the cause. *Waller v. Joy*, 16 Law J. Rep. (N.S.) Exch. 17; 16 Mee. & W. 60; 4 Dowl. & L. P.C. 338.

(d) *Proceedings at the Trial.*(1) *In general.*

A witness for the plaintiff having stated that he had never heard of a certain agreement in writing, the agreement was put into his hands, and he was then asked by the defendant whether he had seen an agreement respecting the above matter; he replied, "Never, before I came into court":—Held, that the defendant, if he wished the agreement read, must put it in as his own evidence. *Keys v. Harwood*, 15 Law J. Rep. (N.S.) C.P. 207; 2 Com. B. Rep. 905.

A witness on cross-examination answered a question put to him by the defendant's counsel, and went on to make a further statement, which was not legal evidence. The plaintiff's counsel in reply remarked upon this further statement; he was stopped by the jury, who understood the witness to have said the direct contrary to that attributed to him by the plaintiff's counsel, who then wished to recall the witness, but the Judge refused to allow this to be done:—Held, that the witness having volunteered a statement which was not evidence, it was the duty of the Judge not to notice it; and that he was right in refusing to recall the witness to correct the mistake of the jury as to what the statement was. *Catlin v. Barker*, 17 Law J. Rep. (N.S.) C.P. 62; 5 Com. B. Rep. 201.

In an action brought against several defendants, who appear at the trial by different counsel, it is a matter for the discretion of the Judge whether he will allow more than one counsel to address the jury on behalf of the defendants.

Semble—that if at the close of the plaintiff's case there is only one point for the opinion of the jury, only one speech should be allowed. *Nicholson v. Brooke*, 17 Law J. Rep. (N.S.) Exch. 229; 2 Exch. Rep. 213.

(2) *Right to begin.*

To an action of trespass *qu. cl. fr.*, the defendant justified the entry, &c, for the purpose of removing an obstruction to his enjoyment of a right. The replication traversed the right:—Held, that, on the counsel for the plaintiff, at the trial, declining to say that he intended to proceed for substantial damages, the Judge rightly decided that the defendant should begin. *Chapman v. Rawson*, 15 Law J. Rep. (N.S.) Q.B. 225; 8 Q.B. Rep. 673.

Assumpsit on a policy of assurance on life, one of the terms of which was, that it should be void if anything stated by the assured, in a declaration or statement given by him to the directors of the assurance company before the execution of the policy, should be untrue. In this declaration the assured stated, that he had not been afflicted with rupture, or any other disorder which tends to the shortening of life. The declaration in the cause averred the truth of the statement of the assured. Plea, that the declaration or statement was untrue to wit, in this, that the assured at the time of the making thereof was afflicted with rupture, concluding with a verification. Replication, *de injuriâ*:—Held, that the plaintiff was entitled to begin, and the Judge who tried the cause having held the contrary, a new trial was ordered. *Ashby v. Bates*,

15 Law J. Rep. (N.S.) Exch. 349; 15 Mee. & W. 589; 4 Dowl. & L. P.C. 33.

Where to an action against the maker of a promissory note, proof of the first four issues lay on the defendant, and, to a plea of payment into court, the plaintiff replied that the defendant was indebted to him in a larger amount than the sum paid in:—Held that the plaintiff was entitled to begin. *Booth v. Millns or Millars*, 15 Law J. Rep. (N.S.) Exch. 354; 15 Mee. & W. 659; 4 Dowl. & L. P.C. 52.

[See INSURANCE, On Lives, Concealment—EJECTMENT, Right to begin.]

(3) *Evidence in reply.*

In an action of trespass for false imprisonment the defendant justified, first, on the ground that the plaintiff had stolen some "chaff" belonging to the defendant; and, secondly, on the ground that the defendant had reasonable cause for suspecting the plaintiff of stealing his "chaff." The plaintiff gave some evidence of the honest possession of some chaff, and some peculiarities in that chaff were spoken to, similar to those in the chaff found in the plaintiff's drawer, and claimed by the defendant as his stolen property. No mention was made of linseed either in the pleadings or in the course of the plaintiff's case, by cross-examination or otherwise. The defendant called witnesses, who proved that in the chaff lost by him, and also in that found in the plaintiff's drawer linseed was found mixed. The plaintiff then proposed and was allowed by the Judge to call her father, who was in court, to prove that he had bought linseed some months before the alleged felony, and mixed it with chaff, and sent it to the plaintiff, and to produce the invoice which he had received for that linseed.

Held, that it was in the discretion of the Judge to allow such evidence to be given by way of reply, and that he had rightly exercised such a discretion.

Semble—the Court will not lay down any general rule as to the admission of evidence in reply. *Wright v. Wilcox*, 19 Law J. Rep. (N.S.) C.P. 333.

(e) *Entry on the Record.*

The plaintiff T, who sued as a public officer of a banking company, died after issue joined. The Nisi Prius record was made up from the plea roll as though T were alive. The *venire* was awarded as between T and the defendants. No entry was made on the plea roll of T's death, or of the appointment of B as new public officer; but a memorandum was afterwards entered upon the Nisi Prius record of these facts, but not by way of suggestion to the Court, nor followed by any confession by the defendants, or a "*nient dedire*." The cause was entered for trial in the name of B as the plaintiff, and was tried by the jury returned to the *venire* between T and the defendants. Notice was given on the 6th of August to the defendants, that such entry would be made and the cause tried. The defendants appeared under protest, and the verdict was for the plaintiff.

Held, that the entry on the Nisi Prius record was irregular, and did not authorize the trial of the cause in the name of B.

Quare—Whether if the facts had been properly suggested upon the plea roll they would have been traversable; and if so, to what time for pleading

would the defendants have been entitled? *Barne-wall v. Sutherland*, 19 Law J. Rep. (N.S.) C.P. 290; 1 L. M. & P. 159.

(L) NEW TRIAL.

Where an objection is taken at a trial to the admissibility of certain evidence, but such objection is not afterwards pressed, and no subsequent application is made to have it struck out, the circumstance of its having gone to the jury is no ground for a new trial, even though it should appear in the result to have been, on particular grounds, open to objection. *Ferrand v. Milligan*, 15 Law J. Rep. (N.S.) Q.B. 103; 7 Q.B. Rep. 730.

The Court will not grant the defendant a new trial where there has been a misdirection with respect to one item only of the plaintiff's demand, and the plaintiff consents to reduce the damages by the whole sum in respect of which the misdirection took place. *Moore v. Tuckwell*, 15 Law J. Rep. (N.S.) C.P. 153; 1 Com. B. Rep. 607.

Practice as to taking the new trial paper on the last day of term. *Lambert v. Heath*, 15 Law J. Rep. (N.S.) Exch. 296.

Semble—the Court will not grant a new trial merely on the ground that a Judge's ruling as to the right to begin is erroneous, unless clear and manifest wrong has been done thereby. *Booth v. Millis* or *Millars*, 15 Law J. Rep. (N.S.) Exch. 354; 15 Mee. & W. 669; 4 Dowl. & L. P.C. 52.

A cause which was fifteenth on the list for the day, was taken as an undefended cause, at the sitting of the Court, and in the absence of the defendant:—Held, that there was no ground for a new trial, and that the Judge may take the causes in the list in such order as he pleases. *Banks v. Newton*, 16 Law J. Rep. (N.S.) Q.B. 142; 4 Dowl. & L. P.C. 632.

Where leave was given to the defendant to move for a nonsuit or a new trial after the first four days of term, and the case was entered in the list called the "New Trial Motion Paper," but no notice was given to the other side of its being in that list, beyond a statement made by the defendant's attorney to the plaintiff's attorney, that counsel would either move within the first four days of term, or enter the cause in the list; and the plaintiff signed judgment on the sixth day of term, and afterwards a rule *nisi* for a nonsuit or new trial was obtained by the defendant. Upon a rule *nisi* obtained by the plaintiff to set aside the defendant's rule for a nonsuit or new trial:—Held, that the judgment could only be set aside and the defendant let in on payment of costs; and the Court directed the plaintiff's rule to stand over until the merits of the defendant's rule for a new trial should be disposed of.

Quære—Whether it would be sufficient to show positive knowledge in the opposite party of the case being in the list. *Lloyd v. Berkovitz*, 16 Law J. Rep. (N.S.) Exch. 278; 16 Mee. & W. 31.

Where a document which is not legal evidence of the facts contained in it, consists of an enumeration of items otherwise legally proved, the reception of such document in evidence is no ground for a new trial. *Stindt v. Roberts*, 17 Law J. Rep. (N.S.) Q.B. 166; 5 Dowl. & L. P.C. 460.

If a Judge in leaving to the jury a question partly depending upon the construction of an act

of parliament, does not give the jury an explanation of the meaning of the act sufficiently comprehensive to enable them to decide the particular issue, it is a misdirection.

Therefore, where the issue was whether a railway was at a particular spot passing "through a town within the meaning of the Railways Clauses Consolidation Act, section 11," and the Judge merely told the jury that "town" was in the act to be understood in its ordinary sense, the Court granted a new trial.

"Town" in the act means the space on which the inhabitants have permanently collected their dwellings so near to each other that they may be reasonably said to be contiguous. It includes all open spaces surrounded by a continuous line of houses; and, *semble*, all open spaces occupied as mere accessories to the congregated dwelling-houses, although not so surrounded. *Elliott v. the South Devon Rail. Co.*, 17 Law J. Rep. (N.S.) Exch. 262; 2 Exch. Rep. 725.

If a document be offered in evidence at a trial on one ground which is untenable, and be rejected, and after the trial it be discovered that the document might have been offered and admitted on another ground, the Court will not grant a new trial; at all events, not unless manifest injustice would ensue, and the party could not by due diligence have offered the document on the proper ground at the trial. *Doe d. Kinglake v. Bevis*, 18 Law J. Rep. (N.S.) C.P. 128; 7 Com. B. Rep. 456.

The Court will not grant a new trial on the ground of a refusal by the Judge to allow a witness to be called after the case has been closed, unless it is made out very clearly indeed that the Judge in refusing has wrongly exercised his discretion. *Middleton v. Barned*, 18 Law J. Rep. (N.S.) Exch. 433; 4 Exch. Rep. 241.

In an action against a provisional committee-man of a proposed railway company for goods, &c. supplied in the course of the formation of the company, and which resulted in a verdict for the defendant, the foreman of the special jury was himself a provisional committee-man of the same company. He did not make any affidavit that he was unaware of the question to be tried when he entered the jury-box:—Held, that this was a ground for a new trial; but it was granted only on payment of costs by the plaintiff, as it appeared that his attorney had been aware of the jurymen's interest.

Though a jurymen's affidavit of what occurred in the jury-box during the trial cannot be received, it is admissible to explain the circumstances under which he came into the jury-box.

An action was brought against a member of a provisional committee for (amongst other things) printing prospectuses of a proposed company. The defendant had admitted that all the work sued for had been done; after the case had been summed up, the jury inquired how early the defendant became a member of the committee, and the counsel for the plaintiff thereupon gave them the date of one of the prospectuses printed by the plaintiff in which the defendant's name appeared as a member of the provisional committee, and the jury gave a verdict for the plaintiff.

Quære—Whether the admission by the defendant

that all the work had been done rendered the contents of the prospectus evidence against him; but,

Held, that under the circumstances, the defendant was entitled to a new trial on the ground of surprise.

Held, also, that the fact of the jury accompanying their verdict with a statement that they had arrived at it independently of the prospectus did not alter the case. *Bailey v. Macaulay*, 19 Law J. Rep. (n.s.) Q.B. 73; 15 Q.B. Rep. 533.

A new trial will not be granted on the ground of surprise, though it appear on affidavit that a witness who was expected did not appear at the trial, unless it be stated that there was surprise. *Hoare v. Silverlock*, 19 Law J. Rep. (n.s.) C.P. 215.

In case for injury to the plaintiff's reputation in trade, by fabricating inferior articles with the plaintiff's name, the jury having given damages 5*l.*, as upon the supposed profits on the articles proved to have been sold, the Court refused to interfere with the verdict, as upon inadequacy of damages. *Manton v. Bales*, 1 Com. B. Rep. 444.

This Court cannot aid a party in obtaining a copy of the notes taken at a trial.

An application for a rule, that a defendant might be furnished with a copy of the notes taken by the Judge of the Sheriffs of London's Court on a former trial between the same parties, was refused. *Parkhurst v. Gosden*, 2 Com. B. Rep. 894.

A new trial refused where the cause had been taken in its proper course in the absence of the defendant's counsel, the defence intended to be set up being without equity. *Blogg v. Bousquet*, 6 Com. B. Rep. 75.

Where one of the issues raised was either immaterial, or was the same as that raised by the first plea, held that it did not vitiate the proceedings and was no ground for a new trial. *Hunt v. Cox*, 2 Exch. Rep. 606.

Where a cause has been tried in a borough court on a writ of trial issuing out of the Court of Common Pleas at Lancaster, a motion for a new trial cannot be made to a Judge sitting in banco at Westminster, under the 4 & 5 Will. 4. c. 62. s. 26. *Bury v. Peers*, 4 Dowl. & L. P.C. 163.

Where the Court were of opinion that the direction of the learned Judge who tried the cause, though in terms correct, might still have been misunderstood by the jury, they granted a new trial. *Toulmin v. Hedley*, 2 Car. & K. 157.

(M) DISCONTINUING ACTION.

The Court will not allow the plaintiff to discontinue the action after a general verdict, distinguishing from a special verdict, where something remains to be done by the Court. *Young v. Hichens*, 6 Q.B. Rep. 606.

(N) PROCEEDINGS.

(a) Disclosing Plaintiff's Residence.

The plaintiff, a female, who had been employed by the defendant to take care of his house, but who had subsequently left it, brought an action against him for breach of promise of marriage. The defendant had threatened to proceed criminally against her on a charge of taking away some of his property from the house. The Court refused to compel the

plaintiff's attorney to disclose her place of residence, as the defendant knew who she was, and had avowed that he sought the information with the view of effecting her arrest on the criminal charge. *Harris v. Holler*, 19 Law J. Rep. (n.s.) Q.B. 62; 7 Dowl. & L. P.C. 319.

(b) Staying.

[See LIBEL.]

A rule to set aside a writ of summons and subsequent proceedings had been obtained, on behalf of the defendant, on an affidavit that the action was commenced without the authority of the plaintiff. It appeared, in answer, that the action was brought to recover from the defendant arrears of maintenance-money due to his wife under a deed of separation, of which the plaintiff was a trustee, but that she had refused to carry out the trusts of the deed, in collusion with the defendant, for the purpose of preventing the wife from obtaining payment of the arrears, and, having been informed that the action was brought in her name, had refused to sanction it, but without stating any reason for so doing. The Court discharged the rule with costs. *Auster v. Holland*, 15 Law J. Rep. (n.s.) Q.B. 229; 3 Dowl. & L. P.C. 740.

If, at the trial of a cause, a juror be withdrawn under the advice of counsel, and a second action brought for the same cause, the Court will stay the proceedings, notwithstanding the belief of the attorneys on each side that such withdrawal would not operate as a termination of the suit. *Gibbs v. Ralph*, 15 Law J. Rep. (n.s.) Exch. 7; 14 Mee. & W. 804.

Where separate actions are brought against several joint contractors for the same debt, the Court, upon payment of the debt and costs in one action, will stay proceedings in the other actions without costs. *Newton v. Blunt*, 16 Law J. Rep. (n.s.) C.P. 121; 4 Dowl. & L. P.C. 674; 3 Com. B. Rep. 675.

N brought three separate actions for the same cause of action against three members of a railway provisional committee. A Judge at chambers, upon N declining to elect in which action he would proceed, made an order for staying the proceedings in two of the actions. The Court rescinded the order. *Newton v. Belcher*, *Newton v. Palmer*, *Newton v. Liddiard*, 16 Law J. Rep. (n.s.) Q.B. 37; 9 Q.B. Rep. 612.

Where a plaintiff had brought eleven separate actions for the same cause of action against eleven members of a provisional railway committee, the Court refused to stay the proceedings in each of the actions except such one as the plaintiff should elect.

Quare—Whether they would have stayed the proceedings, if the defendants had consented to be bound by the verdict in one action. *Giles v. Tooth*, 16 Law J. Rep. (n.s.) C.P. 3; 4 Dowl. & L. P.C. 486; 3 Com. B. Rep. 665.

The plaintiff brought an action of debt, for work and labour, but failed to prove that any work was actually done; he, nevertheless, obtained a verdict, which the Court afterwards set aside, directing a nonsuit to be entered. He then commenced a fresh action, in assumpsit, for the same cause, suing *in forma pauperis*, and declaring upon a special contract. The Court, on motion, stayed the proceedings in the latter action, until the former should be disposed of. *Haigh v. Paris*, 16 Law J. Rep.

(n.s.) Exch. 37; 16 Mee. & W. 144; 4 Dowl. & L. P.C. 325.

A plaintiff who has obtained a verdict in an action for unliquidated damages, has a right to sign final judgment in the usual way; and the Court will not deprive him of his right, and stay further proceedings upon payment by the defendant of the sum recovered and the costs. *Peat v. Magnall*, 18 Law J. Rep. (n.s.) Q.B. 6; 6 Dowl. & L. P.C. 261.

The Court will not rescind an order made by a Judge to stay proceedings until further order, after a lapse of two years. Such an order, though wrong in form, is not a nullity. *Griffin v. Bradley*, 18 Law J. Rep. (n.s.) C.P. 97; 6 Com. B. Rep. 722.

The plaintiff brought an action of slander against D, who justified. The cause was tried, the plaintiff nonsuited, and the defendant's costs taxed at 40s. The plaintiff then brought a second action (*in forma pauperis*) for substantially the same slander as was complained of in the former action. The Court, on motion, stayed the proceedings in the second action till the costs of the first action should be paid. *Hoare v. Dickson*, or *Dickinson*, 18 Law J. Rep. (n.s.) C.P. 158; 7 Com. B. Rep. 164.

Where a plaintiff who had been taken in execution for the costs of a former action, had been afterwards discharged from custody under the Insolvent Debtors Act, such taking does not operate as a satisfaction of such costs. Where, therefore, under such circumstances, a second action for the same cause had been commenced, the Court stayed the proceedings until the costs of the former action should be paid. *Stilwell v. Clark*, 18 Law J. Rep. (n.s.) Exch. 165; 3 Exch. Rep. 264.

The indorser of a promissory note paid the indorsees in default of the maker, and then sued the maker in the name of the indorsees without their authority, and obtained a verdict. The amount of the verdict having been paid, and an execution issued for costs, the Court, on motion, made a rule absolute to stay all proceedings without costs on either side. *Coleman v. Beadman or Coleman v. Biedman*, 18 Law J. Rep. (n.s.) C.P. 263; 7 Com. B. Rep. 871.

The practice of the superior courts to stay the proceedings where an action is brought for less than 40s. is not affected by the operation of the 9 & 10 Vict. c. 95, or the City of London Local Act, 10 & 11 Vict. c. lxxi. Such action will in general be stayed unless there is no inferior court in which it could have been brought. *Stutton v. Bament*, 18 Law J. Rep. (n.s.) Exch. 318; 3 Exch. Rep. 831.

An action was brought against the defendant on a promissory note, signed by himself and other directors, as follows:—"We, the directors of the Royal Bank of Australia, for ourselves and the other shareholders of the said company, jointly and severally promise to pay G H W, or bearer, on the 19th of February 1850, at the Union Bank of London, 200l. for value received, on account of the company."

Held, that the defendant was personally liable on the note, and was not sued as a contributory of the company, and therefore was not entitled to a stay of proceedings under the 11 & 12 Vict. c. 45. s. 73. *Penkivil v. Connell*, 19 Law J. Rep. (n.s.) Exch. 305; 5 Exch. Rep. 381.

The Court will stay proceedings in an action

brought by the defendant in replevin on the replevin bond against the plaintiff in replevin, for not prosecuting the replevin suit with effect, when such plaintiff has been prevented from declaring in the replevin suit, after removal into the superior court, by reason of the defendant in replevin not having appeared in that suit in such court, pursuant to steps taken by such plaintiff to compel his appearance. *Evans v. Bowen*, 19 Law J. Rep. (n.s.) Q.B. 8; 7 Dowl. & L. P.C. 320.

The plaintiff brought three separate actions against A, B and C, joint contractors, to recover the same debt, and recovered verdicts in the actions against A and B. Before judgment was signed in either of these actions, C paid the debt and costs in the action against him:—Held, that A and B were entitled to have the proceedings stayed in the actions against them without payment of the costs.

Where separate actions are brought against several joint contractors for the same debt, and one of them pays the debt and costs in the action against himself, the proceedings may be stayed in the other actions, notwithstanding that the case against each of the defendants would have to be established by different evidence. *Bailey v. Haines*, *Bailey v. Bracebridge*, 19 Law J. Rep. (n.s.) Q.B. 402; 15 Q.B. Rep. 533.

[See INTERPLEADER.]

(c) *Setting aside.*

An application to set aside a judgment, on the ground that the signing of it was contrary to good faith, must be made promptly. *Saunders v. Jones*, 15 Law J. Rep. (n.s.) Q.B. 272; 3 Dowl. & L. P.C. 770.

A defendant took out a summons to set aside judgment and execution for irregularity with costs, and the Judge without deciding the question of irregularity, ordered the proceedings to be set aside without costs, and on the condition of the defendant's bringing no action. The defendant protested against those terms; but afterwards drew up and served the order and obtained the benefit of it. The Court refused to rescind that part of the order which directed no action to be brought, considering that the defendant had made himself a party to the order and was bound by its conditions. *Pearce v. Chaplin*, 16 Law J. Rep. (n.s.) Q.B. 49; 9 Q.B. Rep. 802.

Under rule 15, of Reg. Gen. Mich. term, 3 Will. 4, the declaration, in its commencement, should state whether it is delivered or filed by the plaintiff in person, or by his attorney; a declaration omitting this is irregular, and may be set aside, notwithstanding the notice of declaration served states it to have been served by an attorney. But held, that the proper course in such a case is to apply to a Judge at chambers, and that the Court will not give the defendant the costs of the application to the Court, though the declaration be delivered or filed in term. *White v. Feltham*, 16 Law J. Rep. (n.s.) C.P. 14; 4 Dowl. & L. P.C. 454; 3 Com. B. Rep. 658.

The defendant, who appeared as Charles Frederick Augustus William, Duke of Brunswick and Luneburg, sued as Charles Frederick Augustus William d'Este, commonly called the Duke of Brunswick, pleaded a plea to the jurisdiction, in-

titled, "Charles Frederick Augustus William, Sovereign Duke of Brunswick and Luneburg, sued as, &c., at the suit of Charlotte Munden," accompanied by an affidavit, similarly entitled:—Held, that the plea was a nullity, and that the plaintiff was entitled to sign judgment; and the Court refused to set it aside, there being no affidavit of merits. *Munden v. the Duke of Brunswick*, 16 Law J. Rep. (n.s.) C.P. 167; 4 Dowl. & L. P.C. 807; 4 Com. B. Rep. 321.

Where a defendant has been served with process, and an attorney, without authority, appears for him, if the attorney be insolvent the defendant will be relieved upon equitable terms, provided he has a defence on the merits. But if the attorney be solvent the defendant will be left to his remedy by summary application against him.

But where the plaintiff, without serving the defendant with a writ of summons, accepts the appearance of an unauthorized attorney, the Court will set aside the judgment as irregular, with costs, and leave the plaintiff to recover those costs and the expenses from the delinquent attorney. *Bayly v. Buckland*, 16 Law J. Rep. (n.s.) Exch. 204; 1 Exch. Rep. 1.

The writ was in an action of debt; and the commencement of the declaration was in the form usual in debt. The first count was good either in debt or in assumpsit, and the second and only other count was a good count in assumpsit:—Held, that this was a good declaration in assumpsit, and should therefore be set aside for irregularity, as varying from the process.

Held, also, that under these circumstances the plaintiff could not insist that the declaration was demurrable for misjoinder of a count in debt with a count on promises, as an answer to an application to set it aside for irregularity. *Moore v. Foster*, 17 Law J. Rep. (n.s.) C.P. 101; 5 Dowl. & L. P.C. 352; 5 Com. B. Rep. 220.

A replication commenced "And the plaintiff as to the forty-sixth plea"—it then traversed an allegation in that plea, and went on—"and this the plaintiff prays may be inquired of by the country; and as a further answer in this behalf to the said forty-sixth plea,"—it then alleged new matter by way of answer and went on—"and this the said plaintiff is ready to verify; and further as to the forty-sixth plea,"—alleging new matter, and concluded—"and this the plaintiff is ready to verify."—Held, that such a replication is so irregular in form that the Court will set it aside with costs, upon a summary application. *Tolson v. the Bishop of Carlisle*, 17 Law J. Rep. (n.s.) C.P. 195; 5 Dowl. & L. P.C. 789; 5 Com. B. Rep. 761.

A declaration on a bill of exchange stated it to be payable at three months, and contained counts for goods sold and delivered and on an account stated. The bill, as produced at the trial, was made payable at two months, and on the record being referred to, appeared payable in like manner at two months, but the word "two," in the record, had been written on an erasure.

The plaintiffs having obtained a verdict, the Court set aside the record and all subsequent proceedings, refusing leave to the plaintiffs to retain their verdict on the account stated. *Suker v. Neal*, 17 Law J. Rep. (n.s.) Exch. 56; 1 Exch. Rep. 468.

Where a plea is sworn to be false, and is manifestly tricky, and such as to put the plaintiff to a reasonable difficulty in replying to it, the Court will set it aside and allow judgment to be signed for want of a plea. *Levy v. Railton*, 19 Law J. Rep. (n.s.) Q.B. 16.

After notice of trial given to the defendant's attorney for the first sittings in Michaelmas term, the defendant's attorney, on the 9th of October, died. The cause was tried, pursuant to the notice, on the 3rd of November, and a verdict found for the plaintiff, and notice of taxation of costs was left by the plaintiff at the office of the defendant's deceased attorney on the 8th of November, the plaintiff's attorney not being aware of the death. On the 9th of November the plaintiff signed judgment for the debt and costs. In March 1850, the defendant being in prison, the plaintiff lodged a detainer against him.

The defendant having obtained a rule nisi to set aside all the proceedings in the action since the 9th of October, deposing that he did not know of any notice of trial having been given, and believed that none had been given, and that he had had no notice of any proceedings subsequent to the plea, until he found that the detainer had been lodged, but not stating when he first knew that his attorney was dead, the Court discharged the rule. *Ashley v. Brown*, 19 Law J. Rep. (n.s.) Q.B. 477; 1 L.M. & P. 451.

To a declaration by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that the plaintiff was indebted to the defendant in 157*l.* 10*s.* on a judgment recovered, which he, the defendant, is ready to verify by the record, and also in 160*l.* for goods sold, which said sums the defendant offers to set off and allow to the plaintiff against the damages, concluding with a verification.

The Court set aside the plea on the grounds of its being false (there being an affidavit of its falsehood), and calculated to embarrass the plaintiff. *Nutt v. Rush*, 19 Law J. Rep. (n.s.) Exch. 54; 4 Exch. Rep. 490.

Upon demand of oyer of a deed, the plaintiff's attorney delivered to defendant a copy of the deed with alterations and erasures in it, as they appeared on the deed, although made without authority; the defendant set out the deed in his plea as altered. The Court would not set aside the plea, but allowed the plaintiff to re-deliver oyer as he might be advised, on payment of costs. *Turquand v. Hennes*, 7 Com. B. Rep. 179.

Assignees of a bankrupt applying to set aside proceedings on the ground of irregularity, must come to the court within a reasonable time after notice of the irregularity.

An original writ of *fi. fa.* and a testatum writ were sued out on the 23rd of February, and on the same day the defendant's goods were seized under the testatum writ. On the 26th, the original writ, with the return of *nulla bona*, was filed in the proper office of the Court. On the 25th, a fiat in bankruptcy was issued against the defendant, and on the 10th of March, creditors' assignees were appointed. The plaintiff having made up the roll, on the face of which the original writ appeared to be regularly returned before the issuing of the testatum writ, the defendant's assignees applied to

a Judge at chambers, on the 10th of March, to have the roll amended, by inserting the true date of the return of the *testatum fi. fa.*, and were referred by the Judge to the Court:—Held, that this was at most but an irregularity, and that a motion made on the 5th of May for that purpose was too late. *Butterworth v. Williams*, 4 Dowl. & L. P.C. 82.

A rule to set aside the declaration and judgment signed thereon, and all subsequent proceedings, and to discharge the defendant out of custody, on the ground that the defendant has never been served with process in the action, must ask to set aside the appearance also; unless it appear upon affidavit that no appearance has in fact been entered.

A party moving to set aside proceedings on the ground of irregularity must ask to set aside the first proceeding in which the irregularity occurs. *Hardwick v. Wardle*, 4 Dowl. & L. P.C. 739.

Where an incorrect copy of a writ of summons was served as if tested on a Sunday, but the writ itself was regular:—Held, that the defendant was not bound to treat the proceeding as a mere nullity, although the plaintiff had taken no subsequent steps; but might come to the Court to set the copy and service aside. *Corrall v. Foulkes*, 5 Dowl. & L. P.C. 590.

(O) MOTIONS, RULES AND ORDERS.

A rule was obtained in a cause of B v. D, calling upon F (an attorney) to render an account of and pay over money due to B, and the matters of this rule were, by a subsequent rule, referred to the Master. B afterwards died. A rule was then obtained, calling upon F to shew cause why B's executors should not be made parties to the two former rules instead of B. This rule and the affidavits on which it was granted were entitled, "B, deceased, v. D":—Held, that this was a fatal objection to the rule, there being no such cause as "B, deceased, v. D":—Held, also, that it was not necessary that the second rule should be drawn up on reading the first, if it adverted to the first which was in court. *Bland v. Dax*, 15 Law J. Rep. (n.s.) Q.B. 1; 8 Q.B. Rep. 126.

An affidavit, stating that service of a rule had been made upon Mr. S "who acts as the attorney or agent of the defendant in this cause," was held sufficient. *Patrick v. Richards* or *Patrick v. Richards*, 15 Law J. Rep. (n.s.) Q.B. 204; 3 Dowl. & L. P.C. 573.

Upon an interlocutory judgment for the plaintiff in an action on a covenant to pay to the plaintiff all such sums as should be received by the defendant, a sequestrator, and be at his disposition from time to time, in part or in full satisfaction of a certain debt due to the plaintiff, the Court refused to make a rule *nisi* to compute absolute. *Smith v. Nesbitt*, 15 Law J. Rep. (n.s.) C.P. 31; 3 Dowl. & L. P.C. 420; 2 Com. B. Rep. 288.

Seemle—that where a rule for a new trial has been obtained on payment of costs, a term's notice should be given, after the lapse of more than a year, of a motion to discharge it. *Lord v. Wardle*, 15 Law J. Rep. (n.s.) C.P. 259; 3 Com. B. Rep. 295.

A rule to discharge a rule absolute for a new trial on payment of costs, after taxation and demand of costs, is, in the Exchequer, a rule *nisi*, which makes itself absolute if cause be not shewn within a limited

time. *Phillips v. Warren*, 15 Law J. Rep. (n.s.) Exch. 3; 14 Mee. & W. 730; 3 Dowl. & L. P.C. 301.

According to the practice of the Court of Queen's Bench (which is at variance with the practice of the Court of Common Pleas in this respect), the plaintiff is bound to draw up, and take notice of the terms of a rule discharging a rule for judgment as in case of a nonsuit upon a peremptory undertaking. Therefore, where the plaintiff did not go to trial according to his undertaking, and the defendant got a rule for judgment as in case of a nonsuit, the Court refused to set that rule aside on the ground that the plaintiff had not been served in due time with a copy of the rule discharging the rule for judgment as in case of a nonsuit on the peremptory undertaking. *Landells v. Ball*, 16 Law J. Rep. (n.s.) Q.B. 370; 5 Dowl. & L. P.C. 62.

A rule for making a Judge's order a rule of court and for the costs of the application, is absolute in the first instance, provided there be an affidavit of the service and of disobedience of the order. *Black v. Low*, 16 Law J. Rep. (n.s.) Exch. 56; 4 Dowl. & L. P.C. 285.

Where a rule obtained in the name of the plaintiff to set aside an order had been discharged on an affidavit of the plaintiff that the application was made without his authority or consent, the Court allowed a second application to be made on the same affidavits in the name of the party on whose behalf the action was brought. *Tilt v. Dixon*, 17 Law J. Rep. (n.s.) C.P. 61.

In this court, the party moving to enlarge a rule should serve the rule for enlarging it on the other party. And when a rule is enlarged by consent, the party whose interest it is to keep it alive must serve the enlarging rule on his adversary. *Batty v. Marriott*, 17 Law J. Rep. (n.s.) C.P. 140; 5 Dowl. & L. P.C. 477; 5 Com. B. Rep. 420.

A party is entitled to a Judge's order on the default of the opposite side in attending two summonses, and he ought not to obtain a third summons.

The defendant, having obtained two Judge's summonses for time to plead, neither of which was attended by the plaintiff, on the non-attendance on the second summons, made an affidavit of service, and left it with the Judge's clerk for signature. The Judge having left chambers without signing it, the defendant, at the suggestion of the clerk, took out a third summons, returnable on the following day, when, on default of attendance, he obtained an order, previously to which, at the expiration of the time for attending the second summons, the plaintiff had signed judgment:—Held, that the judgment was regular. *Hawkins v. Wilkinson*, 17 Law J. Rep. (n.s.) Exch. 230; 2 Exch. Rep. 340.

The Court cannot take notice of a consent on a summons, unless followed in due time by an order drawn up and served.

A defendant is not bound to return an irregular notice of trial, though made aware, by a notice to produce, that the plaintiff is proceeding thereon. *Wood v. Harding*, 3 Com. B. Rep. 968.

A rule that money paid into court in lieu of bail should be paid out to the defendant after judgment as in case of nonsuit, is not absolute in the first instance. *D'Ebro v. Schmidt*, 18 Law J. Rep. (n.s.) Q.B. 223; 6 Dowl. & L. P.C. 742.

Where at the trial a verdict was taken for the plaintiff, with liberty, by the consent of both parties, to the defendant to move to enter a verdict, if the Court should think him entitled to do so, and the defendant died after the trial and before the next term, a motion to enter a verdict for the defendant may be made without putting the executors of the defendant on the record, or making them parties to the rule. *Freeman v. Rosher*, 18 Law J. Rep. (N.S.) Q.B. 349.

Defendant was arrested, and deposited the amount of debt and 10*l.* costs with the sheriff. A few days after he embarked for Australia, leaving no person to receive papers or act for him. Plaintiff obtained a rule calling upon defendant to shew cause why the money should not be paid to plaintiff according to the 43 Geo. 3. c. 46. s. 2. A copy of the rule was stuck up four days in the offices of the court:—Held, that under the circumstances there had been a sufficient service of the rule *nisi*, which was made absolute. *Shackel v. Johnson*, 18 Law J. Rep. (N.S.) C.P. 249; 7 Com. B. Rep. 865.

On the last day of term a rule was made absolute on affidavit of service. The Master, next day, discovering that the affidavit was defective, refused to draw up the rule. The Court, considering the rule as a pending rule, allowed a motion to be made in the sittings after the term to make the rule absolute on an amended affidavit of service. *Dow v. Bell*, 18 Law J. Rep. (N.S.) Exch. 391; 4 Exch. Rep. 259.

Where a rule *nisi* for a new trial is obtained by one only of two defendants, although it must be served upon the other, he cannot be heard in support of the rule, but he may shew cause against its being absolute. *Wakley v. Healey*, 18 Law J. Rep. (N.S.) Exch. 426; 4 Exch. Rep. 53.

It is not a good objection to an order for charging stock under the 1 & 2 Vict. c. 110. s. 15. that it requires cause to be shewn on a day specified, although the statute directs that it shall require cause to be shewn "within a time to be mentioned in such order." *Robinson v. Burbidge*, 19 Law J. Rep. (N.S.) C.P. 242; 1 L. M. & P. 94.

As a general rule, no counsel is allowed to move twice in the same day, except in the case of motions for new trials. *Hollis v. Hoseason*, 19 Law J. Rep. (N.S.) Exch. 269.

Held, that a motion to increase the damages found by the jury upon a trial in the vacation, made after the first four days of the term, is too late. *Masters v. Farris*, 1 Com. B. Rep. 715.

Where a motion, beside the merits, fails through defect in the affidavits, the application cannot be renewed. *Ilderton v. Burt*, 6 Com. B. Rep. 433.

Where the service is upon the wife of the party at his dwelling-house, the affidavit must shew where the dwelling-house is situate.

A rule cannot be *enlarged* after the day on which it is returnable. *Abrahams v. Davison*, 6 Com. B. Rep. 622.

Service of a rule to compute, by delivering it to "the landlord at the residence of the defendant," is not sufficient. *Griffin v. Gilbert*, 7 Com. B. Rep. 701.

Service of rule to compute by delivery to the housekeeper at defendant's residence,—Held, not sufficient. *Lewis v. Blurton*, 7 Com. B. Rep. 102.

Where a rule for a new trial upon payment of

costs is granted, a rule to rescind that rule, upon the ground that the costs have not been paid, is, in the Common Pleas, a rule *nisi* only in the first instance. *Speare v. Ward*, 1 L. M. & P. 248.

(P) JUDGE AT CHAMBERS.

Where a Judge at chambers has dismissed a summons to strike out a count, the full Court will not interfere. *Slack v. Clifton*, 8 Q.B. Rep. 524.

A Judge at chambers has no power during term to make an order for leave to enter an appearance after the return of a *distingas*, under the 2 Will. 4. c. 39. s. 3; but the application should be made to the Court. *Ross v. Gandell*, 18 Law J. Rep. (N.S.) C.P. 224; 7 Com. B. Rep. 766.

[See ATTORNEY AND SOLICITOR, Bill of Costs—ANNUITY.]

(Q) SPECIAL CASE.

A verdict having been taken for the plaintiff, subject to a special case, the terms of which were to be settled by a barrister, and the barrister having settled the case, the defendant refused to procure the signature of a serjeant to it. The Court granted a rule, that unless the defendant, within a week, caused the case to be properly signed, the postea should be delivered to the plaintiff. *Doe d. Phillips v. Rollins*, 15 Law J. Rep. (N.S.) C.P. 186; 2 Com. B. Rep. 842.

The Court will not hear a special case in which the parties have agreed that the Court may draw such inferences from the facts as a jury might draw, and that the case may be turned into a special verdict. *Engstrom v. Brightman*, 17 Law J. Rep. (N.S.) C.P. 142; 5 Dowl. & L. P.C. 499; 5 Com. B. Rep. 419.

The Court refused to give judgment in a special case stated for the opinion of the Court, under the 3 & 4 Will. 4. c. 42. s. 25, it appearing that the action was not *bonâ fide* brought to try a question really in contest between the parties to the cause. *Doe d. Duntze v. Duntze*, 17 Law J. Rep. (N.S.) C.P. 220; 6 Com. B. Rep. 100.

The Court will not hear a special case which is not signed by counsel for both parties. *De la Branchardiere v. Elvery*, 18 Law J. Rep. (N.S.) Exch. 381; 4 Exch. Rep. 380.

(R) BILL OF EXCEPTIONS.

A bill of exceptions was tendered to a Judge's direction, and, under the 55 Geo. 3. c. 42. s. 7, was signed by him at the trial. The draft, thus prepared, was, some months afterwards, more formally drawn up, and was tendered to him for signature. He refused to sign it, unless a sentence, explaining his direction, was introduced into the bill, and the party excepting finally consented to its introduction. The bill of exceptions, with his explanation forming part of it, was presented to the Court:—Held, that the introduction of this explanation was highly irregular: but that, being on the record, the Court below, and this House, could only look to the record, and could neither receive an affidavit of the facts, nor examine the draft of the exceptions, originally prepared and signed. *The Earl of Glasgow v. the Hurlet and Campsie Alum Company*, 3 H.L. Cas. 25.

(S) JUDGMENTS.

After verdict a term's notice is not necessary before signing judgment, though four terms have elapsed between the verdict and judgment. *Newton v. Boodle*, 16 Law J. Rep. (n.s.) C.P. 135; 3 Com. B. Rep. 795.

The Court of Exchequer, in this term, delivered judgment in two cases relating to the liabilities of provisional committeemen. This Court granted a rule *nisi*, which involved the same point (which the Court of Exchequer had decided) before their judgment was delivered:—Held, that the judgment of one Court of Westminster Hall is binding upon the others, and is only to be reviewed by a court of error. *Barker v. Stead*, 16 Law J. Rep. (n.s.) C.P. 160; 3 Com. B. Rep. 946.

Where judgment was signed for the debt and 2*l.* the costs of signing judgment, no mention being made in the *incipitur* of the sum of 24*l.* the amount of costs agreed upon, except by a memorandum at the top, and judgment was issued for the debt, and 26*l.* costs:—Held, that the judgment and execution were not irregular. *Deacon v. Allison*, 6 Com. B. Rep. 434.

(T) EXECUTIONS.

Final judgment having been signed against A and B in June 1843, on the same day a *ca. sa.* issued against both, under which A was taken, but afterwards discharged under the Insolvent Act; but the writ still remained in the sheriff's office unexecuted against B, and without any return having been made to it. In January 1845, a *fi. fa.* was issued upon the same judgment, under which B's goods were taken in execution, but the judgment had not been revived by *sci. fa.*:—Held, that the *fi. fa.* was not irregular, as materials existed for making up the roll, the *ca. sa.* being still in force against B, and capable of being returned at any time.

A rule *nisi* to set aside a *fi. fa.*, and the affidavit on which it was obtained, were intitled *A v. B.* It appeared, that the writ of summons and a *ca. sa.*, which had issued long previously, were in a cause of A (sued as C) *v. B.*:—Held, that as the cause might have irregularly got a wrong name, in which the party had acquiesced, the rule ought not to be discharged on that ground. *Franklin v. Hodgkinson*, 15 Law J. Rep. (n.s.) Q.B. 132; 3 Dowl. & L. P.C. 554.

Under an execution against the goods of A, the sheriff cannot seize goods which A has deposited with another person as security for a debt. *Rogers v. Kennay*, 15 Law J. Rep. (n.s.) Q.B. 381.

In ejectment there was a verdict for the defendant, and an allocatur given for the costs under the consent rule, which ordered that if a verdict should be given for the defendant the lessors of the plaintiff should pay to the defendant costs to be adjudged. A *fi. fa.* issued pursuant to the 1 & 2 Vict. c. 110. s. 18, was held to be regular. *Doe d. Pennington v. Barrell*, 16 Law J. Rep. (n.s.) Q.B. 296; 4 Dowl. & L. P.C. 755; 10 Q.B. Rep. 531.

A writ of execution may issue on a rule of court (1 & 2 Vict. c. 110. s. 18.) After the expiration of a year and a day, without a *sci. fa.* or any application to the Court. *Spoooner v. Payne*, 17 Law J. Rep.

(n.s.) Q.B. 68; *nom. In re Spooner*, 11 Q.B. Rep. 136.

A writ of *ca. sa.* need not contain the clause relating to interest given in the form prescribed by the rule Hil. term, 3 Vict., unless the plaintiff chooses to claim interest.

Where the *ca. sa.* purported to satisfy 59*l.* 7*s.*, and the debt secured was 55*l.*, and the costs 3*l.* 10*s.*, the Court refused to attribute the difference to a claim for interest not mentioned in the writ, as it might refer to incidental expenses of the levy. *Stopford v. Fitzgerald*, 16 Law J. Rep. (n.s.) Q.B. 310; 4 Dowl. & L. P.C. 725.

The 7 & 8 Vict. c. 96. s. 57, taking away the writ of *ca. sa.* in actions wherein the sum recovered does not exceed 20*l.* exclusive of the costs recovered by such judgment, applies only to cases where something is recovered by the plaintiff for debt and something for costs, and where the sum recovered for debt does not exceed 20*l.* A *ca. sa.* may therefore issue for costs of nonsuit.

Under the 1 & 2 Vict. c. 110. s. 17, interest may be recovered on a judgment for costs of nonsuit.

An award of a *ca. sa.* into a different county, without any *testatum* clause, is error on the record. *Newton v. Lord Conyngham*, 17 Law J. Rep. (n.s.) C.P. 288; 5 Com. B. Rep. 749.

A writ of *fi. fa.* returnable "immediately after the execution thereof," is not executed until the whole amount indorsed is levied under it, and may, if in the hands of the sheriff, be put in force after the levy of a part. *Jordan v. Binckes*, 18 Law J. Rep. (n.s.) Q.B. 277; 7 Dowl. & L. P.C. 30.

It is no cause to shew against a motion to charge a defendant in execution, who has been brought up on a writ of *habeas corpus ad satisfaciendum*, that the warrant of attorney on which the judgment has been signed was given without consideration, and the judgment signed in breach of good faith. Such facts are the proper grounds of a substantive motion to set aside the warrant of attorney and judgment and subsequent proceedings, and to discharge the defendant out of custody. The Court will, therefore, not postpone the motion to charge the defendant in execution until the other rule comes on to be discussed. *Cooke v. Wright*, 5 Dowl. & L. P.C. 274.

[See ARBITRATION, Award.]

PRACTICE, IN EQUITY.

(A) BILLS.

- (a) *In general.*
- (b) *Of Discovery.*
- (c) *Of Interpleader.* [See INTERPLEADER SUIT.]
- (d) *Of Revivor.*
- (e) *Supplemental and of Review.*
- (f) *Amendment of.*
- (g) *Taking pro Confesso.*
- (h) *Taking off the File.*
- (i) *Retaining.* [See INJUNCTION.]
- (k) *Dismissal of.*

(B) PROCESS.

(C) CONTEMPT.

(D) APPEARANCE.

(E) ANSWER.

- (a) *In general.*
- (b) *Supplemental.*

(F) PLEA.

(G) DEMURRER.

(H) REPLICATION.

(I) PETITION.

(K) CLAIM.

(L) MOTIONS.

- (a) *In general.*
- (b) *Notice of Motion.*

(M) PRODUCTION OF DOCUMENTS.

- (a) *General Points.*
- (b) *When Production may be enforced.*
- (c) *Privileged Documents.*

(N) COMMISSION.

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(P) INTERROGATORIES.

(Q) EXAMINATION OF WITNESSES.

(R) DEPOSITIONS.

- (a) *Reading.*
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(S) PUBLICATION.

(T) INSPECTION OF SUBJECT OF SUIT.

(U) EVIDENCE BEFORE THE MASTER.

(V) CONDUCT OF SUIT.

(W) STATING PROCEEDINGS.

(X) ORDERS AND DECREES.

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- (a) *Generally and Proceedings.*
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(AA) EXCEPTIONS.

- (a) *In general.*
- (b) *Answers.*
- (c) *Reports and Certificates.*

(BB) SALES BY THE COURT.

(CC) PAYMENT INTO COURT.

(DD) PAYMENT OUT OF COURT.

(EE) SETTING DOWN AND HEARING CAUSE.

(FF) ISSUE AND CASE SENT TO LAW.

(GG) RECEIVER.

(HH) INFANTS' SUITS.

(II) NEXT FRIEND.

(KK) LUNATIC.

(LL) PAUPER.

(MM) PROCEEDINGS IN DIFFERENT COURTS.

(NN) PETITION OF RIGHT.

(OO) REHEARING.

(PP) APPEAL.

(QQ) JURISDICTION OF THE COURT.

(RR) CREDITOR'S CLAIM.

(SS) JURISDICTION AND DUTIES OF THE MASTERS.

(TT) PRELIMINARY INQUIRIES.

(UU) SERVICE OF PAPERS.

(VV) DELAY.

(WW) TRAVERSING NOTE.

(XX) WRITS OF FI. FA.

(YY) IRREGULARITY.

(ZZ) ATTACHMENT.

(AAA) ALLOWANCE OF INTEREST.

(A) BILLS.

(a) *In general.*

Where authority is given to take land for a public purpose, and pay the money into court to be dealt with on petition, the ordinary jurisdiction of the Court to proceed by bill is not excluded. *Hyde v. Edwards*, 12 Beav. 160.

A party having a legal title, may sustain a bill in equity to recover deeds, without having first established his title at law, where a deed to be recovered would be the proper evidence in a trial at law to enforce the legal right against the tenant in possession of the property in question, and that, notwithstanding the evidence furnished by the deed might have been obtained by means other than a suit in equity.

Decree as between the claimant of property and the trustee who claimed to hold the same property in trust for an infant defendant, reserving the right of the infant defendant.

Position, duty, and liability of a trustee for infants of an estate created by an invalid deed, or a deed of doubtful validity, and which is impeached by other parties. *Elsley v. Lutyens*, 8 Hare, 159.

(b) *Of Discovery.*

The 12th Order of May 1845 applies only to a cross-bill of discovery in aid of a defence to an original bill. *Heming v. Dingwall*, 2 Ph. 212.

The right of discovery is the same between the Crown and a subject as between subject and subject. The statute 21 Jac. 1. c. 14. has no application to suits in equity.

A plaintiff is entitled to discovery, not only of that which constitutes his own title, but also to discovery for the purpose of repelling an anticipated defence; and also to discovery of what the case is which the defendant relies upon, and how it is made out; that is, the grounds and foundation of the defendant's title, but not to discovery of the evidence by which it is intended to be supported. *Attorney General v. London (Corporation)*, 19 Law J. Rep. (N.S.) Chanc. 314; 2 Mac. & G. 247; 2 Hall & Tw. 1; affirming s.c. 18 Law J. Rep. (N.S.) Chanc. 314, 339; 12 Beav. 8, 171.

Where the respective titles alleged by the plaintiff and the defendant were antagonistic, the plaintiff claiming the reversion in lands alleged to be in the possession of the defendant as lessee, and the defendant claiming to be entitled in fee to such lands, but admitting that he derived his title under a person alleged by the plaintiff to have been lessee only, and that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, correspond with the parcels described in the demise to such alleged lessee, it was held that the plaintiff was entitled to a discovery of such parcels, and to a production of so much of the purchase deed as described them.

A plaintiff is not entitled to discovery of documents the right to the possession or inspection of which is not necessary to the proof, and is only consequential upon the existence of the title he claims, that title not being admitted,—but where the Court finds upon the answer that, although the title of the plaintiff is not admitted, the question as to the existence of such title is a question to be tried,—

the plaintiff is entitled to the discovery and production of particulars material to establish his case on such trial.

Consideration of the limits of the right to discovery, in cases of adverse title, of the deeds and evidences in the possession of the defendant. *Attorney General v. Thompson*, 8 Hare, 107.

(c) *Of Interpleader.*

[See INTERPLEADER SUIT.]

(d) *Of Revivor.*

[*Bampton v. Birchall*, 5 Law J. Dig. 543; 1 Ph. 568.]

A decree was made that certain documents should be delivered up, and that the plaintiff's bill should be dismissed, and the costs taxed and paid by the plaintiff. One of the defendants died after the documents had been delivered up, but before the costs had been taxed or paid. A bill of revivor was then filed:—Held, that a bill of revivor could not be filed for the purpose of costs alone, notwithstanding that the 1 & 2 Vict. c. 110. s. 18. gives the effect of judgments to decrees of courts of equity. *Andrews v. Lockwood*, 15 Law J. Rep. (N.S.) Chanc. 285; 15 Sim. 153.

After decree in a creditors' suit, the plaintiff died, leaving no personal representative: the decree was ordered to be prosecuted on the petition of another creditor without bill of revivor. *Brown v. Lake*, 2 Coll. C.C. 620.

A suit was instituted by A, the assignee of a bankrupt, against B and others, and, by a decree made in the cause, it was ordered that A should pay certain costs to the defendants, except B, and that B should pay them to A. A died, and, by an order made in the cause, it was ordered that C should be substituted as plaintiff in the place of A, and the suit prosecuted in the same manner as if C had been originally a plaintiff therein. A writ of *f. fa.*, drawn up in pursuance of the Orders of May 1839, issued on the application of C against B on behalf of these costs. On a motion to set aside the writ for irregularity,—Held, that there was no occasion for a bill of revivor, and that the writ was regular. *Man v. Ricketts*, 15 Law J. Rep. (N.S.) Chanc. 97.

The death of a defendant between the hearing of the cause and the judgment does not render a bill of revivor necessary prior to drawing up the decree. *Belsham v. Percival*, 8 Hare, 157.

A suit abated after decree by the marriage of one of several co-plaintiffs, unknown to their solicitor in the cause, and was not revived until proceedings had been subsequently had under the decree. Upon the application of the plaintiffs, the Court declared that they were entitled to the same benefit of the proceedings since the abatement as they would have been if the suit had been immediately revived; and ordered the suit and proceedings to be carried on accordingly. *Johnson v. Johnson*, 19 Law J. Rep. (N.S.) Chanc. 371.

The defendant to an original bill having died after appearance, but before answer, the plaintiff filed a bill of revivor and supplement against his personal representative, praying that the personal representative might answer both bills. The personal representative demurred to both bills:—Held,

that he should have demurred to the bill of revivor and supplement only. *Granville v. Betts*, 17 Sim. 58.

(e) *Supplemental and of Review.*

A bill was filed to have the benefit of a judgment against real estate, devised to the defendant by the will of the judgment debtor. The defendant by her answer, claimed the estate under deeds of conveyance from the testator in his lifetime; and before filing her answer, commenced an action of ejectment. The plaintiffs then filed a supplemental bill, impeaching the validity of the conveyance to the defendant, and stating the proceedings respecting the action. The common injunction obtained in the supplemental bill to restrain the action was dissolved, the question of the title of the judgment creditors not being raised in the supplemental suit, and the circumstances connected with the conveyance to the defendant being improperly brought before the Court by a supplemental bill, instead of being introduced into the original bill by way of amendment. *Parker v. Constable*, 15 Law J. Rep. (N.S.) Chanc. 16.

A suit instituted by eight plaintiffs was ordered to stand over, with leave to file a supplemental bill, on an objection for want of parties. One of the plaintiffs then died, and a supplemental bill was filed against her personal representatives, and the person who had been declared a necessary party:—Held, that the suit could not proceed without being revived or the original bill amended. *Parker v. Day*, 15 Law J. Rep. (N.S.) Chanc. 191.

Motion to dismiss for want of prosecution, made after the bankruptcy of the plaintiff, refused, with costs, the proper form of motion being that the assignees file a supplemental bill within a given time, and in default the bill stand dismissed. *Robinson v. Norton*, 10 Beav. 484.

Where the Court retains a bill for twelve months, with liberty for the plaintiff to proceed at law to recover a moiety of certain freehold estates, which he had been prevented from recovering at law under an *elegit*, in consequence of outstanding terms of years, and restrains the defendants from setting up such terms, or pleading the Statute of Limitations, it is irregular for the plaintiff, upon a partial failure of the proceedings at law, to file a supplemental bill to bring the facts which had transpired subsequent to the hearing before the Court, with a view to obtain a further and more extended relief.

The Court, by its decree at the hearing, retained the bill for a year, and gave the plaintiffs leave to bring an action for the recovery of a moiety of certain freehold estates, which they claimed by virtue of an *elegit*, and it restrained the defendants from setting up outstanding terms of years, and also from setting up the Statute of Limitations, though this was not specifically asked by the bill. Under this decree, the plaintiffs brought an action of ejectment against the receiver of the estates, who was a party to the suit, and against the tenants who were no parties to the suit. One of the plaintiffs died, and the survivor obtained a verdict against the receiver; but the tenants of the estate, who were no parties to the suit, set up the outstanding terms, and also pleaded the Statute of Limitations, and obtained a verdict. The surviving plaintiff then filed a supplemental bill, and bill of revivor, and stated the

whole of the proceedings at law, and asked for more extensive relief than he was considered entitled to at the hearing:—Held, that the supplemental bill was irregular; and a decree was made dismissing so much of it as consisted of supplemental matter, with costs. *Smith v. Effingham (Earl)*, 16 Law J. Rep. (N.S.) Chanc. 445; 10 Beav. 589.

A petition asking liberty to bring a new action, or for an issue, was refused, as the relief prayed was contrary to the practice; and it was held that the verdict against one defendant could not be considered as a verdict against all, and that there could be no stay of proceedings until the plaintiff had appealed. *Ibid.* 11 Beav. 82.

A and B being, with others, incumbrancers on an estate, A filed a bill against B to have an account of the incumbrances and their priorities ascertained. A decree was made directing a reference to ascertain the different incumbrances and their priorities, and the plaintiff was to bring them before the Court. The Master made his report finding the other charges and rejecting B's claim, who took exceptions. The plaintiff neglected to bring the other incumbrancers found by the Master before the Court, and the exceptions were ordered to stand over, with liberty to the plaintiff to file a supplemental bill against all necessary parties. The plaintiff accordingly filed a supplemental bill against B and the other incumbrancers, contesting the validity of the securities found by the Master, and seeking as against B relief different from that sought by the original bill:—Held, first, That the supplemental bill was irregular, and that so far as it sought to impeach the incumbrances found by the Master, or sought against B relief different from that prayed by the original bill, it should be dismissed, with costs. Secondly, That B had a right in the second suit to impeach A's securities, though he had not done so in the original suit. Thirdly, That the other incumbrancers had a right to contest the plaintiff's securities though at the hearing the plaintiff admitted their priority; and lastly, an action was directed to try the validity of the plaintiff's securities. *Hele v. Bexley (Lord)*, 11 Beav. 537.

Where a case of wilful default by an executor is charged by a bill, and stated in the answer of a defendant, a co-defendant, notwithstanding the decree for the common accounts in the original suit, will be entitled to file a supplemental bill, and to have inquiries directed whether there has been any wilful default.

A suit was instituted by residuary legatees against the sole executor of a testator, and against an annuitant, for the administration of the testator's estate, the whole of which was made subject to the annuity. The bill charged the executor with want of diligence, and with wilful default, and that loss had been sustained in consequence of such wilful default, and it asked for the consequential relief. By his answer the executor stated facts which shewed that there were grounds for the charges in the bill, but no evidence was brought forward by the plaintiffs to support the charges, and a decree for the common accounts alone was made. The prosecution of the decree having been committed to the annuitant, who was a defendant in the original suit, it was ascertained that there had been a loss, and that

there was a case for inquiry; and the executor having died, the annuitant filed a supplemental bill against his executors, charging the executor with wilful default, and that at the time of the decree there was a case for inquiry, and praying the consequent relief:—Held, that the annuitant had no means of obtaining relief against the executor at the hearing, and that the supplemental bill was properly filed. *Berrow v. Morris*, 16 Law J. Rep. (N.S.) Chanc. 506; 10 Beav. 437.

A suit was instituted on behalf of infants against the tenant for life and three trustees in respect of a breach of trust. The bill being taken *pro confesso* a decree was made against the trustees for the payment of a sum of money in respect of the breach of trust. One of the trustees, who was abroad and in contempt for non-performance of the decree, filed a second bill against the plaintiffs and the other defendants in the first suit, recognizing the decree in that suit, but (but besides other things which were clearly not inconsistent with the decree) seeking, on the ground of fraud and collusion between the tenant for life and his co-trustees, to make the interest of the tenant for life available for the purpose of reimbursing him (the plaintiff) the liability with which he had been fixed, as he alleged, through the active agency of the tenant for life:—Held, that such a bill could not be regarded as a bill of review or as a supplemental bill in the nature of a bill of review; and a motion to take it off the file for irregularity, as having been filed without the leave of the Court, was refused, with costs.

One test of its being such a bill is, to inquire whether, if the decree had not been referred to in the bill, it could have been pleaded in bar to the relief prayed.

Held, also, that this decision was not affected by there being matters in the prayer of the bill as to which the plaintiff would not be entitled to relief.

The circumstance of the plaintiff being out of the jurisdiction and in contempt did not prevent his filing the bill in question.

The bill having been filed before the Master of the Rolls was ordered to be transferred to the Vice Chancellor by whom the decree in the original suit had been made. *Taylor v. Taylor*, 1 Mac. & G. 397; 1 Hall & Tw. 437.

When application is made for leave to file a supplemental bill of review on the ground of discovery of new evidence, the question is not merely whether the evidence is material, but whether it is of such weight as, when taken in connexion with the mass of evidence adduced on both sides at the former hearing, would have been likely, if then brought forward, to have turned the scale. *Hungate v. Gascoigne*, 15 Law J. Rep. (N.S.) Chanc. 382; 2 Ph. 25.

Upon petition for leave to file a bill of review, it being held that the new matter brought forward was such as, if unanswered, would entitle the plaintiff to a decree, or would raise a question of so much nicety and delicacy as to be the fit subject of the judgment on the case, the petition was granted. *Hungate v. Gascoigne*, 15 Law J. Rep. (N.S.) Chanc. 142.

After a decree in a suit against the heir of A, the plaintiff petitioned for leave to file a bill of review, alleging error apparent on the face of the decree, and also that the plaintiff had discovered

since the decree that the defendant was executor of A, and that it was essential to bring the defendant before the Court in that character. Petition dismissed, because a bill of review for error apparent may be filed without leave of the Court; and because the defendant had admitted in his answer that A's will was in his possession. *Trulock v. Robey*, 15 Sim. 265.

Property was held by A, B and C, in trust for D, for life, with remainder to her children. The children filed a bill against the trustees for a breach of trust, and by the decree the trustees were ordered to replace the fund. C afterwards being in contempt for non-performance of the decree, filed a bill against the other trustees and the tenant for life, alleging that they had received and retained the produce of the breaches of trust, and seeking to make them and the life estate liable to indemnify C:—Held, that this was not in the nature of a bill of review, and might be filed without leave of the Court; and secondly, that C's contempt did not prevent his filing the second bill. *Taylor v. Taylor*, 12 Beav. 220.

A bill of review for error apparent on the decree applies only to errors of form and not to errors of judgment on the merits. *Trulock v. Roby*, 2 Ph. 395.

In support of a bill of review for error in a decree the pleadings in the cause cannot be referred to. *Trulock v. Robey*, 15 Sim. 277.

(f) Amendment of.

The plaintiff is not to obtain an order of course for leave to amend his bill, after a defendant (being entitled to move) has served a notice of motion to dismiss the bill for want of prosecution. Order of April 13, 1847; 16 Law J. Rep. (n.s.) Chanc. 296; 2 Ph. cxxxix.; 9 Beav. xiii.

Amendments after answer. *Rigby v. Rigby*, 9 Beav. 311.

All the defendants who had appeared to the bill had answered; and the time within which the plaintiff was entitled to an order of course to amend had expired, if such time was to be computed from the last of those answers. Other defendants, who were within the jurisdiction, had not appeared, nor been served with a subpoena. The plaintiff then obtained an order of course to amend:—Held, that this order ought not to be discharged for irregularity; but the Court discharged it upon the merits of the case, the plaintiff having taken no steps to get an answer from the other defendants. The words "last answer" in the 66th and 68th Orders of May 1845, mean the last answer required to be put in before a replication can be filed. *Arnold v. Arnold*, 16 Law J. Rep. (n.s.) Chanc. 236; 1 Ph. 805; 9 Beav. 206.

Since the Orders of May 1845, all special applications for leave to amend a bill should be made, in the first instance, to the Master in rotation, and not to the Court except by way of appeal.

As a general rule, an appeal from the decision of the Master upon such an application will not be heard by the Lord Chancellor, although the act 3 & 4 Will. 4. c. 94. gives the right of appealing to the Lord Chancellor, Master of the Rolls, or Vice Chancellor, and the decision of either of those

Judges is to be final. *Coombes v. Ramsay*, 16 Law J. Rep. (n.s.) Chanc. 214; 2 Ph. 168.

All special applications for leave to amend must, for the future, be made, in the first instance, to the Master in rotation, and not to the Court, except by way of appeal.

The affidavits in support of a special application for leave to amend, after the expiration of the four weeks mentioned in the 68th Order of May 1845, must strictly comply with the requisition of that Order; and the affidavit of the solicitor himself will not be dispensed with. But where the defendants are abroad, or are a corporate body, and an affidavit cannot be obtained from them, the affidavit of their solicitor will be sufficient.

A motion made after the New Orders of 1845 came into operation, is to be governed by those Orders, although the notice of motion was given, or the facts to which it related occurred while the former Orders were in force; but, in deciding upon such a motion, the Court will take into consideration whether the proceedings of the party would have been satisfactory according to the former practice. *Christ's Hospital v. Grainger*, 15 Law J. Rep. (n.s.) Chanc. 145; 1 Ph. 634. See also *Winnaill v. Featherstonhaugh*, 15 Law J. Rep. (n.s.) Chanc. 149.

An objection for want of parties having been allowed at the hearing, plaintiff obtained an order to amend by adding parties. He did not amend, but brought on the cause again for hearing, without having discharged the order, or stating on the record why he had not acted on it. The Court refused to proceed with the hearing. *Davis v. Chanter*, 15 Sim. 93.

Under all orders to amend a bill, the plaintiff must amend within fourteen days when no time is limited. *Armitstead v. Durham*, 11 Beav. 428.

An order of course to amend by adding parties obtained after replication, is irregular. *Hitchcock v. Jacques*, 9 Beav. 192.

After one of several defendants has put in a sufficient answer, the plaintiff cannot obtain more than one order of course to amend, though the other defendants may not have answered. *Duncombe v. Lewis*, 10 Beav. 273.

By the effect of the 37th General Order of August 1841, the answer put in by a defendant to an original bill, although it extends to matters retained in the amended bill, does not preclude the defendant from demurring generally to such amended bill, by overruling the demurrer, as it would have been held to do before that Order was made. *Wythe v. Ellice*, 6 Hare, 505.

Defendant put in an insufficient answer, and plaintiff obtained an order of course to amend, and that the defendant might answer the amendments and exceptions together. No amendment was made within fourteen days:—Held, that a second order to amend could not be obtained *ex parte*. *Dolly v. Challin*, 11 Beav. 61.

The 66th Order of May 1845 is applicable to bills of discovery.

A plaintiff took exceptions which he gave notice of abandoning:—Held, that he had thereby shortened the time allowed for amending as of course.

A plaintiff after the time allowed obtained an order of course to amend. The order was dis-

charged, with costs, and the amended bill was ordered to be taken off the file: *Peile v. Stoddart*, 11 Beav. 591.

Where a plaintiff has obtained an order of course to amend after one or more answers have been filed, he can obtain no further order of course to amend, although he has called for and obtained an answer to the amended bill from the defendants who had answered the original bill, and although other defendants may not have answered the original bill.

If the right of the plaintiff to an order of course to amend be barred as against one defendant, it is barred against all. *Winthrop v. Murray*, 7 Hare, 150.

In the description of the plaintiff, he was called John Watts, his true name being William John Watts, as evidenced by the body of the bill and answers. Leave was given to amend the bill by altering the name J. Watts into W. J. Watts, on giving notice to the defendants of the intention to alter the name pursuant to the order of the Court. *Watts v. Symes*, 16 Law J. Rep. (n.s.) Chanc. 332.

After an order of the Vice Chancellor to amend the bill on payment of costs, made on a special application for leave to amend without prejudice to the common injunction, which was not acted upon, the plaintiff obtained an order to amend, as of course, on petition at the Rolls:—Held, that the last order was irregular, but that the Master of the Rolls could not order it to be taken off the file. *Edge v. Duke*, 16 Law J. Rep. (n.s.) Chanc. 168; 10 Beav. 184.

Upon motion for further time to amend, on account of the plaintiff having been obliged to dismiss his solicitor for negligence and misconduct, and the new solicitor not having had time to investigate the proceedings in the suit, it was held, that the plaintiff was not entitled to relief, although he might have his remedy by action against the solicitor. *Clarke v. the Mayor, &c. of Derby*, 16 Law J. Rep. (n.s.) Chanc. 69.

Two orders had been made by the Court, on notice to the defendant, for leave to amend the plaintiff's bill after the expiration of the time within which orders might be obtained to amend as of course; but the affidavits filed in support of the motions were not in conformity with the requisitions of the 69th of the General Orders of the Court of the 8th of May 1845:—Held, on motion to discharge both the orders, that notwithstanding the 21st of the Orders of the 8th of May 1845, the orders made were irregular. *Potts v. Whitmore*, 16 Law J. Rep. (n.s.) Chanc. 162; 10 Beav. 177.

After three of four defendants to a bill had answered, the plaintiff obtained an order of course to amend, which he acted upon; before any answer had been put in to the amendment, the plaintiff obtained another order, as of course, to amend as he should be advised; and the bill was again amended by striking out of the bill the name of a person who had been made a party by the previous amendment, but who was at the date of the amendment dead, and substituting his legal personal representative in his place:—Held, that the second order was irregular. *Horsley v. Faucett*, 16 Law J. Rep. (n.s.) Chanc. 184; 10 Beav. 191.

On motion by one of several defendants to dismiss a bill for want of prosecution, the plaintiff

shewed for cause an order to amend the bill obtained since the date of the notice to dismiss, one of the other defendants not having put in his answer to the bill; and on payment of the defendant's costs, no order was made. The same defendant afterwards moved to discharge the order to amend for irregularity. The plaintiff had been guilty of great delay in proceeding with the cause, and the defendant who had not answered was the husband of the plaintiff, and represented by the same solicitor. Motion refused, but without costs.

In a case where one of the defendants to a bill had not put in his answer, the plaintiff, after great delay, and after notice of motion had been given to dismiss the bill for want of prosecution, obtained an order as of course to amend the bill:—Held, that under the 66th of the General Orders of May 1845, the order was not irregular.

Held, however, that though such an order could not be considered to be irregularly obtained, the same might be discharged on the merits, on account of the misconduct of the plaintiff with reference to the proceedings in the cause, but the motion in such case must be before that branch of the Court to which the cause is attached. *Foreman v. Gray*, 16 Law J. Rep. (n.s.) Chanc. 233; 9 Beav. 196, 200.

Upon appeal, the Lord Chancellor allowed a demurrer as to parties, but at the same time gave the plaintiff leave to amend his bill without limiting the time. After the time allowed by the General Orders of the Court for making amendments had expired, the plaintiff obtained, as of course, the common order, under which he filed an amended bill:—Held, upon an application to discharge the order for irregularity, that, where no time is limited by a special order for making amendments, it is limited by the General Orders of the Court; that the cause was not out of court by not acting upon the special order, and that special application might have been made to the Court for further time; and that the order of course was irregular, and must be discharged, with costs. *Bainbridge v. Baddeley*, 18 Law J. Rep. (n.s.) Chanc. 385; 12 Beav. 152.

The rights of parties litigating in equity must be decided *secundum allegata et probata*; and where a plaintiff prays by his bill for the specific performance of an agreement, but the Court considers he is not entitled to that relief, it is irregular to give him liberty at the hearing to amend the prayer of his bill by asking to be placed as nearly as possible in the same position as if that agreement had never been entered into.

A reference to the Master should be confined to such matters as are alleged and proved in the bill, and not extended to circumstances in which those essentials are wanting, but upon which the plaintiff might be able to found an equity. *Bellamy v. Sabine*, 17 Law J. Rep. (n.s.) Chanc. 105; 2 Ph. 425.

After an order of the Vice Chancellor, referring it to the Master to ascertain which of two bills it would be most for the benefit of an infant to prosecute, the plaintiff in one suit obtained the common order, and amended his bill:—Held, that the order was irregular, and it was discharged, but without costs.

Held, also, that the Master of the Rolls, upon an

application to discharge the order for irregularity, had not jurisdiction to order the amendments to be taken off the file, even with consent. *Fletcher v. Moore*, 18 Law J. Rep. (n.s.) Chanc. 384; 11 Beav. 617.

Special orders to amend must be obtained upon the affidavit of the plaintiff and the solicitor.

On obtaining a special order to amend, it is not necessary that the affidavit mentioned in the 68th General Order of May 1845 should state all the amendments to be made in the bill. *Payne v. Little*, 19 Law J. Rep. (n.s.) Chanc. 459.

The rule, that a plaintiff in an original suit by amending his bill after a cross bill is filed loses his priority of suit, and cannot call upon the defendant to answer the amended bill, before he answers the cross bill, will not prevail, where exceptions being taken to the answer to the original bill for insufficiency and allowed, the plaintiff, under an order to amend and for the defendant to answer the amendments and exceptions together, amended his bill after a cross bill filed, but having served notice of the order to amend, before he was served with the subpoena to answer the cross bill. *Gray v. Haig*, *Haig v. Gray*, 19 Law J. Rep. (n.s.) Chanc. 446; 13 Beav. 65.

Two suits having been instituted by two different next friends on behalf of an infant, an order of reference was made in both suits as to which was most for the benefit of the infant. Subsequently to the date of the order, but before it was executed, a demurrer was put in to one suit and submitted to, and the bill substantially amended:—Held, that the amendment of the bill in one suit did not preclude the Master from proceeding with the order of reference.

Under such an order of reference the Master is to report as to the "suit," and therefore is bound to refer both to the original bill and the amended bill (if any) as evidence of the object and scope of the suit.

It is not a ground of appeal that the Court below has reserved the question of costs, which might have been properly disposed of at the hearing. *Goodale v. Gawthorne*, 19 Law J. Rep. (n.s.) Chanc. 447; 1 Mac. & G. 319; 2 Hall & Tw. 193.

When a bill is amended by special leave not fixing any time for the amendment, it ought to be amended within fourteen days. *Cridland v. De Mauley*, 2 De Gex & S. 560.

(g) Taking pro Confesso.

Where a bill had been ordered to be taken pro confesso against one of two defendants, and the cause was afterwards set down to be heard as against the other defendant, and a decree was then made against both defendants,—Held, that it was not necessary for the clerk of records to attend in court with the record upon the second occasion.

The issuing of an attachment is not a proceeding in the cause within the meaning of the 4th Order of November 1841, *semble*. *Needham v. Needham*, 15 Law J. Rep. (n.s.) Chanc. 132; 1 Ph. 640.

Where a husband and wife were defendants to a bill, but had neglected to put in any answer, and the husband had been taken under an attachment for want of answer, the bill was ordered to be taken pro confesso, not only against the husband, but

against the wife also. *Alexander v. Osborn*, 16 Law J. Rep. (n.s.) Chanc. 368.

The order referred to in the 81st of the General Orders of Court of the 8th of May 1845, is only the preliminary Order, that the record and writs clerk attend with the record of the bill at the hearing of the cause.

By the same Order, the practice is rendered uniform in all cases, whether there are several defendants or only one defendant to a bill.

A like practice must be pursued under the 76th of the same General Orders of Court, in the cases of defendants absconding, or being served with notice. *Brown v. Home*, 16 Law J. Rep. (n.s.) Chanc. 177.

Under the 88th of the same Orders liberty was given to the plaintiff to issue such process of contempt as he might be advised to compel performance of the decree. *Ibid.* 10 Beav. 400.

To take a bill pro confesso under the 77th Order of May 1845, it must be shewn by the evidence of the officer that he has used due diligence to execute the writ of contempt. *Yearsley v. Budgett*, 11 Beav. 144.

A bill was amended under the 65th Order of May 1845, after an order to take the bill pro confesso:—Held, that such amendment destroyed the effect of the order. *Weightman v. Powell*, 18 Law J. Rep. (n.s.) Chanc. 71; 2 De Gex & S. 570.

Under the 76th Order of May 1845 the Court has jurisdiction to order the costs of a motion by the plaintiff to take the bill pro confesso to be paid by the defendant, although the latter puts in his answer before the motion is made. *Spooner v. Payne*, 2 De Gex & S. 439.

A bill was in the presence of and adversely to the *cestuis que trust* taken pro confesso against a trustee living abroad. The Court under the 86th Order of May 1845 dispensed with service of the decree on him. *Benbow v. Davies*, 12 Beav. 421.

Where the preliminary order for taking a bill pro confesso has been made, the defendant cannot be heard at the hearing unless he waives all objections. *Greaves v. Greaves*, 12 Beav. 422.

(h) Taking off the File.

Motion made that a bill should be taken off the file, on the ground that the person whose name was affixed to the bill as the plaintiff's solicitor was not a solicitor of the court. Order made thereon, where there was a suggestion that the name of a solicitor of the court would be substituted. *Richardson v. Moore*, 15 Law J. Rep. (n.s.) Chanc. 424.

In a bill purporting to be exhibited by an infant plaintiff by her next friend, she was described by her maiden name, but was, in fact, clandestinely married. The Court refused a motion made on behalf of her husband (a defendant) to have the bill taken off the file. *Wortham v. Pemberton*, 1 De Gex & S. 644.

A bill reflecting on a party ordered by consent to be taken off the file. *Clifton v. Bental*, 9 Beav. 105.

The plaintiff having filed a bill for a partition, after answer amended his bill by adding a prayer in the alternative for a partition or a declaration that the plaintiff was entitled to the moiety claimed by the defendant; after answer, the plaintiff reamended omitting the prayer for a partition. The

Court refused a motion to take the re-amended bill off the file.

Semble—that such a motion may be acceded to if a plaintiff obtain discovery by a bill making an offer which he withdraws by amendment. *Potter v. Waller*, 2 De Gex & S. 418.

E G, the testator, being entitled to the equity of redemption in certain premises, by his will gave all his real and personal property to his "widow, A, the daughter of S M." In a bill by A for redemption of the premises, she described herself as A G, widow and devisee of E G, the testator. It appeared that the plaintiff had taken out probate to the will of E G, and also administered to another party, under the description of "A M, otherwise G, spinster." On motion, by the defendant, to take the bill off the file, or that the plaintiff should give security for costs on the ground of misdescription, the Court refused to make any order, on the ground that the description of the plaintiff involved a question of title to the subject-matter of the suit. *Griffith v. Ricketts*, 15 Law J. Rep. (N.S.) Chanc. 230; 5 Hare, 195.

(i) *Retaining.*

[See INJUNCTION.]

(k) *Dismissal of.*

A plaintiff filed a replication, but served no subpoena to rejoin. The Orders of May 1845 then came into operation. The plaintiff not proceeding in the cause,—Held, that the proper course was for the defendant to move that the plaintiff do file a replication in the form of the 93rd Order, within a limited time, or, in default, that the bill do stand dismissed. *Spencer v. Allen*, 15 Law J. Rep. (N.S.) Chanc. 31; 4 Hare, 455.

Notice of motion was given by one of two defendants to dismiss the bill for want of prosecution. The plaintiff thereupon filed a replication to the answer of that defendant. The other defendant had not appeared. On the motion being made, the plaintiff undertook to dismiss the bill against the other defendant, whereupon the Court refused the motion, but ordered the costs to be paid by the plaintiff. *Heanley v. Abraham*, 5 Hare, 214.

Pending a reference of title ordered in a suit for specific performance, the defendant cannot, under the 14th Order of May 1845, dismiss the bill for want of prosecution. *Collins v. Greaves*, 5 Hare, 596.

A filed an original bill and afterwards another, which he prayed might be taken as supplemental to the former, against B. Some of the statements in the latter were contradictory of the former bill. Both bills were dismissed, with costs. *Blackburne v. Staniland*, 15 Sim. 64. See *Jenkins v. Cross*, 15 Sim. 76.

Order on the application of the plaintiff to dismiss his bill with costs against disclaiming defendants, without prejudice to any question how the costs should ultimately be borne. *Baily v. Lambert*, 5 Hare, 178.

On a motion by one of several defendants to dismiss for want of prosecution, it is not enough for the plaintiff to shew that the answers of the other defendants have not been filed; he must also shew that due diligence has been used in getting them in. *Mornington (Earl of) v. Smith*, 9 Beav. 251.

A filed a bill against B & C. B was the principal defendant, and the only question in the cause was between A and B, but no complete decree could be made without the account being taken as between A and C, and as A had examined C as a witness in the cause, the Court held that no decree could be made, and dismissed the bill without prejudice to filing a new one. *Champion v. Champion*, 15 Sim. 101.

The plaintiff filed his replication in July 1844; the defendant gave notice of motion in the present term to dismiss for want of prosecution, and the plaintiff filed a subpoena to rejoin:—Held, that the defendant not having moved to dismiss, as he might have done, in Trinity term, the particular proceeding was not complete under the old Orders; a new replication must, therefore, be filed, and the cause proceeded with under the New Orders. *Lovell v. Blew*, 15 Law J. Rep. (N.S.) Chanc. 31.

Upon motion by some of the defendants to dismiss the bill under the first article of the 114th Order of May 1845, the fact that other defendants have not yet put in their answer is not *per se* a ground for refusing the motion; the plaintiff must shew sufficient excuse for the delay in not getting in the other answers.

Where, upon a motion to dismiss, the plaintiff is ordered to file his replication within a given time, the vacation will be reckoned in the computation of such time. The 4th article of the 14th Order of May 1845 does not apply to such a case.

The Court will not, as of course, nor except in case of necessity, give a plaintiff leave under the reservation in the 93rd Order of May 1845, to file a second replication in the same cause. *Stinton v. Taylor*, 15 Law J. Rep. (N.S.) Chanc. 321; 4 Hare, 608.

If the defendant cause delay in the progress of the suit, the Court will not grant his application to dismiss the bill for want of prosecution, but will make such qualified order as will meet the justice of the case. *Dalton v. Hayter*, 15 Law J. Rep. (N.S.) Chanc. 33.

The words "the last of the answers," contained in article 1. of the 114th Order of the 8th of May 1845, have reference to the last of the answers of the same defendant to the original or amended bill, and not to the last of the answers of the several defendants to the bill. *Ibid.*; and *Sprye v. Reynell*, 16 Law J. Rep. (N.S.) Chanc. 286; 10 Beav. 351.

Where a demurrer has been overruled, with costs, and the defendant has appealed, the plaintiff is not entitled to the common order of course to dismiss his bill, upon payment of costs. *Lewis v. Cooper*, 16 Law J. Rep. (N.S.) Chanc. 265; 10 Beav. 32; 2 Ph. 178.

Under the Orders of May 1845, one of several defendants may move to dismiss a bill for want of prosecution, if the plaintiff has taken no step for four weeks after his answer is sufficient, although his co-defendants have not answered; but an order to amend obtained and served after notice of the motion is ordinarily an answer to the motion, but the plaintiff will have to pay the costs of the motion. *Lester v. Archdale*, 9 Beav. 156.

Upon a bill for discovery and relief, a plea to all the relief, but not in form to all the discovery, is not a plea "to the whole bill" within the meaning of the

48th and 49th Orders of May 1845, and where, after the expiration of three weeks, a defendant having so pleaded to all the relief but not to all the discovery, obtained as of course an order to dismiss the bill:—Held, that such order was irregular.

An order to amend after a plea to all the relief, and an answer to the discovery asked by a bill, is not to be obtained as of course under the 66th Order of May 1845, and an order so obtained was discharged with costs. *Neck v. Gains*, 1 De Gex & S. 223.

Where the same solicitor appeared for two defendants, one of whom had and the other had not filed his answer so long a time previously as to entitle him to move to dismiss the bill for want of prosecution, the Court refused such a motion by the former defendant, with costs. *Winthrop v. Murray*, 7 Hare, 150.

A cause was put at issue according to the old practice, more than two months before the Orders of May 1845 came into operation, but no further proceeding was taken:—Held, that the defendant could not move to dismiss the bill for want of prosecution, under the 114th Order, section 4, but must set down the cause for hearing according to the old practice. *Griffith v. Griffith*, 16 Sim. 35.

Proceedings in a second suit were stayed until the costs of a former suit for the same purpose had been paid; after great delay, order made that if the costs were not paid in a limited time the bill should stand dismissed. *Latour v. Holcombe*, 11 Beav. 624. See also s. c. 10 Beav. 256.

Bill filed by the underwriter of a policy of insurance on a ship to have it delivered up, on the ground of deviation and unseaworthiness; but only deviation was proved. Bill dismissed. *Thornton v. Knight*, 16 Sim. 509.

A testator bequeathed to his widow a legacy and a life annuity. She survived him twenty-eight years, and after her death, her executrix filed a bill for their recovery. No explanation was given of the circumstances, and no proof of any intermediate payment. The bill was dismissed, on the ground of laches. *Pattison v. Hawkesworth*, 10 Beav. 375.

The plaintiff obtained an order to amend, but did not serve it until after the defendant had moved to dismiss for want of prosecution:—Held, that the defendant was entitled to dismiss notwithstanding the order to amend. *Jones v. Charlemont*, 17 Law J. Rep. (n.s.) Chanc. 449.

A, a defendant, having answered the bill, gave a notice of motion to dismiss the bill for want of prosecution for the first day of Michaelmas term. On the 5th of November, before the motion came on, the plaintiff obtained an order from the Master for liberty to amend the bill on payment of 6s. 8d., which he served on A, with a tender of the 6s. 8d., which was refused. The plaintiff amended his bill, and required an answer to the amendments from A. The plaintiff did not serve A with a subpoena to answer the amended bill, or file a replication, or set down the cause on the bill and answer:—Held, that A was entitled to move to dismiss the bill for want of prosecution. *Raistrick v. Elsworth*, 17 Law J. Rep. (n.s.) Chanc. 248; 2 De Gex & S. 95.

Upon motion to dismiss a bill for want of prosecution by a defendant, who had put in his answer, it was objected by the plaintiff that three out of the

sixteen defendants had not yet answered the bill:—Held, that the plaintiff not having used due diligence in getting in the answers, the bill must be dismissed, unless the plaintiff would undertake to proceed immediately. *Baldwin v. Damer*, 16 Law J. Rep. (n.s.) Chanc. 448.

After several orders had been made from time to time in a suit, giving the plaintiffs liberty to amend, an order was made, on the application of some of the defendants to dismiss the bill, that the plaintiffs should file a supplemental bill within ten days, bringing the assignees of a bankrupt plaintiff before the Court, or the plaintiffs' bill stand dismissed, with costs. The plaintiffs filed a supplemental bill within the prescribed period, but took no further proceedings therein. On notice of motion, by some of the defendants, to dismiss the original and supplemental bills, which had been served on the other defendants as well as the plaintiffs,—Held, that the defendants moving were entitled only to an order to dismiss the original bill, with costs against the plaintiffs, and that they were not entitled to ask for any order against the other defendants, and must therefore pay their costs of the motion; and the Court would not give the defendants the costs of the motion.

The defendants ought to have applied to the Court for an order discharging the order directing the plaintiffs' bill to stand dismissed in default of the plaintiffs filing a supplemental bill within ten days. *Ward v. Ward*, 17 Law J. Rep. (n.s.) Chanc. 397; 11 Beav. 159.

After decree for an account, the bill cannot be dismissed even with consent. The proper order is to stay all proceedings. *Egg v. Devey*, 11 Beav. 221.

The application of the rule of the court to dismiss a bill in which the title to relief is founded upon allegations of fraud, if fraud be not proved, depends not upon the use or omission in the bill of the word "fraud," but upon the fact, whether the charges upon which the relief is sought are in their nature such as this Court regards as constituting fraud. *McCalmont v. Rankin*, 8 Hare, 15.

A reference as to title was made before hearing. A motion to dismiss for want of prosecution pending the reference was refused. *Gregory v. Spencer*, 11 Beav. 143.

The defendants to a bill, by their answer, alleged that they had assigned whatever interest they had in the subject-matter of the suit to a third party, and disclaimed. The plaintiff then amended his bill by making the assignee a party, who by his answer admitted the assignment, and claimed the interest transmitted to him by the assignment. A replication was filed to both answers, but no evidence was entered into on either side to prove the assignment:—Held, that the bill must be dismissed, with costs, against the disclaiming defendants. *Glover v. Rogers*, 17 Law J. Rep. (n.s.) Chanc. 2.

A plaintiff who had obtained a special injunction against a defendant, afterwards obtained an order to amend without prejudice to the injunction, and amended his bill after seven days, but before the expiration of fourteen days. Motion by defendant to dismiss the bill for want of prosecution dismissed, without costs. *Kennedy v. Lewis*, 18 Law J. Rep. (n.s.) Chanc. 455.

On motion to dismiss by one of several defendants,

the plaintiff alleged that he had been unable to proceed on account of the other defendants having demurred, and the order upon such demurrer not having been drawn up:—Held, that the bill must be dismissed as against this defendant. *Jones v. Morgan*, 17 Law J. Rep. (n.s.) Chanc. 365.

A defendant offering the plaintiff all the relief specifically sought by his bill moved to dismiss without costs, or that the plaintiff might apply respecting them. The plaintiff then insisted on a further demand, which might be had under the prayer for general relief or by amendment. The Court refused the motion, with costs, but intimated that the proceeding must be considered at the hearing. *Hennet v. Luard*, 12 Beav. 479.

A defendant having answered the bill and having subsequently become bankrupt, and not having obtained his certificate, moved for an order to dismiss the bill in circumstances which but for the bankruptcy would have entitled him to the order with costs. The plaintiff on the motion undertook not to proceed against the defendant in respect of the subject-matter of the suit, and the Court dismissed the bill, without costs. *Findlay v. Lawrence*, 2 De Gex & S. 303.

Where a cause has stood over at the hearing, with liberty to the plaintiff to amend, and the plaintiff has failed to amend, the proper course is to move upon notice that the plaintiff amend within a time stated or the bill be dismissed. During the pendency of an order to amend, the common order to dismiss for want of prosecution would be irregular. *Emerson v. Emerson*, 18 Law J. Rep. (n.s.) Chanc. 50; 6 Hare, 442.

After bill filed and appearance entered, the defendant became bankrupt, and the plaintiff shortly afterwards obtained the common injunction for want of an answer. No proceedings were taken in the suit for two years, when the defendant having been declared entitled to his certificate, but not having taken it up, put in his answer, and then moved to dismiss for want of prosecution:—Held, that notwithstanding his bankruptcy and the other circumstances, the defendant was entitled to an order dismissing the bill, with costs. *Blackmore v. Smith*, 18 Law J. Rep. (n.s.) Chanc. 271; 1 Mac. & G. 80; 1 Hall & Tw. 155.

Bill filed by a plaintiff on behalf of himself and all other the shareholders in a company, praying that the defendants, the directors of the company, might be ordered to repay the shareholders all sums which might appear to have been improperly paid by them out of the funds of the company. The defendants moved to dismiss upon payment to the plaintiff of the sum claimed by him, together with his costs:—Held, that the plaintiff having complete dominion over the suit, and being the only person with whom the defendants could deal, they were entitled to dismiss upon the proposed terms. *Scarth v. Chadwick*, 19 Law J. Rep. (n.s.) Chanc. 327.

A legatee, who was entitled to a share of the proceeds of an estate directed to be sold, provided the sum realized did not exceed a certain amount, mortgaged his share twice, and before the fund became divisible filed his bill against the trustees and other parties interested, and his mortgagees, for the performance of the trusts and for an account of what was due upon the mortgage, charging the trustees

with breach of trust, and charging that nothing was due upon the mortgage; and asking that the trustees might pay the costs of suit. When the period of division arrived the trustees paid the other legatees their shares. On motion by all the defendants, except the mortgagees, the bill was dismissed against all the defendants except the mortgagees, upon the trustees paying the plaintiff's legacy into court, and paying to the plaintiff and the mortgagees their costs of suit up to and inclusive of the motion. *Sawyer v. Mills*, 19 Law J. Rep. (n.s.) Chanc. 242; 1 Mac. & G. 390; 1 Hall & Tw. 569.

An agreement was come to between the plaintiff and the defendant, by which it was agreed that the bill should be dismissed, and that the defendant should pay all costs, which were to be taxed, if necessary; and the plaintiff agreed to move to dismiss, and, in default of her doing so the defendant was authorized to instruct counsel for that purpose on her behalf. A sum of money was paid in respect of the plaintiff's costs, the solicitors undertaking to return a part, if, upon taxation they should be found to have been overpaid; and an order was made on a motion by the plaintiff for the dismissal of the bill, but from the fault of the plaintiff the defendant could not get it passed and entered. Upon motion by the defendant three years afterwards, an order was made as against the plaintiff and her solicitors to leave with the Registrar the original order and the counsel's brief on the motion. *Robison v. Manuelle*, 2 Hall & Tw. 402.

(B) PROCESS.

The 31st Order of May 1845 refers to absconding to avoid service generally, and not in the particular suit only. *Cope v. Russell*, 2 Ph. 404.

Course of proceeding where a defendant, served with a copy of the bill under the 23rd Order of August 1841, dies before appearance. *Edington v. Banham*, 2 Coll. C.C. 619.

The Court will not order service of a copy of a bill on the wife, who has been deserted by the husband, to be good service on the husband; but the plaintiff must proceed, according to the old practice, against the husband.

The Court will not order substituted service of a subpoena on the wife of a party to appear and answer the bill, where he has deserted his wife, and has not since been heard of, although the husband and wife were made parties to the suit, in respect of a small annuity, claimed by the wife for her separate use, under a testator's will, and she had answered the bill separately and apart from her husband, under an order of the Court. *Thomas v. Selby*, 15 Law J. Rep. (n.s.) Chanc. 280; 9 Beav. 194.

Motion under the 33rd Order of May 1845, to serve subpoena and copy of bill upon a defendant and his wife and six infant children, out of the jurisdiction—order made. Service on the defendant would be good service on his wife, but not upon the infant children, who must all be served separately. *Jones v. Geddes*, 15 Law J. Rep. (n.s.) Chanc. 65.

A defendant, who is of unsound mind, but not found so by inquisition, may, together with his wife, a co-defendant, both of whom are residing out of the jurisdiction, be served, by order of the Court, with

subpœna to appear and answer the bill. *Biddulph v. Camoys*, 15 Law J. Rep. (n.s.) Chanc. 141.

Under the 33rd Order of May 1845, the Court is empowered, in its discretion, to order service of a subpœna to appear and answer upon a defendant out of the jurisdiction in any suit whatever, though such defendant has neither property nor domicile in this country. *Whitmore v. Ryan*, 15 Law J. Rep. (n.s.) Chanc. 232; 4 Hare, 612.

A party having gone abroad to avoid service, substituted service at the last place of residence and on her solicitor ordered. *Burlton v. Carpenter*, 11 Beav. 33.

A bill was filed in January and a copy of it served in October 1845:—Held, that the 16th Order of May 1845, article 2, requiring a copy of the bill to be served within twelve weeks after filing the bill, did not apply to a case where the proceeding was complete under the old Orders. *Feltham v. Clarke*, 15 Law J. Rep. (n.s.) Chanc. 32.

The circumstances that certain solicitors had acted as solicitors of a defendant to a foreclosure suit in several other matters, including a suit relating to the estate which was the subject of the foreclosure suit, and that such defendant could not be found so as to be personally served with a subpœna to answer the bill of foreclosure,—Held, insufficient grounds for ordering substituted service on the solicitors to be good service on him. *Hurst v. Hurst*, 1 De Gex & S. 694.

Where a defendant was out of the jurisdiction, the Court declined to make an order for substituted service of the subpœna to appear and answer, upon a gentleman who had acted for him as attorney in an action wherein judgment was obtained, upon which this suit was founded, and who had since been in communication with him upon the same matters, but who was not shewn to have any authority to act for him in the matter of the present suit, or with reference to the interests affected by it. *Cope v. Russell*, 16 Law J. Rep. (n.s.) Chanc. 369.

A suit was instituted against three trustees, who all appeared by the same solicitor. After decree, the sole plaintiff died, and a bill of revivor was filed. One of the defendants could not be found, being supposed to have gone to America; but there was no evidence of his having absconded to avoid service, and the place of his residence could not be ascertained. The Court ordered substituted service of the subpœna to appear in the revived suit upon his solicitor in the original suit. *Norton v. Hepworth*, 18 Law J. Rep. (n.s.) Chanc. 172; 1 Mac. & G. 54; 1 Hall & Tw. 158.

A copy bill was served without leave after the expiration of twelve weeks. The Court, on the joint application of the plaintiff and the defendant, gave leave to enter a memorandum of the service. *Tugwell v. Hooper*, 10 Beav. 19.

On the 2nd of November 1846 the plaintiff served the defendant with a copy of a subpœna, omitting, however, the indorsement required by the 4th Order of December 1833. On the 10th of December the plaintiff obtained an order for leave to enter an appearance for the defendant, and served him with a copy of it on the 30th of December. Motion, by the defendant on the 8th of February 1847, for the discharge of the service and order granted, with

costs. *Johnson v. Barnes*, 16 Law J. Rep. (n.s.) Chanc. 173; 1 De Gex & S. 129.

Substituted service of subpœna for defendants, out of the jurisdiction of the Court, to appear to and answer a bill of revivor and supplement, ordered to be made on their solicitors in the original suit. *Hart v. Tulk*, 18 Law J. Rep. (n.s.) Chanc. 336; 6 Hare, 618.

All the trustees named in a will being dead, one of the *cestuis que trust* filed a bill against the others, the heir of the trustee who died last, and other persons who had been in possession of the estates, praying an account of the rents received, for the appointment of new trustees, and for conveyance of the estates:—Held, that the *cestuis que trust*, who were defendants, had been rightly served with a copy of the bill under the 23rd General Order of August 1841. *Johnson v. Tucker*, 15 Sim. 485.

In a suit by one of the next-of-kin of an intestate, for the administration of his estate, the other next-of-kin may be served with a copy of the bill under the 23rd Order of August 1841. *Knight v. Cawthron*, 17 Law J. Rep. (n.s.) Chanc. 103; 1 De Gex & S. 714.

Where the time for serving a defendant with a copy of the bill is enlarged it is not necessary to serve him with the order enlarging the time. *Fenton v. Clayton*, 15 Sim. 82.

Where a defendant becomes bankrupt after answer, and his assignees are before the Court, it is not necessary to serve the bankrupt with a subpœna to hear judgment. *Stahlschmidt v. Lett*, 16 Law J. Rep. (n.s.) Chanc. 368; 5 Hare, 595.

Notwithstanding the bill alleged that the estate of B was fully administered, and that the parties beneficially interested in the estate were parties to the suit, yet the executor of B, being a party against whom direct relief was in substance prayed, was not a party to be served with a copy of the bill under the 23rd Order of August 1841. *Powell v. Cockerell*, 4 Hare, 557.

(C) CONTEMPT.

[*Terrell v. Souch*, 4 Hare, 535.]

In an order of committal for contempt, it is not necessary, although it is more correct that there should be a distinct adjudication that a contempt has been committed.

In an order of committal for contempt, it is not usual to direct the costs of the application to be paid, but the Court has jurisdiction to do so if it is thought desirable. But the party in contempt is not liable to the payment of charges and expenses which are not included in the term "costs."

An order of committal for contempt must be under the seal of the Court; and if it is only signed by the Judge it will be invalid. *Ex parte Van Sandau re Martin*, 15 Law J. Rep. (n.s.) Bankr. 13; 1 De Gex, 303.

Proceedings for contempt stayed on account of defendant's inability, through illness, to put in an answer. *Hicks v. Lord Alvanley*, 9 Beav. 163.

Where a defendant had been remanded, and an order made for a *habeas corpus* to bring him up to the bar of the court to have the bill taken *pro confesso*, and, upon his being brought up, he had been discharged, but that order was discharged upon

appeal:—Held, that the defendant might be brought up upon a second writ under the original order, and that a fresh order was not necessary for the issuing of the writ.

If the last of the thirty days, mentioned in rule 5. section 15. of the act 1 Will. 4. c. 36. (during which time a plaintiff is required to bring a defendant, in contempt for not answering, to the bar of the court) happens out of term, the plaintiff may bring the defendant to the bar of the court on any day during vacation, though prior to the expiration of the first four days of the ensuing term. *Needham v. Needham*, 15 Law J. Rep. (N.S.) Chanc. 132; 1 Ph. 640.

A party in contempt may be brought up on a *habeas corpus*, and remanded, not only upon a seal day, but upon any other day, whether in term or in vacation. *Ibid.*

Where the plaintiff and the defendant in the original suit both become bankrupt before answer, and a supplemental bill is filed by the assignees of the plaintiff (who are also assignees of the defendant), stating the fact of the bankruptcy, it is irregular on the part of the assignees to proceed by attachment in the name of the bankrupt plaintiff, to enforce from the bankrupt defendant an answer to the original bill.

The notice of motion to discharge the attachment should be headed in both causes. *Robertson v. Southgate*, 16 Law J. Rep. (N.S.) Chanc. 30; 5 Hare, 223.

An attachment issued in vacation under the 11 Geo. 4. & 1 Will. 4. c. 36. s. 15, may be made returnable more than fifteen days after it is tested, and it is not irregular for it to have a larger return than the last return of the term following that in which it issued.

A party prosecuting process of contempt is not bound to bring the prisoner to the bar of the court, in order that he may be turned over to the Queen's Prison. *Wroe v. Clayton*, 16 Sim. 183.

A female defendant was committed for contempt in not putting in an answer. She had been generally known as an unmarried woman, but moved to be discharged on the ground that she was married, and that the proceedings against her were irregular:—Held, that she was entitled to be discharged upon motion, she having produced a certificate of her marriage, and an affidavit from a person who described himself as her husband, but whose residence was not known; and that she ought not to be required to put in a plea of coverture. *Attorney General v. Adams*, 17 Law J. Rep. (N.S.) Chanc. 392.

An attachment cannot be obtained on motion *ex parte* against a married woman ordered to answer apart from her husband. *Graham v. Fitch*, 2 De Gex & S. 246.

In a bill against husband and wife, the husband, after sequestration executed for want of the answer of himself and wife, answered separately without leave of the Court; and then, upon motion with notice, and supported by affidavits that his wife lived apart from him and he had no controul over her, obtained an order to discharge the attachment and sequestration upon payment of the costs of his contempt, and that his wife should answer separately.

On appeal by the plaintiff, the Lord Chancellor refused to discharge that order, on the ground that,

as the plaintiff did not think fit to apply to take the irregular answer off the file, the defendant would be without any means of clearing his contempt, but the order was varied so as to enable the plaintiff to take up the process of contempt at the point where it left off, in case the answer should be found insufficient. *Steele v. Plomer*, 18 Law J. Rep. (N.S.) Chanc. 209; 1 Hall & Tw. 149.

(D) APPEARANCE.

[*Wilton v. Rumbolt*, 5 Law J. Dig. 608; 14 Sim. 56.]

An appearance may be entered for infant defendants, after service, under the 2 Will. 4. c. 33. and 4 & 5 Will. 4. c. 82. *Anderson v. Stather*, 15 Law J. Rep. (N.S.) Chanc. 260.

Where a defendant is proved to be out of the jurisdiction of the Court, it will, under the 33rd Order of the 8th of May 1845, limit a time within which the defendant is to appear after service of the subpoena, and also a time within which he is to plead or answer; but the time allowed for demurring will be twelve days only, the same as was allowed previously to the Orders of the 8th of May 1845 coming into operation. *Brown v. Stanton*, 15 Law J. Rep. (N.S.) Chanc. 65.

The plaintiff filed his bill in 1842; the defendant appeared and answered in the same year; the plaintiff amended his bill in 1844, and served a subpoena on the defendant's solicitor to answer. The defendant at this time resided abroad; the plaintiff applied for leave to enter an appearance for the defendant:—Held, that this case was not within the 29th Order of May 1845. *Marquis of Hertford v. Suisse*, 15 Law J. Rep. (N.S.) Chanc. 30.

Application by the plaintiff for leave to enter an appearance for the defendant under the 29th Order, the subpoena to appear and answer having been served in May 1845:—Held, that the plaintiff must serve a new subpoena or give notice of motion. *Walker v. Hurst*, 15 Law J. Rep. (N.S.) Chanc. 72.

Four plaintiffs instituted an original and two supplemental causes, and three of the same plaintiffs, on a subsequent abatement, filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last suit, and not the solicitor on the record in the first three, is entitled to appear for the plaintiffs.

The Order of the 18th of October 1842 substitutes the solicitor for the Six Clerks, and does not give the solicitor a right to insist as against his client upon acting in the cause until removed by order of court. *Ward v. Swift*, 6 Hare, 309.

The application by a party, by his counsel, for time to answer affidavits filed in support of a motion, whereupon time is given, is not an appearance entitling the other party to obtain the order, on a subsequent motion, without an affidavit of service, no counsel then appearing for the opposite party. *Hutton v. Hepworth*, 6 Hare, 319.

The bill was filed after the Orders of May 1845 came into operation. The defendant answered the bill, and went abroad. The plaintiff then amended his bill, and, under the 26th Order of May 1845, served the defendant's solicitor with a subpoena.

Motion by the plaintiff, under the 29th Order of May 1845, for leave to enter an appearance for the defendant, refused. *Sewell v. Godden*, 16 Law J. Rep. (N.S.) Chanc. 181; 1 De Gex & S. 126.

In a suit against husband and wife, the husband, residing in Scotland, was served on behalf of himself and his wife with a subpoena and office copy of the bill under the 33rd Order of May 1845, his wife then living apart from him. The husband entered an appearance for himself alone:—Held, that the plaintiff was entitled under that Order to enter an appearance for the wife. *Steele v. Plomer*, 18 Law J. Rep. (N.S.) Chanc. 211; 1 Mac. & G. 83; 1 Hall & Tw. 153.

(E) ANSWER.

[See ARBITRATION, Arbitrator.]

(a) In general.

The first application for time to answer is not of course, but must (unless the facts be admitted by the plaintiff) be supported by affidavit shewing sufficient cause and due diligence. *Brown v. Lee*, 11 Beav. 162.

Bill filed 9th of February: time to answer expired on the 30th of March, when a month's time was given. A second application for time was refused by the Master on the 3rd of May, but, on appeal, three weeks were given by the Court on the 22nd of May.

On application for time to answer, it must be considered, that the answer is necessary, not only for giving a discovery to the plaintiff, but to enable the defendant to state the nature of his defence to the suit. *The York and North Midland Rail. Co. v. Hudson*, 13 Beav. 69.

In a special case, the time for answering was enlarged on five successive occasions.

Upon an application for time to answer, the Court relies on the statement of counsel as to the necessity of further indulgence. *Byng v. Clarke*, 13 Beav. 92.

Under an order for time to answer simply, the defendant has a right to put in a plea.

A defendant abroad, after two orders to answer simply, obtained a third order for time to answer, upon a representation that the answer was prepared and intended to be filed forthwith. The third order, as delivered out, was in terms "to plead, answer, or demur, not demurring alone," and the defendant thereupon filed a plea of outlawry, the judgment of outlawry having passed after the order was made. The plea was ordered to be taken off the file for irregularity, upon the ground that the filing of a plea, though within the terms of the order, was, under the circumstances, an abuse of the order (17 Law J. Rep. (N.S.) Chanc. 96; 6 Hare, 12); but, upon appeal to the Lord Chancellor, the order was discharged, it being held that while the order for further time to answer was subsisting, no irregularity had been committed in filing such a plea. *Hunter v. Nockolds*, 17 Law J. Rep. (N.S.) Chanc. 253; 2 Ph. 540.

Defendants to a suit in the same interest ought to join in answering; but there is no rule of the Court which compels them to do so. *Greeedy v. Lavender*, 18 Law J. Rep. (N.S.) Chanc. 62; 11 Beav. 417.

A demurrer put in to a bill was overruled at the hearing, and the Court gave the defendant a month's time to answer:—Held, that the Master, in such a case, had not jurisdiction to give further time for answering. *Haig v. Gray*, 19 Law J. Rep. (N.S.) Chanc. 344.

Husband having obtained leave to answer separately from his wife, an order was afterwards made, on the application of the plaintiff, that the wife should answer separately from her husband. *Bray v. Akers*, 15 Sim. 610.

Practice as to enforcing answers from husband and wife, where the latter is living separate from her husband and out of the jurisdiction. *Nichols v. Ward*, 2 Mac. & G. 140.

Part of the assets of a testator were in the course of administration in India by an official administrator appointed there. Before they were completely administered, a legatee's suit was commenced in England against the executrix who had proved the will here, and who after obtaining from the Master successive orders extending the time for putting in her answer, obtained one more order giving her six weeks' further time. This order was made on an affidavit of her solicitor setting out a letter from the Indian administrator promising to remit the balance by the next mail, and stating that the receipt of the balance and of the accounts was necessary to enable the defendant to put in a complete answer:—Held, that although the Court might not have granted the indulgence, the order ought not to be discharged.

Principles on which the Court proceeds in reviewing the Master's decision on such points. *Nott v. Nott*, 1 De Gex & S. 373.

Where it appeared by an answer that C, who was not a party to the suit, had an interest in the subject-matter of it, but the objection on account of C's absence was not taken by any of the answers,—Held, that the case was within the 40th General Order of August 1841, and the Court made a decree saving the rights of C. *Feltham v. Clark*, 1 De Gex & S. 307.

Writs of attachment for want of answer, though regular, discharged, and time given to answer, where the defendants had reasonable grounds for thinking an answer would not be required without previous intimation. *Siderfeld v. Thatcher*, 11 Beav. 201.

The Order 43rd of May 1845 which directs that commissions to take answers are to be made returnable without delay does not preclude the answer from being filed, although delay may have occurred. *Hughes v. Williams*, 5 Hare, 211.

Under the 38th Order of August 1841, a defendant cannot refuse to answer an interrogatory on the ground that the bill is open to a general demurrer. *Mason v. Wakeman*, 17 Law J. Rep. (N.S.) Chanc. 208; 2 Ph. 516; reversing s.c. 15 Law J. Rep. (N.S.) Chanc. 423; 15 Sim. 374.

Mode of correcting the title of an answer which purports to be the answer of several defendants where the answer has been sworn by some of such defendants, but the others refuse to join in it. *Thatcher v. Lambert*, 5 Hare, 228.

The Court will not make a *prospective* order, dispensing with the oath of the messenger, in the case of an answer coming from abroad, although when an answer has already reached this country, and the Court has been satisfied that it has been pro-

perly taken, it has dispensed with the necessity of having the oath of the messenger. *Pinnock v. Rigby*, 15 Law J. Rep. (N.S.) Chanc. 64.

At the hearing of an objection taken by way of answer for want of parties, the defendant is not at liberty to contend that there is any defect of parties besides that stated in the answer. The plaintiff after he has set down the cause to be heard on this objection cannot refer the answer for impertinence.

Where the objection is allowed at the hearing, the costs will be reserved. *Lovell v. Andrew*, 15 Sim. 581.

A transferred stock from her own name into the joint names of herself and B (a stranger); and A, after receiving the dividends for some years, died intestate, leaving B surviving. To a bill by the administratrix of A, claiming the stock as part of A's estate, B put in her answer, stating that A, after the transfer, informed the defendant, that the transfer was made in confidence that the defendant, if she survived A, would fulfil every wish and direction which she might express respecting it. The answer then stated that the wishes which A from time to time expressed were that the defendant should pay certain sums to specified individuals, the dividends of part to the plaintiff for life, and should hold the residue for herself absolutely; and that the defendant had paid over the said sums in pursuance of those directions:—Held, that the plaintiff having read from the answer the admission of the trust, was bound to go on to read what the trusts were, the trusts, though declared from time to time, forming one transaction. That credit was to be given to the statements, so far as the trusts were for the benefit of strangers; but so far as they were beneficial to the defendant, the Court directed an issue with liberty to examine the defendant. The application of the plaintiff to withdraw that part of the answer which she had read refused, under the circumstances. *Freeman v. Tatham*, 15 Law J. Rep. (N.S.) Chanc. 323; 5 Hare, 329.

The answers of defendants resident out of the jurisdiction, to the plaintiff's original bill, had been prepared and sworn, and were awaiting a messenger to bring them to England; during which time the plaintiffs amended their bill, and gave notice to the defendants that they required from them no answer to the amendments; three days after the amendments had been made, the plaintiffs gave notice of motion, that, if the defendants did not answer the plaintiffs' bill within eight days from the date of the order to be made on the motion, the plaintiffs might, in default, be at liberty to file a traversing note against them:—Held, that the motion was irregular, and the same was refused, with costs. *Pinnock v. Rigby*, 15 Law J. Rep. (N.S.) 192.

Where a defendant was incapacitated from putting in his answer through illness, but was in possession of his mental faculties, an order for a guardian for the purpose of putting in his answer was discharged; the proper course in such a case being to extend the time for answering as occasion may require. *Willyams v. Hodge*, 19 Law J. Rep. (N.S.) Chanc. 196; 1 Mac. & G. 516; 1 Hall & Tw. 575.

The Court will in many cases compel a defendant to answer direct questions, the answer to which the Court may be less ready to allow a plaintiff to seek

by examining the papers of his opponent. *Attorney General v. Thompson*, 8 Hare, 116.

The defendant, having filed three answers, which were reported insufficient, filed a fourth answer before the certificate of the insufficiency of the third answer was obtained. A motion by the plaintiff, under the 10th Order of 1828, to have the fourth answer taken off the file, was granted. *The Corporation of Liverpool v. Chippendale*, 19 Law J. Rep. (N.S.) Chanc. 328.

(b) Supplemental.

[*Fulton v. Gilmour*, 5 Law J. Dig. 610; 1 Ph. 522.]

Leave given to file a supplemental answer where information had been obtained by a breach of professional confidence. *Raincock v. Young*, 16 Sim. 122.

(F) PLEA.

[*Emmott v. Mitchell*, 5 Law J. Dig. 549; 14 Sim. 432.]

A plea to a bill of revivor by the representatives of a deceased defendant that the party whom they represent was never served with a subpoena to appear and answer, and did not appear to nor answer the original bill, overruled as insufficient in substance—not excluding the fact that the deceased party might by other means have been bound by the proceedings in the original cause. *Rawlins v. Moss*, 6 Hare, 604.

A plea was overruled and ordered to stand for an answer. Exceptions were then taken and submitted to, after which a warrant was taken out for time to answer, which was consented to. The order, as drawn up, gave leave to plead, answer, or demur, &c. The defendant filed a second plea. An application to take it off the file was refused until the order of the Master had been discharged.

The order was afterwards discharged on proof which satisfied the Court that it was not in accordance with the consent. *Chambers v. Howell*, 12 Beav. 563.

Bequest to the children of A as a class. B claiming to be a child of A, filed a bill for the administration of the testator's estate. A plea stating the illegitimacy of the plaintiff required to be put in upon oath. *Wild v. Gladstone*, 19 Law J. Rep. (N.S.) Chanc. 286.

A defendant by plea stated that the plaintiff J H H C was commonly called Viscount Alford, and not Viscount Alfred, as stated in the bill, and submitted to the Court whether he should make any further answer:—Held, that the defendant might have guarded himself from the error, and was not to be excused from answering; and that the plaintiff was not to be compelled to correct the error at the expense of giving the defendant further time to answer the bill: and the plea was overruled, with costs. *Cust v. Southee*, 19 Law J. Rep. (N.S.) Chanc. 526.

Where a plea of outlawry has been filed to a bill, and the outlawry has been reversed after the filing of the bill, but before the plea put in, the practice is for the plaintiff to move upon notice that the defendant, on a new subpoena served upon him and payment to him of 20s. costs, put in his answer within a limited time. The costs of such motion

must be borne by the plaintiff. *Hunter v. Nockolds*, 17 Law J. Rep. (N.S.) Chanc. 380; 6 Hare, 459.

(G) DEMURRER.

[See PLEADING, IN EQUITY—Bill.]

[*Knight v. Marjoribanks*, 5 Law J. Dig. 611; 14 Sim. 198.]

The defendant demurred to the bill for want of parties, and the plaintiff submitted to the demurrer, and added these parties by amendment. The defendant again demurred to the bill for want of equity, and for want of parties. On the argument of the second demurrer,—Held, that the Court was at liberty, with reference to costs, to look at the first demurrer.

The defendant demurred to the bill for want of parties, and the plaintiff submitted to the demurrer. The defendant again demurred for want of parties, and the Court, after argument, reserved the question to the hearing of the cause. The demurrer would have been overruled without costs had there not been a former demurrer; but in consequence of the former demurrer, it was overruled with costs to a certain amount. *Brydges v. Bacon*, 15 Law J. Rep. (N.S.) Chanc. 128.

Where a plaintiff had unsuccessfully applied to have a demurrer taken off the file for irregularity, and had not set down the demurrer for argument within the time allowed by the 46th Order of May 1845, the Court (discharging an order of the Court below) refused to restore the bill. *Mathews v. Chichester*, 16 Law J. Rep. (N.S.) Chanc. 160; 5 Hare, 207.

Some of the defendants were served with a copy of the bill under the 25th Order of August 1841, but did not enter any appearance. After the hearing, the bill was amended merely by adding parties, and the *quasi* defendants were served with a copy of the amended bill, to which they then entered an appearance in the usual form, and filed a general demurrer:—Held, that they were not entitled, in that state of the cause, to file such a demurrer; and it was ordered to be taken off the file. *Powell v. Cockerell*, 15 Law J. Rep. (N.S.) Chanc. 196; 4 Hare, 565.

A defendant, who had not demurred to the bill within twelve days from his appearance afterwards put in an answer and a demurrer to the whole bill, and set down the demurrer for argument. The demurrer was overruled for irregularity. *Skey v. Garlick*, 16 Law J. Rep. (N.S.) Chanc. 480; 1 De Gex & S. 396.

The Court, on the argument of a demurrer, takes into consideration the nature of the case, for the purpose of considering as well whether there ought to be any direction given as to costs, as whether there ought to be any leave given to amend the bill, and the same is entirely in the discretion of the Court upon the facts appearing before it. *Schneider v. Lizardi*, 15 Law J. Rep. (N.S.) Chanc. 435; 9 Beav. 461.

The Court will not determine on demurrer a point which cannot conveniently be decided by that form of proceeding. *Leigh (Lord) v. Ashburton, (Lord)*, 11 Beav. 470.

A bill was filed for the specific performance of an agreement, by which the plaintiff was to receive

a per-centage upon a certain number of bottles of mineral water, imported by the defendant from the duchy of Nassau, in consideration of personal services rendered by him to the defendant, for procuring the right of exportation. An agreement was also made that a deed should be executed to carry out the terms of the agreement. The defendant appeared to the bill, and applied for an extension of time to answer. Defendant then died, and upon a bill of revivor and supplement being filed against his personal representative, a general demurrer was put in:—Held, that the Court might direct the execution of a deed for carrying out an agreement of this nature, but, at all events, the demurrer could not be sustained, since the original defendant had applied for further time to answer, and his representative was bound by that act, and was precluded from demurring. *Granville v. Betts*, 18 Law J. Rep. (N.S.) Chanc. 32.

The 37th General Order of August 1841, although it removes the technical objection, that an answer to matters covered by a demurrer overrules the demurrer, yet does not enable a defendant who has answered the original bill to demur to an amended bill upon any cause of demurrer to which the original bill was open. *Attorney General v. Cooper*, 3 Hare, 166.

(H) REPLICATION.

[See (A) Bills, (k) Dismissal of.]

The replication, the form of which is contained in the 93rd Order of May 1845, is the replication intended by the 111th of those Orders; and, therefore, where a subpoena to rejoin under the old practice had been served previously to the operation of those Orders, it was determined that publication did not pass under the 111th of those Orders, and that an order of the Court was necessary for that purpose.

Unless a good objection be shewn, the Court will, in a case like the present, direct publication to pass.

Where a replication *only*, according to the old practice, has been filed, a replication in the new form may be filed for the purpose of putting the cause at issue. *Wheatley v. Wheatley*, 15 Law J. Rep. (N.S.) Chanc. 123.

The plaintiff having filed a replication, neglected to give notice thereof to the defendant, until thirty-five days afterwards. The replication was ordered to be taken off the file, and the plaintiff to pay the costs of the application for that purpose. *Johnson v. Tucker*, 16 Law J. Rep. (N.S.) Chanc. 442; 15 Sim. 599.

Where notice of filing replication is not given on the same day on which the replication is filed, as required by the 23rd Order of October 1842, the Court will not declare the replication void; but will correct the consequence of the irregularity, by adding to the time allowed to the defendant for taking the next step in the cause the time lost to him by the delay in the service of the notice. *Wright v. Angle*, 17 Law J. Rep. (N.S.) Chanc. 29; 6 Hare, 107.

(I) PETITION.

Facts occurring after a petition has been answered

cannot be introduced into it by amendment. *Doubt-free v. Elworthy*, 15 Sim. 77.

If a petition for an *ex parte* order suppresses any fact, whether material or not, which if known to the officer would have caused him to apply to the Court before drawing up the order, the order will be discharged for irregularity, *Cooper v. Lewis*, 2 Ph. 178.

A suit for specific performance of a contract was at the hearing ordered to stand over. The contract being afterwards performed, the plaintiff was allowed on petition to bring before the Court the facts occurring subsequent to the answer. *Pricev. the Mayor, &c. of Penzance*, 4 Hare, 506.

It is not necessary to name the next friend of the petitioner on the petition of a married woman, under the 2 & 3 Vict. c. 54, for access to infants in the custody of the father. *In re Groom*, 7 Hare, 38.

The petition of a person not a party to the cause must state his residence. *Glazbrook v. Gillatt*, 9 Beav. 492.

A petition was presented by several solicitors, complaining of certain irregularities in the proceedings in one of the Masters' offices; an objection that the petitioners had no *locus standi* was overruled, although some only were engaged in any suit in which any reference had been made to that particular Master. *In re Whiting*, 15 Law J. Rep. (N.S.) Chanc. 242; 1 Ph. 650.

Prolixity in setting out at length, in a petition or other pleading, clauses of a public statute. *In re Manchester and Leeds Rail. Co., ex parte Osbaldiston*, 8 Hare, 31.

Where two petitions are presented in the same matter, the one first presented is entitled to be first opened. *In re Mallorie*, 1 Hall & Tw. 435.

(K) CLAIM.

General Orders of the 22nd of April 1850, as to the cases in which claims may be filed, and giving forms, 19 Law J. Rep. (N.S.) Chanc. ii.; 1 Mac. & G. xiv.; 2 Hall & Tw. ix.

Practice as to setting down claims for hearing. *M'Culloch v. Haggart*, 12 Beav. 546.

Leave given to amend a claim. *Early v. Whiting*, 12 Beav. 549.

Practice where claim filed after bill exhibited for the same purpose, and decree afterwards made in the suit before the claim heard. *Dicker v. Hugo*, 12 Beav. 550.

Trustees and devisees of real and personal estate claimed to have the will of their testator established against co-heiresses-at-law, and the trusts carried into execution, and the personal estate administered. The Court gave permission to file the claim. *Rickford v. Young*, 19 Law J. Rep. (N.S.) Chanc. 311; 12 Beav. 537.

Upon motion for leave to file a claim to take certain partnership accounts alleged to have been irregularly kept, and for an injunction,—Held, that the Orders were not intended to apply to a special case of this nature.

Held also, that such claims did not require the signature of counsel. *Carmichael v. Ogilby*, 19 Law J. Rep. (N.S.) Chanc. 424.

Course adopted in claims for the appointment of new trustees, see 19 Law J. Rep. (N.S.) Chanc. 572.

Special claims in what cases allowed. *Ibid.*

Claim by a married woman by her next friend. *Rolling v. Hargreaves*, 19 Law J. Rep. (N.S.) Chanc. 570.

The Court will not make any order in the absence of the defendant, unless on the production of proper evidence in support of the claim. *Anonymous*, 19 Law J. Rep. (N.S.) Chanc. 570.

A defendant to a claim residing out of the jurisdiction may be served with a writ of summons by leave of the Court. *M'Coy v. Cross*, 19 Law J. Rep. (N.S.) Chanc. 570.

The 22nd Order as to reviving suits is not applicable to suits instituted before the 22nd of May 1850. *Carter v. Smith*, 19 Law J. Rep. (N.S.) Chanc. 571.

A common claim by first mortgagee against second mortgagee and mortgagor allowed. *Pownall v. Durkin*, 19 Law J. Rep. (N.S.) Chanc. 571.

A common claim allowed by mortgagee against mortgagor, and judgment creditor of mortgagor. *Hanson v. Games*, 19 Law J. Rep. (N.S.) Chanc. 571.

Where there was a bequest of stock to an executor on trust, a claim by the *cestuis que trust* against the executors may be filed without leave. *Smith v. Smith*, 19 Law J. Rep. (N.S.) Chanc. 571.

(L) MOTIONS.

(a) *In general.*

Where the creditors and official assignee of a bankrupt filed a bill as co-plaintiffs, and the latter died before the decree, and the former died after it,—Held, that the name of the new official assignee might be substituted as plaintiff, by motion, without the bill being amended, or a supplemental bill being filed; and that he could carry on the suit without a creditors' assignee. *Man v. Rickets*, 15 Law J. Rep. (N.S.) Chanc. 79; 1 Ph. 617.

A trustee charged with breach of trust admitted by his answer the misapplication of three sums, and set forth an account crediting himself with these sums, and a fourth which was equally inadmissible. On a motion for payment of these three sums into court, the plaintiff was not allowed to enter into the question of the defendant's right to the fourth sum. *Nokes v. Seppings*, 2 Ph. 19.

Special leave given to the plaintiffs to move for liberty to amend their bill by striking out the name of one of such plaintiffs and making him a defendant:—Held, to authorize a motion by such of the parties as were to remain, excluding the plaintiff whose name was to be struck out: and the Court made the order, without prejudice to a motion then pending for a receiver in the original cause. *Hart v. Tulk*, 6 Hare, 612.

A motion stood over on the defendant's application; when it again came on the defendant had *without order* changed his solicitor, and no counsel then appeared for him. The motion was granted on an affidavit of service. *Davidson v. Leslie*, 9 Beav. 104.

It is only in very special cases, and not at the option of the parties, that affidavits are admitted on a motion, after it has been opened to the Court. *The East Lancashire Rail. Co. v. Hattersley*, 8 Hare, 86.

Some of the *cestuis que trust* of a mining lease filed a bill against their trustees and the lessors, alleging that an agreement binding in equity had

been entered into between the defendants for a reduction of the royalties covenanted to be paid by the lessees; and that in violation of this agreement the lessors were suing the lessees upon the covenant, and the bill sought for a specific performance and an injunction against the suit at law. Notice of motion for the injunction was given, and affidavits filed verifying the statements in the bill. Before the day fixed by the notice, the lessors put in their answer, but the trustees did not. The plaintiffs filed further affidavits denying certain misrepresentations which the answer stated to have been made:—Held, that the affidavit might be read on the motion. *Griffiths v. Williams*, 2 De Gex & S. 15.

A plaintiff served a defendant with a notice of motion, under the 76th Order of May 1845. Before the motion was made the defendant put in his answer:—Held, that the plaintiff had a right to bring on the motion for the purpose of obtaining the costs of it. *Spooner v. Payne*, 17 Law J. Rep. (N.S.) Chanc. 130; 2 De Gex & S. 439.

Motion by a plaintiff in a creditors' suit, after decree, to restrain proceedings of other creditors in other suits. Practice as to the payment to such creditors so to be restrained of their costs of such proceedings and of the motion. *West v. Swinburne*, 19 Law J. Rep. (N.S.) Chanc. 81.

At a meeting of a railway company in May 1848 it was resolved that 1,055,000*l.* should be raised by 105,500 preference shares of 10*l.* each, on which a fixed dividend of 6*l.* per cent. should be paid. In July 1848, one of the dissentients filed a bill praying a declaration that this resolution was unauthorized by the company's acts, and for an injunction against the issue of such shares, and no other specific relief. Upon motion in August for an injunction accordingly, it appeared by the affidavit of the secretary that the preference shares had been offered to all the shareholders rateably, and had been taken to the amount of 777,770*l.* on which the first instalment had been paid, and that other shareholders had expressed their desire to accept other shares, and that there were only five dissentients:—Held, that the motion involved substantially the whole matter in dispute in the cause, and must be refused. *Fielden v. the Lancashire and Yorkshire Rail. Co.*, 2 De Gex & S. 531.

(b) Notice of Motion.

An order may be impeached for irregularity, although the notice of motion does not specify the ground, the omission being material (if at all) only as to costs. *Brown v. Robertson*, 2 Ph. 173.

Motion by one of several defendants that the deposition of a witness who had been examined by the plaintiff should be suppressed:—Held, that notice of the motion ought to have been served on the other defendants. *Barnett v. Papineau*, 18 Law J. Rep. (N.S.) Chanc. 466.

(M) PRODUCTION OF DOCUMENTS.

(a) General Points.

Production of documents for a limited period refused. *Attorney General v. Bingham*, 9 Beav. 159.

Production refused of a deed which the plaintiff

by his bill sought to set aside. *Dendy v. Cross*, 11 Beav. 91.

On motion for production, the defendant asked that the plaintiff might be prevented using the documents for any collateral purpose, alleging that proceedings at law were pending. The Court declined so to restrict the order. *Tagg v. the South Devon Rail. Co.*, 12 Beav. 151.

A person served with a subpoena duces tecum under the 24th Order of May 1845, to produce a document at the hearing of a cause, may, at such hearing, be called upon his subpoena and asked whether he produces the document, and if he declines to do so, why he so declines, or other like questions confined to the mere purpose of production. *Griffith v. Ricketts*, 7 Hare, 301.

The defendant pleaded to part of a bill and answered as to the remainder. The plaintiff moved for production before the plea had been set down. The Court directed the motion to stand over until the plea had been argued. *Buchanan v. Hodgson*, 11 Beav. 368.

In a suit to obtain evidence in aid of an ejectment commenced by the plaintiff against the defendant, the clerk of records and writs, upon a motion for the production of deeds admitted by the defendant's answer to be in his custody, will, upon an affidavit of service, be ordered to produce them at that or any other trial at law between the parties. *Smith v. Stone*, 18 Law J. Rep. (N.S.) Chanc. 233.

Deeds brought into court by the executor under the common order for the production of documents made in a creditors' suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; and the Court refused to order such deeds to be delivered to the plaintiff in the cause, though he was the tenant for life of the estate comprised in the deeds. *Plunkett v. Lewis*, 6 Hare, 65.

A suit was instituted to restrain proceedings at law to recover for work and labour in constructing a sewer, on the ground of fraud on the part of the defendant in equity in improperly obtaining possession of an estimate in writing, and by chemical process removing the figures indicating the price. The document in question having been deposited with the clerk of records in pursuance of an order for production, the plaintiff moved for liberty to subject it to chemical tests for the purpose of the trial at law, upon an undertaking by the defendant to produce it to be stamped at the trial at law. The Court refused to make any order. *Twentyman v. Barnes*, 2 De Gex & S. 225.

Re-delivery of documents deposited in the Master's office. *Alderman v. Bannister*, 9 Beav. 516.

(b) When Production may be enforced.

Defendant admitted that documents were in his solicitors' hands, having come to them as representatives of the solicitors of the defendant's testator; but he said they were not in his possession or power or under his controul. The Court refused to order production. *Palmer v. Wright*, 10 Beav. 234.

A bankrupt defendant put in his answer, stating that certain books, &c. were in his solicitor's possession, who claimed a lien on them, and that he could not obtain possession thereof. The Court

ordered the defendant to produce them, with liberty to apply, if necessary. *Rodick v. Gandel*, 10 Beav. 270.

A bill was filed against trustees and a *cestui que trust* to set aside a conveyance. The trustees admitted the possession of certain letters, &c., but insisted that they were privileged communications between them and their *cestui que trust*, for whom they, or one of them, acted as solicitor. The *cestui que trust*, by his answer, denied that the other defendants were his solicitors; but stated, in his answer to the amended bill, that the letters, &c. had come to their possession as his solicitors, or related to matters in which he had consulted them respecting proceedings in the ecclesiastical court, to enable him to instruct his proctors:—Held, that the answer of the *cestui que trust* might be read by the plaintiff, as against the other defendants, the trustees, upon a motion for the trustees to produce the letters, &c.; and an order was made for their production. *Blenkinsopp v. Blenkinsopp*, 17 Law J. Rep. (N.S.) Chanc. 343; 2 Ph. 607; reversing s. c. 16 Law J. Rep. (N.S.) Chanc. 88; 10 Beav. 143.

Estates were demised to trustees for a term of ninety-nine years, in trust, to permit the wife of the lessor, or such persons as she should by will appoint, to receive the rents thereof during the term. The fee simple was afterwards purchased, subject to the term, and the purchaser subsequently purchased the term, and took an assignment of it from the wife and the trustees. The wife, as was alleged, by her will bequeathed the estate to the plaintiff; but the will and the title of the plaintiff under the will were not admitted by the defendant; who, however, acknowledged that he had in his possession the original demise, and also the indenture of assignment, an abstract of which latter deed he set forth in his answer:—Held, that under the circumstances, the plaintiff was not entitled to the production of any of the deeds. *Glover v. Hall*, 17 Law J. Rep. (N.S.) Chanc. 249; 2 Ph. 484.

On a motion for production of documents, the plaintiff must shew from the admissions in the answer that the documents relate to the contents of the bill as it stands when the motion is made. *Haverfield v. Pyman*, 2 Ph. 202.

A mortgagee against whom a bill was filed by another mortgagee for redemption and foreclosure, admitted the possession of vouchers consisting of bills of exchange and promissory notes,—Held, that he was bound to produce them. *Gibson v. Hewett*, 9 Beav. 293.

Where the defendant stated in his answer that under a certain deed which was in his possession his father was tenant for life, and never had any greater estate than for life, and that he himself was tenant in tail under the same deed, it was held that the plaintiff was not entitled to a production. *Wasley v. Tempest*, 9 Beav. 407.

The defendant, by his answer, denied the plaintiff's title to certain money deposited with a bank, but admitted the possession of a document which gave him (the defendant) controul over the money:—Held, on a motion for the production of the document, that the plaintiffs were only entitled to inspect it and take copies, and not to deprive the defendant of his controul over the money by having

the document deposited in the usual way. *Mayor of Berwick v. Murray*, 1 Mac. & G. 530; 1 Hall & Tw. 452.

The defendant to a bill of discovery, in aid of the plaintiff's defence to an action at law, cannot be compelled to produce a document as to which the bill contains no allegation that it relates to the matter in issue in the action.

This protection was held to be sufficiently claimed by the defendant stating that he was advised, and verily believed, that the document in question did not contain evidence in support of the plaintiff's pleas. *Peile v. Stoddart*, 1 Mac. & G. 192.

A bill was filed by the heir-at-law of a testator, against a purchaser from his devisees in trust for sale, to set aside the conveyance on the ground that the purchaser had acted as solicitor to the devisees, and the consideration was inadequate. The defendant, by his answer, insisted that the title was materially defective, and, regard being had to that, the consideration was adequate; and he admitted possession of the title-deeds:—Held, that the title-deeds must be produced. *Shallcross v. Weaver*, 19 Law J. Rep. (N.S.) Chanc. 450; 2 Hall & Tw. 231; 12 Beav. 272.

An order for the production of deeds, &c. will not be made against the administrator of a deceased defendant, though the suit has been revived, and though an order has been previously made against the defendant himself, there being nothing to shew that they were in the possession of the administrator. *Scott v. Wheeler*, 19 Law J. Rep. (N.S.) Chanc. 402; 12 Beav. 366.

Where the entries in the trade books of a defendant may shew the infringement by him of an alleged custom for the benefit of the plaintiff, the Court will order the production of the trade books for the inspection of the plaintiff before the hearing, and before the existence of the custom has been proved, notwithstanding the existence of such custom is denied by the answer of the defendant. *Ord v. Fawcett*, 19 Law J. Rep. (N.S.) Chanc. 487.

Executors and trustees, by their answer, admitted six books to be in the custody or power of their agent, and the agent, on a motion for production, deposed that he was agent for many other persons, and that his books related to the affairs of such other persons, as well as to those in question in the cause:—Held, that the executors had not so mixed up the testator's accounts with others as to preclude them from insisting that the books were not in their power, and a motion for production was refused. *Airey v. Hall*, 2 De Gex & S. 489.

Defendants by their answer stated, that save as appeared therein and in the documents which were mentioned in the schedule thereto, and which the defendants were willing to produce as part of their answer, they were unable to answer further. In a subsequent part of the answer, the defendants admitted possession of the documents scheduled to the answer, which they were willing to produce, with the exception of such as were confidential communications, for which they claimed privilege:—Held, that by the general reference in the former part of the answer, the whole of the documents were made part of the answer; and that the subsequent reservation of some on the ground of pri-

vilage would not protect them from production. *Macintosh v. the Great Western Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 169; 1 Mac. & G. 73; 1 Hall & Tw. 41.

The defendant, in his answer to a bill seeking discovery in aid of the plaintiff's defence to an action at law brought by the defendant against him, stated that the letters, papers and writings scheduled to his answer contained the evidence on which the defendant was advised and intended to rely at the trial of the action, and that the same did not, nor did any of them, "as the defendant was advised and verily believed," contain any evidence whatever in support of the plaintiff's pleas in the action; and that the same were not in any manner material to the plaintiff's case:—Held, that the statement was a sufficient answer to the plaintiff's motion for production and inspection of the scheduled documents. *Peile v. Stoddart*, 1 Hall & Tw. 207.

One of several defendants, by his answer, admitted the possession of documents; but by an affidavit subsequently filed, stated that, since his answer, he had deposited them with one of his co-defendants. A motion for their production refused in the absence of the co-defendant. *Burbidge v. Robinson*, 2 Mac. & G. 244.

(c) *Privileged Documents.*

The draft of an answer prepared for a deceased defendant, but not put in, is a privileged document in the hands of his administratrix. But if the administratrix, by her answer, admit possession of, and set out part of the contents of the document, and crave leave to refer to the same, she loses the privilege as to the part so set out, but retains it as to the remainder. *Belsham v. Harrison*, 15 Law J. Rep. (N.S.) Chanc. 438.

A bill filed against a canal company alleged that the company had for several years been gradually encroaching upon the land of the plaintiff, whose property adjoined to the canal; and prayed for a commission to ascertain the boundaries:—Held, that the company were bound to produce maps of the canal, and also leases of the adjoining lands, which the plaintiff alleged to comprise part of his property; notwithstanding that the company insisted by their answer that they related to their own title and not to the title of the plaintiff. *Bute (Marquis) v. the Glamorganshire Canal Company*, 15 Law J. Rep. (N.S.) Chanc. 60; 1 Ph. 681.

The plaintiff alleged that the defendant, who was in possession of a certain estate, was not the person intended to be the devisee of such estate; the bill prayed that the plaintiff might be declared entitled instead of the defendant, and it prayed an account of the rents and profits of the estate. The defendant pleaded to so much of the discovery as prayed an account, refusing production of all documents relating to the rents and profits, and averred that he was the party designated. The defendant, by his answer, set forth all documents except those relating exclusively to the rents and profits:—Held, that the defendant was no more protected by the plea from production of documents relating to the rents and profits than those relating to identity, and the plea was overruled.

Rigby v. Rigby, 15 Law J. Rep. (N.S.) Chanc. 199; 15 Sim. 90.

In a cross bill filed against a corporation, which claimed an exclusive right of metage of grain and other articles, it was alleged that the right was of modern origin, and that the fees for metage had varied. The corporation admitted metage books and other documents to be in their possession, which were evidence of their title, and the officers of the corporation denied, as to their belief only, that the books and documents would prove the allegations in the cross bill:—Held, that this was not sufficient to protect them, but that the corporation were bound to produce the books and documents. *Combe v. the Corporation of London*, 15 Law J. Rep. (N.S.) Chanc. 80.

S, having discovered that R was entitled to an estate in fee simple, subject to an existing life estate therein, agreed with R to take proceedings for the recovery of the same on condition of S's having one moiety thereof conveyed to him. The conveyance was executed by R of the moiety, and a suit was instituted by S in R's name, in which Y was employed as the solicitor. Whilst the suit was in the course of prosecution, R contracted with S to sell him the remaining moiety of the estate. The estate shortly afterwards fell into possession, when R, suspecting the conveyance and sale to have been fraudulently contrived between S and Y, filed his bill to set them aside. S and Y having put in their answers, containing schedules of documents, and papers, and correspondence between S and Y, having relation to the subject-matter of the former suit, it was decided that R was entitled to require production thereof, and also of the draft of a letter written by Y to S, relating to the sale of the second moiety, and also of cases prepared and opinions of counsel taken thereon, with reference to the subject-matter of the former suit; the same, though instituted by S, having been instituted for the benefit of both R and S, and Y having acted on the behalf and for the benefit of both those parties. *Reynell v. Sprye*, 16 Law J. Rep. (N.S.) Chanc. 117; 10 Beav. 51.

Production refused of letters which passed between the respective solicitors with a view to a compromise, upon an express stipulation that they should not be referred to or used in any way to the prejudice of the defendant if an amicable arrangement was not come to. *Whiffen v. Hartwright*, 11 Beav. 111.

A B wrote the draft of a letter to his solicitor in order that the solicitor might write a similar one to him to be shewn to C D, and thereby induce him to enter into a contract. On a bill to set aside the contract for fraud, —Held, that the solicitor was bound to produce the letter, but not the other correspondence between himself and his client.

Order for production made on admissions in an answer filed prior to the amendment of the bill, but which did not vary the case. *Reynell v. Sprye*, 11 Beav. 618.

A bill was filed to impeach a deed, on the ground of fraud, and the production of cases and opinions and confidential letters by the solicitor relating to the execution of the deed was required. The defendants, who claimed under the deed, alleged that these documents had reference to the proceedings in the suit, and were privileged:—Held, that the

documents must be produced. *Follett v. Jefferys*, 18 Law J. Rep. (N.s.) Chanc. 389.

Case and opinion submitted and taken by trustees in contemplation of the litigation held privileged as against the *cestuis que trust*. *Brown v. Oakshott*, 12 Beav. 252.

Letters alleged by a defendant to have passed between him and his solicitor, in the course of and for the purpose of professional business which the solicitor was employed to transact for him, and a case alleged to have been professionally and confidentially submitted to counsel by the solicitor of the defendant and on his behalf, and the opinion thereon, held not privileged. But a case alleged to have been submitted to counsel by defendant's solicitor in contemplation of legal proceedings, and with reference to the title of the defendant at issue in the present suit, and the opinion thereon, held to be privileged. *Beaton v. King*, 17 Sim. 34.

A brought an action of trover against R & Co. to recover the value of a ship which had been lost at sea, and in respect of which R & Co. had received the insurance-money. R & Co. then filed their bill against A and his partner, to restrain the action, and for an account, charging that the ship was the property of A and his partner, and claiming a lien upon the insurance monies in respect of balances of account due to them from the partnership. A, by his answer, admitted the possession of certain documents, but stated that they belonged not to himself alone, but to himself and his partner, and were in his possession for the benefit of himself and partner. A motion upon the answer of A for the production of these documents was refused.

A defendant, residing at Quebec, by his answer admitted the possession of letters which had been sent by him "to his agent" for the purpose of being communicated to his solicitors, and which had reference to the suit:—Held, that these communications were privileged.

On a motion for the production of documents, it is not sufficient for the plaintiff to read detached insulated passages from the answer admitting possession, but he must take the whole case as it is stated in the answer. *Reid v. Langlois*, 19 Law J. Rep. (N.s.) Chanc. 337; 1 Mac. & G. 627; 2 Hall & Tw. 59.

(N) COMMISSION.

In a suit for partition, if a reference is necessary to ascertain the interests of the parties, the direction for the commission ought to be postponed until the hearing for further directions. *Cole v. Sewell*, 15 Sim. 284.

In ordinary cases it is not necessary to state in the affidavit in support of a motion for a commission to examine witnesses abroad the names of the witnesses, or to verify the matters as to which it is intended to examine them, and the affidavit in support of the motion may be made by the clerk of the solicitor, as well as by the solicitor himself or his client, according to circumstances.

On a motion to produce documents and pay money into court there must be such an admission of probable title in the plaintiff as the Court can safely act upon. *M'Hardy v. Hitchcock*, 17 Law J. Rep. (N.s.) Chanc. 256; 11 Beav. 73, 93.

On a petition by the Commissioner appointed to

examine witnesses in the cause, the solicitor for the defendants was ordered to pay the Commissioner's expenses in attending the commission, and the costs of this petition, although he had given no personal guarantee for the payment of such expenses. *Parsons v. Benn*, 19 Law J. Rep. (N.s.) Chanc. 264.

The proper form of objecting to a Master's certificate, approving of a commission for the examination of witnesses, and the order made thereon. *Jones v. Creswick*, 15 Law J. Rep. (N.s.) Chanc. 342.

(O) AFFIDAVITS.

Swearing of, after the 10th of August 1847. Order of the 9th of August 1847; 17 Law J. Rep. (N.s.) Chanc. 110.

The affidavit required by the 67th Order of May 1845, on a special application to amend an information, must be made by the solicitor to the relators. *Attorney General v. Wakeman*, 15 Sim. 358.

Defendant moved, on affidavits, to discharge an *ex parte* injunction. The motion stood over at the plaintiff's request. Defendant then filed his answer, after which plaintiff filed several affidavits. On the motion being resumed, those affidavits were held inadmissible. *Woodin v. Field*, 15 Sim. 307.

An affidavit of service of an order of the Court must state that the order was "duly passed and entered." *Willetts v. Willetts*, 5 Hare, 597.

Where an affidavit is sworn before a Master extraordinary in Ireland, appointed under the 6 & 7 Vict. c. 82, it is not necessary to verify by affidavit that he filled that character. *Day v. Day*, 11 Beav. 35.

On interlocutory applications, which are necessarily heard on affidavits, the Court does not dispense with the rule, that the best evidence in the power of the parties must be given on disputed points; and, therefore, it is not sufficient to state on affidavit the purport and effect of a document which might be produced. *Stamps v. the Birmingham, Wolverhampton and Stour Valley Rail. Co.*, 7 Hare, 255.

An affidavit of service of a copy of a bill is insufficient, if it omit in the title the name of one of the parties, although no process is prayed by the bill against such party. *Lay v. Prinsep*, 1 De Gex & S. 630.

Upon motion by way of appeal against an order made by the Master for enlarging publication, it was held that no affidavits could be read which had been filed after the order made by the Master. *Parkyn v. Cape*, 18 Law J. Rep. (N.s.) Chanc. 392; 17 Sim. 50.

In a suit by a specialty creditor, his claim was admitted by the answer of the administratrix and heiress-at-law of the debtor, who had died intestate. The cause was set down to be heard on bill and answer, without any replication having been filed:—Held, that the plaintiff might prove, by affidavit at the hearing, the deed creating his charge.

Held, also, that as it was admitted that the estate of the intestate was insufficient to pay in full the demand of the plaintiff, the latter was entitled to have a receiver appointed. *Chalk v. Raine*, 18 Law J. Rep. (N.s.) Chanc. 472; 7 Hare, 393.

(P) INTERROGATORIES.

After the common decree in a suit, instituted by some of the residuary legatees named in a will against the executor and the other residuary legatees, the trustees of a post nuptial settlement of a bond for 2,000*l.* previously given by the testator to his daughter Elizabeth, (the wife of J. R. Holder,) carried in a state of facts before the Master, claiming payment of the total amount secured by the bond. This was met by a counter state of facts, on the part of the executor, who had paid to a creditor of Holder, Holder having been in the possession of the bond, and handed it over to the creditor, a sum of 850*l.*, being the amount of the debt due to the creditor from Holder. The executor, on payment by him of that sum to the creditor of Holder, received the bond back from the creditor. It was sought before the Master to examine Holder on interrogatories, to prove that the executor had notice of the previous assignment of the bond to the trustees of the settlement. The Master refused to receive the interrogatories, on the ground that Holder's evidence was not admissible against the executor. On motion to the Court, by the defendants, the residuary legatees, for leave to examine the executor on interrogatories before the Master as to notice, the Court refused the application with costs.

In a legatees' suit, where the bill contains no notice of an alleged breach of trust, and nothing is said about it in the decree, the Court will not permit the executor to be examined on interrogatories before the Master, touching the breach of trust, but the breach of trust must be established against the executor by a distinct and independent suit. *Ford v. Bryant*, 15 Law J. Rep. (N.S.) Chanc. 261; 9 Beav. 410.

By the decree made in a suit to redeem mortgaged estates, in which several sets of incumbrancers were defendants, the usual accounts were ordered to be taken, and the usual order made for payment, and in default of payment the bill was to be dismissed. By a decree made on a bill of revivor and supplement, in which one of the subsequent incumbrancers was plaintiff, the accounts were directed to be carried on:—Held, that the subsequent incumbrancer, the plaintiff in the bill of revivor and supplement, was not entitled to exhibit interrogatories for the examination of the prior incumbrancers, who were co-defendants in the first suit and mortgagees in possession, although the plaintiff declined to prosecute the decree and to have the accounts taken. *Cottingham v. Shrewsbury (Earl)*, 15 Law J. Rep. (N.S.) Chanc. 441.

Interrogatories to discredit answer. *Suckermore v. Dimes*, 9 Beav. 518.

Under the 103rd and 104th Orders of 1845, additional interrogatories may be exhibited before the Commissioner for the examination of witnesses, during the sitting of the commission as circumstances may require; and it is not necessary to obtain an order of the Court for that purpose. *Lancashire v. Lancashire*, 16 Law J. Rep. (N.S.) Chanc. 48; 10 Beav. 26.

The Commissioner for the examination of witnesses in a cause must return the interrogatories

as well as the depositions signed. *Staniland v. Willatt*, 17 Law J. Rep. (N.S.) Chanc. 373.

Upon a decree opening accounts, the Master ordered interrogatories to be brought in for the examination of the defendants. An objection to the fourth of the interrogatories brought in was overruled, and they were all allowed, and a time was fixed for the defendants to bring in their examination, which was not done till after the time had been twice extended. Upon an inquiry into the sufficiency of the examination, it was for the first time objected, that the plaintiff should have taken in a state of facts before proceeding on the examination; and subsequently it was objected, that the interrogatories should not have been allowed without a previous state of facts being taken in on behalf of the plaintiff. The Master adjourned the inquiry:—Held, on a motion to discharge the Master's certificate, that the Master was not wrong in allowing the interrogatories without a state of facts; that any irregularity had been waived by the submission of the defendants, and the allowance of time to put in the examination; that the decree warranted a special interrogatory without a special state of facts; that in case of difficulty the Master might direct a state of facts to be laid before him; and the motion was dismissed, with costs. *Alfrey v. Alfrey*, 19 Law J. Rep. (N.S.) Chanc. 200; 12 Beav. 292.

Interrogatories were exhibited for the examination of witnesses in a cause. Exceptions were taken to them on the ground that they were leading and suggested answers beneficial to the plaintiff, and not calculated to elicit the truth, and they were allowed by the Master:—Held, upon exceptions to the Master's certificate, that the interrogatories were not leading, and that objections might be taken to the evidence at the hearing of the cause. *Gregory v. Marychurch*, 19 Law J. Rep. (N.S.) Chanc. 289; 12 Beav. 398.

(Q) EXAMINATION OF WITNESSES.

A witness who had attended before the examiner, but had refused to be examined unless he were paid the expenses of some former attendances, ordered upon motion to attend and be examined, and to pay the costs of the motion. *Gaunt v. Johnson*, 6 Hare, 551.

The general rule is, that witnesses resident in London or its neighbourhood should be examined before the examiner and not under a commission; but, *semble*, that the rule is not inflexible. *Sowden v. Marriott*, 2 Coll. C.C. 578.

The solicitor of the plaintiffs in the cause was served with a subpoena to attend and be examined before Commissioners, as a witness for the defendants, and he thereupon attended and delivered to the Commissioners a written refusal to be examined, on the ground of his being professionally employed by the plaintiffs:—Held, that such document was not properly returned by the Commissioners, and ought not to have been set down as a demurrer.

A witness who has attended to be examined in pursuance of a subpoena cannot then refuse to be examined on the ground of irregularity in the service of the subpoena.

It is not necessary to serve the other parties in a

cause with a notice of motion that a witness be ordered to attend and be examined, though the reason assigned by the witness for his refusal to be examined was that he was professionally concerned as solicitor for such other parties. *Wisden v. Wisden*, 6 Hare, 549.

A party by consenting to let an accounting party put in an affidavit instead of an examination is not precluded from afterwards insisting on having an examination, if the discovery given by the affidavit be unsatisfactory. *Attorney General v. the Corporation of Chester*, 11 Beav. 169.

After the examination of witnesses between all the plaintiffs and all the defendants, leave cannot be given to withdraw the replication and examine a defendant.

A witness permitted to be examined upon the former interrogatories after releasing his interest. *Bousfield v. Mould*, 1 De Gex & S. 347.

Re-examination of witness after decree. *Leeds v. Amherst*, 16 Sim. 431.

Upon a motion by a defendant to suppress depositions, supported by the affidavit of the witness that the evidence which she gave before the Commissioner was not truly represented in the depositions, and that she had mistaken the meaning of a technical expression used in the interrogatories, the Court refused to suppress the depositions, but gave liberty to re-examine and cross-examine the witness *vivâ voce* before the Master (the commission being issued after decree) upon the disputed parts of the depositions; and also gave the plaintiff liberty in the same manner to examine, and the defendant to cross-examine the Commissioner and his clerk. *Dobson v. Land*, 7 Hare, 296.

After publication passed, articles were exhibited to discredit one of plaintiff's witnesses, under circumstances rendering it doubtful whether any evidence obtained thereon could be used. A motion to postpone the hearing of the cause, on the ground of the pendency of the examination under the articles, was refused. *Penny v. Watts*, 2 De Gex & S. 501.

Under a commission, a witness was served with a *subpœna duces tecum* to produce a particular document. The *subpœna* was invalid, but the witness, without objecting to it on that ground, refused to produce the document, on the ground that it related to a private matter between himself and a stranger. The refusal to produce was not returned by the Commissioner as a demurrer to the interrogatories, nor did he indorse upon the return any statement that the party refused to answer, and the examining party allowed publication to pass by consent, in ignorance of such refusal. An order obtained upon motion, by the examining party, that a new commission should issue and the witness attend thereat and produce the document and be examined at his own expense, and pay the costs of such new commission and of its execution, was, upon appeal, discharged. *Tippins v. Coates*, 17 Law J. Rep. (n.s.) Chanc. 337; reversing s.c. 17 Law J. Rep. (n.s.) Chanc. 17; 6 Hare, 16.

After publication had passed in this cause, the plaintiff discovered two affidavits made in a cause of *Evans v. Davies*, the one by the defendant in that cause, who was since dead, and whose estate this suit sought to make liable for a sum of money, and

the other by a witness in this cause. Upon a motion to examine witnesses to prove these affidavits and the signatures to them, with a view to discredit the testimony which had been given in this cause,—Held, in the case of the witness, that the plaintiff must adopt the ordinary course of discrediting his testimony, to give the witness an opportunity of explaining. In the case of the deceased party in the suit of *Evans v. Davies*, leave was given to the plaintiff to exhibit an interrogatory to prove the affidavit, that the plaintiff might be in a situation to tender it as evidence at the hearing, subject to any questions as to its being admissible, and the defendant was to be at liberty to exhibit an interrogatory to prove the circumstances relating to the affidavit, or to prove that no such affidavit existed. *Gregory v. Marrychurch*, 19 Law J. Rep. (n.s.) Chanc. 77; 12 Beav. 275.

The common order giving leave to examine a party need not be served on the opposite party.

In an examination of witnesses before Commissioners, a party is not bound to give a list of the names of his proposed witnesses to the opposite side. *Smith v. Pincombe*, 18 Law J. Rep. (n.s.) Chanc. 211; 16 Sim. 479; 1 Hall & Tw. 250.

Order obtained as of course after publication, to examine witnesses as to the credit of a witness examined in the cause,—Held, to be regular.

If under such an order witnesses should be examined as to matters that are in issue in the cause between the parties, the depositions would, on application to the Court, be ordered to be suppressed. *Penny v. Watts*, 18 Law J. Rep. (n.s.) Chanc. 108; 11 Beav. 298.

After publication of his evidence in chief, a witness in the cause may be again examined as to matters upon which he has not been previously examined. *Cuming v. Bishop*, 19 Law J. Rep. (n.s.) Chanc. 401.

(R) DEPOSITIONS.

(a) Reading.

It is not the practice to enter evidence as read, saving just exceptions. *Sherwood v. Beveridge*, 2 Coll. C.C. 536.

One of several defendants in a suit filed a bill as second incumbrancer, against the plaintiff in that suit and other parties, seeking to redeem the plaintiff in the first cause, as the first incumbrancer of the interest of certain residuary legatees. After publication had passed in the first cause, and been extended with the consent of the plaintiff in the second cause, and the plaintiff in the second cause had examined his witnesses, he obtained an order, as of course, to read and make use of the depositions taken in the second cause at the hearing of the first cause, saving all just exceptions.—Held, that the order was regular, although publication might not pass in the second cause before the first cause came on for hearing. *Sowdon v. Marriott*, *Flight v. Marriott*, 15 Law J. Rep. (n.s.) Chanc. 449; 9 Beav. 416.

Real estate was by will devised in trust for A for life, with remainder for B for life, with remainder for C for life, with remainder for the first and other sons of C in tail. Personal estate was by the same will bequeathed on a series of limitations corresponding to those on which the real estate was

settled. A was trustee of the real estate, and C of the personal estate. A suit was instituted by B against A in respect of alleged mismanagement of the real and personal estate, and some evidence entered into by B. Another suit was instituted by the first tenant in tail against A, in respect of the same matter. There was no suggestion that the witnesses examined in the first suit were dead or incapable of giving evidence in the second suit:—Held, that the evidence given in the first suit was not admissible at the hearing of the second. *Blaggrave v. Blaggrave*, 16 Law J. Rep. (n.s.) Chanc. 346; 1 De Gex & S. 252.

(b) *Suppressing.*

[See (Q) Examination of Witnesses.]

From the error of the Commissioner the names of the witnesses examined in the cause were not affixed to the ingrossment of their depositions. On a motion for the suppression of the depositions on this ground, it was ordered that the names should be added to the ingrossment, and that the costs of the motion should be costs in the cause. *Lee v. Egremont*, 17 Law J. Rep. (n.s.) Chanc. 437; 2 De Gex & S. 363.

Replication having been filed in January 1816, and a subpoena to rejoin served in February 1816, no further step was taken in the suit till November 1847, when the plaintiffs applied for leave to withdraw the replication and file a new one; this being refused, the defendants moved to dismiss for want of prosecution; that motion was also refused, but leave was given to set down the cause. The plaintiffs then proceeded to examine witnesses; the defendants now moved that the depositions might be suppressed. Motion refused, on the ground that publication had not passed. *Thomas v. Lewis*, 17 Law J. Rep. (n.s.) Chanc. 135; 15 Sim. 296; 16 Sim. 73.

The Court will not suppress depositions on the ground of irregularity at the instance of a party who knew of the irregularity at the time of the examination, but did not take the objection until long after he had seen the depositions. *Smith v. Pincombe*, 18 Law J. Rep. (n.s.) Chanc. 211; 16 Sim. 497; 1 Hall & Tw. 250.

Two of the witnesses produced by the plaintiffs, and examined under a commission, denied by affidavits that they had deposed to the effect represented by the Commissioner. On motion by some of the defendants, charges of partiality and misconduct not having been established against the Commissioner, an order to suppress the whole of the depositions taken by him was refused; but leave was given to examine and cross-examine both the witnesses *viva voce* in the Master's office on the disputed parts of their depositions. *Dobson v. Land*, 18 Law J. Rep. (n.s.) Chanc. 240.

Where witnesses were examined during the abatement of a suit occasioned by the death of parties, the depositions of those who did not at the time of their examination know of the death of the parties which had caused the abatement were received, and the depositions of those who did know such facts, were suppressed. *Curtis v. Fulbrook*, 8 Hare, 29.

A witness to credit deposed that he believed the

principal witness to be unworthy of belief on account of a particular transaction, which he detailed:—Held, no ground for suppressing more of the depositions than related to the reason assigned for the belief.

The same witness spoke to a conversation in which the principal witness had given an account of a fact material to the issue at variance with his testimony. The Court refused to suppress the depositions, although the principal witness had not been cross-examined as to this. *Penny v. Watts*, 2 De Gex & S. 501.

(S) PUBLICATION.

Where a party filed a bill in this country to perpetuate testimony, which was to be used in the Court of Chancery in Ireland, and the question in the suit there was ripe for decision, the Court here ordered publication of the depositions, leaving the Court in Ireland to decide whether they were or were not admissible. *Morris v. Morris*, 16 Law J. Rep. (n.s.) Chanc. 236; 2 Ph. 205.

After an order to enlarge publication, irregularly obtained, one of the defendants, with notice of the order, but treating it as a nullity, set down the cause under the 116th Order of May 1845, and served a subpoena to hear judgment. On motion by the plaintiff the cause was ordered to be struck out of the registrar's book, and the subpoena set aside at the costs of the defendants; an order, although irregularly obtained, being binding on all parties until set aside. *Hughes v. Williams*, 16 Law J. Rep. (n.s.) Chanc. 200; 6 Hare, 71.

Upon a motion for the enlargement of publication after an application had been refused by the Master, —It was held, that affidavits filed since the hearing before the Master might be read. *Peel v. Hague*, 17 Law J. Rep. (n.s.) Chanc. 486; 16 Sim. 315.

The evidence of a witness, taken *de bene esse* before the cause was at issue, was not published before the hearing. After a decree, directing certain accounts, an application (supported by affidavits that the witness had become insane and that his evidence related solely to items of accounts) that such evidence might be published for the purpose of being used before the Master on the question of accounts, was refused. *Forsyth v. Ellice*, 19 Law J. Rep. (n.s.) Chanc. 334; 2 Mac. & G. 209; 2 Hall & Tw. 424; reversing s.c. 7 Hare, 290.

Pendency of an appeal from the dismissal of a bill held insufficient ground for directing publication to pass of the depositions as to credit for the purpose of their being used on the appeal.

Issues having been directed on the appeal, and one of the witnesses to credit having gone out of the jurisdiction, the Court ordered publication to pass of his deposition. *Penny v. Watts*, 2 De Gex & S. 501.

(T) INSPECTION OF SUBJECT OF SUIT.

Order made on motion for an inspection of coal mines. *The Attorney General v. Chambers*, 12 Beav. 159.

Order upon motion before the hearing, that the plaintiffs and their witnesses should be allowed until publication to view and inspect the workings by the defendants in the plaintiffs' mine, of which the defendants were lessees, and which mine was

entered and worked by means of a shaft in an adjoining mine belonging to the defendants. *Lewis v. Marsh*, 8 Hare, 97.

(U) EVIDENCE BEFORE THE MASTER.

[See EVIDENCE, Privileged Communication.]

Evidence received at the hearing of a cause and entered in the decree, is not necessarily admissible as against all the parties on inquiries before the Master under the decree. *Handford v. Handford*, 5 Hare, 212.

On an inquiry before the Master the plaintiff read from the answer and examination of the defendant, the executor, an admission that a promissory note for 400*l.*, belonging to the testator, had come into the hands of the executor shortly after the testator's death; and the executor was then allowed to read the further statement, that some years afterwards, when the plaintiff (the sole residuary legatee) came of age he had delivered the note to the plaintiff, who thanked him for taking care of it. *East v. East*, 5 Hare, 343.

The answer of a co-defendant cannot be received in evidence on an inquiry before the Master. *Meyer v. Montriou*, 9 Beav. 521.

In the prosecution of inquiries in the Master's office the plaintiff brought in a state of facts and examined, under a commission, witnesses whose evidence charged the defendant with the receipt of monies, and of whose depositions publication had passed. The defendant then brought in a state of facts admitting the receipts, but discharging the defendant by payments. On motion the Court gave the defendant liberty to issue a commission and examine witnesses in support of the discharge, but not to contradict the plaintiff's state of facts. *Parker v. Peet*, 1 De Gex & S. 216.

A decree directed an inquiry whether certain younger children had made any and what assignments of their shares, and under what circumstances. One of the defendants, claiming to be an assignee of a share, carried into the Master's office a state of facts, setting forth the assignment under which he claimed. A co-defendant (one of the children) carried in a counter state of facts, impeaching the assignment, as having been executed for an inadequate consideration and without legal assistance. A motion to suppress interrogatories filed in support of the counter state of facts, as relating to questions in dispute between co-defendants only, and not in issue in the cause, was refused. *Lennard v. Curzon*, 1 De Gex & S. 350.

A motion absolute to commit upon a certificate of the insufficiency of a third examination before the Master refused. *Alfrey v. Alfrey*, 12 Beav. 620.

After warrant issued on preparing the Master's report, the defendant W, who was in default, brought in his discharges, to the receipt of which the plaintiff consented, although in strictness he was entitled to exclude the same. During the prosecution of the proceedings relating to the defendant's discharges, the plaintiff discovered material evidence whereby to charge a co-defendant B, jointly with W, with monies received by W, and he carried in charges before the Master arising thereout, &c. and a state of facts. The Master, on the objection of B, declined to receive any further evidence on the part

of the plaintiff with reference to the charges and state of facts:—Ordered, that notwithstanding the issuing of the warrant on preparing the report, the plaintiff be at liberty to continue the proceedings before the Master directed by the decree. *Shallcross v. Wright*, 18 Law J. Rep. (N.S.) Chanc. 119; 11 Beav. 433.

A reference was made to the Master to ascertain certain facts. Under this reference a witness was examined upon written interrogatories, and his depositions were published. The witness was afterwards examined *vidu voce*. The evidence of the witness given *vidu voce* was objected to before the Master, but not on the ground of his having been examined before on interrogatories. The Master received the evidence. Exceptions were taken to the report on this ground. On the hearing of the exceptions,—Held, that the objection to the *vidu voce* evidence on the ground of the witness having been examined before could not be raised. *Andrew v. Andrew*, 18 Law J. Rep. (N.S.) Chanc. 222.

Upon a motion by way of appeal from the Master's decision, refusing to enlarge publication, the Court received in evidence new facts not before the Master, on which the Court directed the publication to stand enlarged; but as the order was obtained upon materials which were not before the Master, the appellant was ordered to pay the costs of the motion. *James v. Grissell*, 3 De Gex & S. 290.

Application to the Master on evidence already in the office. *Clarke v. Chuck*, 9 Beav. 414.

(V) CONDUCT OF SUIT.

Where decrees had been obtained in two creditors' suits for the administration of the same estate, the Court permitted the plaintiff in the second suit to attend the proceedings under the first decree, but refused to give him the conduct of it, though collusion and irregularity were alleged. *Smith v. Guy*, 2 Ph. 159.

Where the prosecution of an administration suit had been neglected for several years, the conduct of it was given to parties who had been proved to be creditors, until further order. *Beale v. Symonds*, 2 Hall & Tw. 374.

(W) STAYING PROCEEDINGS.

[See COSTS, IN EQUITY, In general.]

[*Garcias v. Ricardo*, 5 Law J. Dig. 623; 14 Sim. 528.]

Order to stay proceedings discharged. *Lenaghan v. Smith*, 2 Ph. 537.

Real estates were conveyed to trustees, upon trust to raise large sums of money for the payment of incumbrancers, who were parties to the deed, one of whom filed a bill to have the trusts carried into execution, and for other objects grounded upon the trust deed. Upon the devisee in possession of the estates undertaking to pay within a month the amount due to the plaintiff, the Court, with the consent of the other incumbrancers, who were defendants, stayed all further proceedings; and that, although the plaintiff was devisee in trust of the equity of redemption in part of the estates for the payment of other incumbrances, and was, con-

tingently, beneficially interested therein. *Damer v. Portarlington*, 15 Law J. Rep. (n.s.) Chanc. 405; 2 Ph. 30; 16 Sim. 380.

All the purposes of a suit being answered, the plaintiff, before answer, moved that the taxing Master might tax the costs of the suit, and that the defendant might pay them, and that all further proceedings in the suit might be stayed. The motion was refused, but the costs of it were reserved. *Langham v. the Great Northern Rail. Co.*, 17 Law J. Rep. (n.s.) Chanc. 436; 16 Sim. 173; 1 De Gex & S. 403.

A demurrer had been allowed with costs, but an appeal had been heard, and was standing for judgment. A motion to stay the proceedings for costs was refused with costs. *Bainbrigge v. Baddeley*, 10 Beav. 35.

Where a bill was filed by a lunatic and his committee, and an injunction granted, and after the decree the lunatic died, and no further proceedings were taken, the Court ordered the injunction to be dissolved, and proceedings to be stayed unless the suit were revived within a limited time. *Price v. Berrington*, 11 Beav. 90.

Where the person whose name was affixed to a bill as the plaintiff's solicitor was not a solicitor of the court, an order directing that the name of a solicitor should be substituted, and that the registrar should satisfy himself that the proposed person was a solicitor, and also directing that all further proceedings against the defendant should be stayed, the plaintiff not being present at the making of the application for the latter part of the order, or having had notice of it, was discharged for irregularity. *Richardson v. Moore*, 16 Law J. Rep. (n.s.) Chanc. 144.

Under an act monies were to be distributed on petition. On a reference to ascertain the persons entitled, one who was not a party to the reference went in and failed. He afterwards filed a bill, on the ground that he wanted discovery and evidence which he could not obtain in the reference. The Court, though the bill was not demurrable, stayed proceedings until the Master had made his report. *Hyde v. Edwards*, 12 Beav. 253.

Motion to stay proceedings in a second suit until payment by plaintiff of the costs in the first, which had been dismissed, refused, it not appearing that the second bill could be produced by a fair amendment of the first.

Cross costs in two suits ordered to be set off. *Budge v. Budge*, 12 Beav. 385.

By a decree at the Rolls, the plaintiff had been declared entitled to real estate, which had been formerly conveyed by him to some of the defendants, under circumstances which induced the Court to set aside the conveyance. None of the parties wished to interfere with some sales which had been since made of parts of the estate, but the amount of the purchase-money for them was ordered to be paid to the plaintiff. The decision was appealed from, and upon motion to stay proceedings pending the appeal upon payment into court of the amount of the purchase-money, the Court made the order, not on account of the alleged poverty of the plaintiff, but on the ground that the substitution of the money for the estate was an accident arising from the sale of part of the property, and that the plaintiff would be in the same position as if none of

the estate had been sold. *Sturge v. Sturge*, 2 Hall & Tw. 469.

(X) ORDERS AND DECREES.

[*Dallon v. Hayter*, 5 Law J. Dig. 627; 1 Ph. 515. *Calvert v. Gandy*, 5 Law J. Dig. 627; 1 Ph. 518. *Man v. Ricketts*, 5 Law J. Dig. 627; 1 Ph. 530. *Askew v. Peddle*, 5 Law J. Dig. 626; 14 Sim. 301. *Palmer v. Horton*, 5 Law J. Dig. 628; 14 Sim. 633.]

As to special inquiry directed by decree. *Lord v. Wightwick*, 2 Ph. 110; *M'Mahon v. Burchell*, *Ibid.* 127.

Upon the Master's certificate that a receiver is in default, the four day order upon him is of course. *Scott v. Platelet*, 2 Ph. 229.

Where the decision of the right between co-defendants is essential to and necessarily involved in the decision of the plaintiff's right, the decree will be conclusive as between the co-defendants; but, otherwise, the rights of co-defendants *inter se* will not be affected by proceedings which are necessary only for establishing or ascertaining the rights of the plaintiff. *Cottingham v. Shrewsbury (Earl of)*, 15 Law J. Rep. (n.s.) Chanc. 441.

An order had been obtained, on the 7th of December, for leave to amend, with the usual undertaking to amend within three weeks. In consequence of some discussion before the registrar, the three weeks elapsed before the order was drawn up. Notice was then given of a motion for leave to draw up the order of the 7th of December as of a subsequent date, the amendments to be made within one week. An order was made on that motion, and it contained the ordinary undertaking to amend within three weeks. The order was discharged as irregular. *Alcock v. Kempson*, 15 Law J. Rep. (n.s.) Chanc. 10.

An order of the Court, which is known to a party, is not to be treated by him as a nullity, although it may have been irregularly obtained, and he has had no regular service of it, and it has not been duly entered.

A defendant obtained, by consent, an order for further time to answer, in which a longer time was allowed, by mistake, than had been agreed upon. After the day when the further time would have expired if the order had been correctly drawn up, but before the day named in the order, the plaintiff issued an attachment for default of answer. The attachment was discharged for irregularity. *Chuck v. Cremer*, 16 Law J. Rep. (n.s.) Chanc. 92; 2 Ph. 113.

On a motion to dissolve an injunction in an interpleading suit, an order was made directing an inquiry as to the title of the defendant who moved, but with respect to a co-defendant who had not answered and did not appear on the motion, directing an inquiry whether he had made a claim. After the report had been confirmed the order of reference was discharged and the consequential proceedings set aside for irregularity, on the ground that the order should have recited an affidavit of service of the absent defendant, and also that no inquiry as to the title of the defendants should be directed until they had all answered. The inquiry ought to extend to the title of all the defendants. *Masterman v. Lewin*, 2 Ph. 182.

Under a decree made in an administration suit, the bill not praying a sale of the testator's real estate, the Master made his report, finding a very small balance of personal estate in the executor's hands, but not sufficient to pay the costs of the suit. By a decretal order made on the Master's report, a sale was directed of the real estate, under which A became the purchaser, and he was found to be such by the Master's subsequent report, which was afterwards confirmed by an order of the Court, and leave was at the same time given to A to pay the purchase-money into court. That order was served on all necessary parties, and passed, and the purchase-money paid into court. A then presented a petition, praying the discharge of that order, insisting that the Court had no power to make the order for the sale of the real estate, or even if it had, that such power had not been properly exercised by the Court. It appeared that one of the defendants beneficially interested was a minor at the date of the original decree. Petition dismissed, without costs. *Baker v. Sowler*, 16 Law J. Rep. (N.S.) Chanc. 333; 10 Beav. 343.

Petition to rectify alleged error in decree dismissed. *Stewart v. Forbes*, 16 Sim. 433.

The accidental omission of a usual term or direction in a decree or order may be corrected by petition under the 45th Order of April 1828; but not the omission of any term or direction which would only have been introduced under the express judgment of the Court.

The representative of a mortgagor who had obtained a bill for redemption was ordered, on the petition of the mortgagee, to produce the original decree for the purpose of correction.

The lien of a solicitor in the cause does not entitle him to withhold an original order of the Court in which there is an accidental error requiring correction. *Bird v. Heath*, 6 Hare, 236.

An order made on affidavit of service of notice of motion must not depart from the terms of the notice, though it be less extensive, if the party may be prejudiced thereby. *Hutton v. Hepworth*, 6 Hare, 315.

Upon the motion of B, the Court ordered that upon his paying the purchase-money into court, he should be substituted as purchaser in the place of A, and that A should be discharged from his purchase. B having omitted to draw up the order, the plaintiffs in the cause did so, and caused a direction to be inserted for payment of the purchase-money by B within twelve days after service of the order, in which form (after notice to B to attend at the registrar's office) the order was passed. On the motion of B, the Court discharged the order, with costs. *Miller v. Smith*, 6 Hare, 609.

If a defendant, who has been examined by the plaintiff as a witness in the cause, submits to a decree against himself, notwithstanding such examination, it cannot be sustained by other defendants who have not been examined, as an objection to a decree against them. *Smith v. Smith*, 6 Hare, 524.

An order, obtained upon affidavit of service, discharged, on the ground of a misnomer of the plaintiff's solicitor in the notice of motion. *Moody v. Heberder*, 17 Law J. Rep. (N.S.) Chanc. 24.

An order to enrol a decree *nunc pro tunc* ought to be served: and where a decree could not have been

enrolled without an order *nunc pro tunc*, and such an order, although obtained, had not been served, the enrolment was ordered to be vacated. *Woods v. Woods*, 17 Law J. Rep. (N.S.) Chanc. 426.

A plaintiff obtained an order to sue *in forma pauperis*, but, before it was served, the defendant gave a notice to dismiss the bill for want of prosecution. The plaintiff then served the defendant with his order to sue *in forma pauperis*, and filed a replication. The defendant having brought on the motion for the purpose of getting the costs of it,—Held, that he was entitled to such costs, as the order to sue *in forma pauperis* only took effect from the time of service. *Smith v. Pawson*, 17 Law J. Rep. (N.S.) Chanc. 454; 2 De Gex & S. 490.

Orders of course correctly drawn up may be passed without notice to the other side.

An order may be varied in the discretion of the Court, on motion *ex parte*, if the variation will not be less beneficial to all parties than the terms of the original order.

Therefore, where a plaintiff who had obtained an order for leave to amend by striking out the name of a co-plaintiff upon paying the costs of the motion and giving security for the costs already incurred, afterwards obtained leave, on motion *ex parte*, to vary the terms of the order by substituting payment for security, and passed such varied order without notice to the defendants, a motion by the latter to discharge the last-mentioned order was refused, and, under the circumstances, with costs. *Hart v. Tulk*, 18 Law J. Rep. (N.S.) Chanc. 162; 6 Hare, 611.

Where the probate stamp does not cover the amount claimed in a suit, a decree even for accounts and inquiries cannot be obtained by the plaintiff until the proper stamp is affixed. *Howard v. Prince*, 10 Beav. 312.

Order directing preliminary inquiries and production of necessary papers, not superseded by order for inspection of all papers in the defendant's possession. *Whicker v. Hume*, 9 Beav. 418.

By a decree setting aside a purchase by an agent from his principal, possession was directed to be given and a conveyance executed; accounts of the rents and purchase-money to be taken and the balance paid, but no lien to be given:—Held, that the conveyance must be made without waiting for the result of the accounts.

An omission in a decree supplied by petition. *Trevelyan v. Charter*, 9 Beav. 140; see *Turner v. Hodgson*, *Ibid.* 265.

An answer was filed on Saturday, and an order *nisi* to dissolve the injunction obtained the same day. Notice of filing the answer and of the order was not given till Monday. The Court, finding the plaintiff was not prejudiced, refused to discharge the order *nisi*, but made the defendant pay the costs of the application. *Suffield (Lord) v. Bond*, 10 Beav. 331.

A witness deposed to having made a copy of a lost bond, and produced a copy, but omitted to identify it as that which he had made. By the decree, inquiries were directed (among other things) as to the circumstances relating to the bond, and whether any debt remained due thereupon.

Held, first, that it was not fit to insert any direction in the decree that the witness should be

examined before the Master as to the matters included in his first examination, but that a distinct application ought to be made for such an order.

Held, secondly, upon motion subsequently made by the plaintiff to the Court, that the case was a proper one for an order for the witness to be examined *vidé voce* to the same matters as to which he had been before examined, and generally. *Stooke v. Vincent*, 1 De Gex & S. 705.

In a suit, in respect of alleged breaches of trust, and not being merely an administration suit, the bill was filed against all the executors, who were jointly and severally liable. After the cause was at issue, one of the executors became bankrupt:—

Held, that the plaintiff having elected to proceed originally against all the executors, could not at the hearing avail himself of the 32nd General Order of the 26th of August 1841, and elect to take a decree against some only of the defendants; but that the assignees of the bankrupt were necessary parties and must be brought before the Court by supplemental bill. *Fussell v. Elwin*, 18 Law J. Rep. (N.S.) Chanc. 349; 7 Hare, 29.

The Court may proceed with a cause so far as a final order can be made, notwithstanding the absence of an interested party, who is out of the jurisdiction: but where the suit was brought to enforce a charge upon the produce of the estate of an absent party, in the hands of his agents and consignees, in performance of an agreement to which the consignees were parties, the Court refused to direct an account to be taken of the amount of such produce received by the consignees; for, as the absent party would neither be bound by the account of what was due to the plaintiff in respect of the charge on the estate, nor be compelled by the decree for payment of what was so found due to allow, in the accounts of his consignees, the payments to be made by them in pursuance of the decree, the accounts of the receipts of the produce of the estate by the consignees could not be taken for any final purpose.

It is not an objection to a decree for one purpose that it may involve the necessity of taking an account, which it may possibly be necessary to take in another suit for another purpose. *Kirwan v. Daniel*, 7 Hare, 347.

If the decree at the hearing makes no provision for the costs of a trustee, the Court will not entertain any petition in respect of them at the hearing on further directions. *Mains v. Greenway*, 18 Law J. Rep. (N.S.) Chanc. 154; 7 Hare, 391.

Form of order referring answer, when the bill has been amended, and the defendant directed to answer amendments and exceptions at the same time. *Watson v. Life*, 1 Mac. & G. 104; 1 Hall & Tw. 308.

Orders discharged on account of the suppression of material facts. *De Feuchères v. Dawes*, 11 Beav. 46.

On an issue directed at the hearing of a cause, the defendant obtained a verdict, and a motion by the plaintiff for a new trial having been refused, the bill was on further directions dismissed. The plaintiff afterwards gave notice of an appeal motion for a new trial, and also presented a petition of appeal from the final order of dismissal; but on the appeal coming on to be heard first, the Court refused to hear it separately, being, as matters then stood, a motion in a dismissed suit.

On the two proceedings afterwards coming on to be heard together, it appearing that the plaintiff's title to equitable relief depended on a legal right, and that that right depended more on questions of legal presumption than on any disputed fact, the Court not being perfectly satisfied with the result of the trial, discharged both the orders appealed from, and made an order retaining the bill for a twelvemonth, with liberty to the plaintiff to bring an action, although the original decree directing the issue was not appealed from.

When a bill is dismissed on the merits, the insertion of a clause that the dismissal shall be without prejudice to any question but that specifically put in issue by the pleadings is superfluous; and the Court has no power to interfere with the effect which such a decree may have, as a matter of evidence, in any future proceeding in which it might, without such reservation, be legitimately used as evidence. *Corporation of Rochester v. Lee*, 1 Mac. & G. 467.

Mode of proceeding where a difficulty arose in drawing up a decree made on appeal, in consequence of there being no proper affidavit of service of the setting down of the appeal on some of the respondents. *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 244.

By a decree made in a cause, Isabel the wife of James M'Hardy, and Henry Buckle, as the administrator of C C, were declared to be entitled in equal moieties to the money to arise from a freehold messuage and premises in England, which had been conveyed to trustees for sale. Before the decree was drawn up, James M'Hardy presented a petition to the Court, stating that he and his wife were born in Scotland, and were domiciled there; that by the law of Scotland marriage operated as an assignment of the wife's personal estate to the husband; that he was entitled to recover the whole without her concurrence, and without her being entitled to any settlement; and it prayed that the freehold house might be conveyed to him and Henry Buckle, and their heirs:—Held, that the petitioner being entitled to the produce of the real estate might elect and take the estate itself, but the fact of the parties electing must be recited in the decree. *Hitchcock v. Clendinen*, 19 Law J. Rep. (N.S.) Chanc. 238; 12 Beav. 534.

In an order directing an issue with liberty for the parties to read at the trial evidence taken *vidé voce* before the Master, it is proper to insert "saving all just exceptions." *Turner v. Maule*, 2 De Gex & S. 209.

To obtain the successive orders (in a matter, and not in a cause) upon a person to pay a sum of money to a party, personal service of the preceding order, and a demand and refusal must be proved; but where the party avoids service, the Court will direct substituted service, and dispense with the necessity of a demand and refusal. *In re Mourilyan*, 13 Beav. 84.

The Court gave some of the defendants the option of taking an issue on a question of fact arising in the cause, and dismissed the bill against another defendant. The option not being declared owing to the death of one of the defendants between the hearing and the judgment,—on the application of the defendant who was ordered to be dismissed, the

Court directed a separate decree to be drawn up as to that defendant. *Belsham v. Perceval*, 8 Hare, 157.

(Y) ACCOUNTS.

A, by will, gave stock equally to B and C. B and C, by their respective wills, gave their shares of the stock among their children, and appointed executors. The children of B and some of the children of C filed a bill against the executor of A to recover the fund, making the executors of B and C and the rest of the children of C parties:—Held, that although the suit was multifarious, after a hearing, there being no misjoinder, the Court might make a decree for accounts and inquiries preparatory to the distribution of the fund. *Powell v. Cockerell*, 4 Hare, 557.

On a bill to set aside a conveyance by a person claiming the fee simple, on the ground of lunacy and fraud, the lunacy was established, but the plaintiff turned out to be entitled only to a life estate in the property:—Held, that he and his personal representative after his death were entitled to an account of the rents and profits during the plaintiff's life as against the parties in possession under the conveyance.

On revivor by a party who was heir-at-law and administrator of a lunatic in a suit to set aside a conveyance made by the lunatic of his estate, it was held that the plaintiff had no title as heir-at-law, but that as administrator he was entitled to an account of the rents and profits during the lunatic's life. *Price v. Berrington*, 7 Hare, 394.

Where the Master had determined that warrants should be served upon those parties only who were entitled in possession, and accounts were taken in the absence of a party who was, at the commencement, entitled in remainder, but afterwards became entitled in possession, but who never appealed from the determination of the Master, nor ever claimed a right to attend him, a petition presented by him to the effect that the Master's report might be discharged, and that the accounts might be taken over again, was dismissed, with costs, reversing the decision of the Court below. *Morison v. Morison*, 17 Law J. Rep. (n.s.) Chanc. 65.

Where an entry in an administrator's account which had been settled was shewn to be fraudulently made, the whole account was opened, notwithstanding the lapse of forty years since the death of the intestate, seventeen since the settlement of the account, and more than two since the discovery of the entry complained against.

Special directions inserted in the decree for the protection of the accounting party. *Alfrey v. Alfrey*, 1 Mac. & G. 87; 1 Hall & Tw. 179.

After decree for an account of personal estate, and, in case of deficiency of the personal estate to pay debts, for the sale of descended real estate, it was on further directions ordered, that on the proceeds of the personal and real estates proving insufficient to pay the debts, the heir-at-law of the intestate should account for the rents and profits received by him of the descended real estate. *Stratford v. Ritson*, 16 Law J. Rep. (n.s.) Chanc. 176; 10 Beav. 25.

In a case where the accounting party was the solicitor or agent of the party sought to be charged, and it appeared that an item of 600*l.* was inserted for professional charges in the account, which it

was sought to treat as settled, no bill of costs having been delivered, and the 600*l.* exceeding by 75*l.* the sum really due:—Held, that this was not such an error as could be set right by a decree to surcharge and falsify, but that the account must be dealt with as an open account. *Coleman v. Mellersh*, 2 Mac. & G. 309.

If accounts are directed to be kept, with regard to future events (which subsequently happen), on a case not raised by the pleadings, and distinct from the points to be decided by the decree, it is in the discretion of the Court to hear a motion for such reference before, or to postpone it until, the hearing of the cause. Therefore, where lessees of premises filed a bill for an injunction to restrain the lessors from committing an alleged breach of their covenant, and the Court directed the plaintiffs first to establish their rights at law, the lessors undertaking to keep certain accounts, and to pay what this Court might award for damages to the plaintiffs, it was held, on motion before the hearing by the plaintiffs, who had succeeded at law, but who, pending the proceedings, had parted with their interest in the subject-matter of the litigation, that they were entitled to an order of reference to take the accounts directed, without bringing the cause to a hearing or filing a supplemental bill, the defendants not assigning any reasons for postponing the motion until the hearing, and the justice of the case not requiring a supplemental bill.

The motion of the plaintiffs respecting their costs of the proceedings at law, was ordered to stand over, without prejudice to the question of the costs of the motion, until the report had been made, upon the ground that the costs of such proceedings might be affected by the result of the reference. *Rigby v. the Great Western Rail. Co.*, 19 Law J. Rep. (n.s.) Chanc. 470.

(Z) REFERENCES.

(a) Generally and Proceedings.

Orders of the 3rd of June 1850; 19 Law J. Rep. (n.s.) Chanc. xiii.; 2 Hall & Tw. xlix.; 1 Mac. & G. lvii.; 12 Beav. xiv.

Rotation of Masters after August the 10th, 1847; Order of July 28, 1847; 17 Law J. Rep. (n.s.) Chanc. 110.

In a suit for the administration and distribution of funds under a will, on a motion for the reference, on preliminary inquiries, as to proper parties to the suit, incumbancers of shares of parties interested, and taking of accounts, &c., with liberty for the Master to state special circumstances, the Court granted a reference only as to parties. *Greedy v. Lavender*, 15 Law J. Rep. (n.s.) Chanc. 217.

In a common injunction cause the Court will, on an *ex parte* application of the plaintiff, supported by an affidavit of facts, and stating that the plaintiff will be prejudiced unless the exceptions are immediately referred to the Master, and that the application is made *bond fide*, and not for the purpose of delay, order exceptions to an answer to be referred *instantly*, without waiting for the expiration of the eight days mentioned in the 25th article of the 16th of the Orders of the 8th of May 1845. *Muggeridge v. Sloman*, 15 Law J. Rep. (n.s.) Chanc. 152; 9 Beav. 314.

After service of an order referring exceptions to

the Master in rotation for insufficiency, it was discovered that the exceptions ought to have been referred to the Master to whom the cause had been referred, and that the word "amended" had been omitted in the order, upon which the plaintiff's solicitor (after the lapse of the fourteen days allowed for referring exceptions for insufficiency,) altered the order, by procuring the word "amended" to be added thereto, and the name of one Master to be inserted in the stead of another:—Held, that the order of reference was irregular, and must be discharged. *Wooll v. Townley*, 15 Law J. Rep. (N.S.) Chanc. 143; 9 Beav. 41.

Where there has been a previous reference to the Master in a cause, all subsequent references should be made to the same Master, and not to the Master in rotation. If, however, the order erroneously obtained was the consequence of a mere omission, and not the wilful or perverse conduct of the plaintiff, the Court will direct the reference to the proper Master, although the order to proceed was not obtained within the proper time. *Tuck v. Rayment*, 15 Law J. Rep. (N.S.) Chanc. 103; 9 Beav. 35.

On the dismissal of a bill with costs, the Court referred it to the Master to inquire and state whether it was necessary or proper that several defendants, consisting of trustees and their *cestuis que trust*, appearing by the same solicitor, and having no conflicting interests, should have filed two separate answers.

Reference to the Master, under the 122nd Order of May 1845, to distinguish the parts of a cross bill which were of unnecessary length, and to ascertain the costs thereby occasioned. *Woods v. Woods*, 5 Hare, 229.

Where, under the powers of a private act of parliament, a party presented his petition to the Court, seeking a reference to the Master to inquire who was a party entitled, one such reference having been made, the Court refused, with costs, a second similar petition by another party.

Held, also, that a direction for production of papers by parties, and their examination on interrogatories, on a petition like the present, was contrary to practice. *In re London Dock Co.*, 17 Law J. Rep. (N.S.) Chanc. 111; 11 Beav. 78.

A reference of exceptions *instantly* in an injunction case on an *ex parte* motion is regular. *Teesdale v. Swindell*, 9 Beav. 491.

Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the Court does not usually insert in the order declarations as to the interests which the parties are to take. *Williams v. Teale*, 6 Hare, 254.

A reference to the Master to inquire which of two suits is most for the benefit of infants has not the effect of course of staying proceedings in both suits during reference. *Westby v. Westby*, 16 Law J. Rep. (N.S.) Chanc. 483; 1 De Gex & S. 410.

Reference to a Master other than the one certified to be in rotation irregular. *Suffield (Lord) v. Bond*, 10 Beav. 146.

The Master overruled the second exception and allowed the others. After a further answer, the plaintiff obtained an order of course, referring back the answer and other exceptions. It was discharged, with costs. *Emmott v. Emmott*, 12 Beav. 557.

An omission to give notice of filing exceptions on the same day does not render a subsequent order of reference irregular, but the omission is matter of compensation in time, upon a proper application.

On the 6th of March the plaintiff took exceptions, but did not serve the notice until the next day, and obtained an order to refer on the 15th. A motion to discharge the order was refused. *Lowe v. Williams*, 12 Beav. 482.

If one of the defendants is out of the jurisdiction, and it is objected by the answers of others that persons not parties to the suit claim an interest in the subject-matter, the Court will not order a reference for preliminary inquiries and accounts, under the 5th General Order of the 9th of May 1839. *Darbishire v. Home*, 19 Law J. Rep. (N.S.) Chanc. 458.

A vendor by public auction of shares in an incorporated railway company, at the request of the purchaser (who had paid the purchase-money) executed a transfer to a third party who did not accept it, or register himself as a shareholder. On a bill filed by the vendor against the purchaser for a specific performance, the Court directed the usual reference as to title. *Shaw v. Fisher*, 2 De Gex & S. 11.

In directing a reference under a private act of parliament, the Court will make the same provision for the production of deeds and the examination of parties and witnesses, as in the case of a reference in a suit. *Hyde v. Edwards*, 1 Mac. & G. 410; 1 Hall & Tw. 552.

(b) Report.

The Master of Reports and Entries and the Clerk of Reports, instead of the fees receivable for all copies of orders, exceptions, petitions, reports, or other documents, are to receive for all such copies bespoke after the 4th day of March instant, 4d. for every folio of ninety words, and no more. *Order of March 3, 1847*; 16 Law J. Rep. (N.S.) Chanc. 295; 9 Beav. 11.

A party who objects to the draft of the Master's report, on the ground that it is not warranted by the evidence, is not bound to produce office copies of the depositions; but should notify to the Master what part of the evidence he relies upon. *Wilson v. Wilson*, 15 Sim. 487.

The Master comprised two subjects in his report, one of which required confirmation by orders *nisi* and absolute, and the other by petition. A motion to confirm the report as to part was refused, as there should have been separate reports. *Ramsdale v. Ramsdale*, 10 Beav. 568.

In a creditors' suit, an application to confirm absolute the Master's report of the best purchaser, made by consent before the expiration of the time limited by the order *nisi*, refused. *Vernon v. Thellusson*, 10 Beav. 452.

It is informal for the Master to state in his report that he founds his opinion as to a vendor's title on the opinion of a conveyancer. *In re Collard*, 10 Beav. 334.

After a report was confirmed by orders *nisi* and absolute, it was varied in a part relating to the maintenance of infants. *Ramsdale v. Ramsdale*, 11 Beav. 220.

Where a party, having the charge and conduct of the proceedings, under an order of reference before the Master, is unsuccessful by reason of the Master's

report being unfavourable to his claim, he will be compelled to file the report on the application of an interested party for whose protection and assistance the report is necessary to be filed. *In re London Dock Company*, 17 Law J. Rep. (N.S.) Chanc. 111; 11 Beav. 78.

One notice of motion to confirm the Master's report of best purchaser, and to pay the purchase-money into court, is irregular. *Duffield v. Elwes*, 13 Beav. 85.

(AA) EXCEPTIONS.

(a) *In general.*

An order for leave to file exceptions in the form of *nunc pro tunc* will not be made even by consent; but a special order may be made for filing them, notwithstanding the time limited has expired. *Biddulph v. Lord Camoys*, 9 Beav. 155.

Exceptions for insufficiency overruled where they varied in a material particular from the form of the interrogatory, as where the one was in the present and the other in the past tense. *Duke of Brunswick v. Duke of Cambridge*, 12 Beav. 279.

(b) *Answers.*

The Court, in common injunction causes, on the *ex parte* application of the plaintiff, will, in proper cases, direct exceptions taken to the answer for insufficiency, to be referred *instantly*, notwithstanding the 25th article of the 16th Order of May 1845; but the application ought to be supported by an affidavit, stating that the plaintiff would be prejudiced, unless the exceptions were referred *instantly*, and that the application was not made with a view to delay. *Muggeridge v. Slowman*, 15 Law J. Rep. (N.S.) Chanc. 279; *s.p. Jones v. Roberts*, 15 Law J. Rep. (N.S.) Chanc. 434.

Application to take exceptions to answer off the file, on the ground of their having been filed on the 10th of December, the answer having been put in on the 15th of August preceding, refused, although the exceptions were held to be filed one day too late, and the defendant was to elect, within the first four days of the next term, whether he would submit to the exceptions. *Whitmore v. Sloane*, 15 Law J. Rep. (N.S.) Chanc. 104; 9 Beav. 1.

Exceptions to answer will not be ordered to be taken off the file, because the order of reference is not served in due time. But if the plaintiff serves the order after the time, and obtains a warrant, the defendant is entitled to apply to the Court for his costs. *Atlee v. Gibson*, 1 De Gex & S. 162.

On the 20th of May the defendant filed a plea as to part of the bill, and an answer as to the remainder. On the 29th of June the plea was, after argument, overruled. On the 18th of July the plaintiff took exceptions to the answer for insufficiency, and on the 29th, obtained an order of course, at the Rolls, for referring them to the Master. A motion by the defendant to take the exceptions off the file, on the ground that they were not filed within six weeks after the answer was filed, and to discharge the order of the Master of the Rolls, was refused, with costs.

A Vice Chancellor has no power to discharge an order of course made at the Rolls.

Where a plea and answer are filed to a bill, and the plea is argued and overruled, the time limited

by the 16th Order of May 1845, article 22, for taking exceptions for insufficiency, runs from the overruling of the plea, and not from the time of filing the plea and answer.

Semble—Where, under an order of course, made at the Rolls, exceptions for insufficiency are referred to the Master, a Vice Chancellor has the power of ordering the exceptions to be taken off the file: *Esdaile v. Molineux*, 16 Law J. Rep. (N.S.) Chanc. 68; 2 Coll. C.C. 641.

Upon exceptions for insufficiency to the answer of a party who had been attorney in the transactions impeached, and who refused discovery on the ground of privilege, the Court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after, for the question of sufficiency must be determined as of a time anterior to the exceptions. *Chant v. Brown*, 7 Hare, 79.

Defendants filed a demurrer and answer, and, the demurrer being overruled, obtained time to answer. They filed a further answer: on special application leave was given to the plaintiff to file exceptions thereto, although he had not filed any to the original answer. *Attorney General v. London*, 12 Beav. 247.

An exception to an answer held to have been properly allowed, although it set out inaccurately the interrogatory, the answer to which was the subject of exception, there being besides the inaccurate transcript of the interrogatory, a reference to it by its number. *Semble*—that the reference by number alone would be insufficient. *Esdaile v. Molyneux*, 1 De Gex & S. 218.

(c) *Reports and Certificates.*

[*Stocken v. Dawson*, 2 Ph. 141.]

The Master, in his report, stated that he had admitted certain evidence, and that he thereupon found certain facts. A party objecting to the admission of the evidence, and to the conclusion thereupon, cannot open that objection as appearing on the face of the report without having taken exceptions. *East v. East*, 5 Hare, 347.

The defendants demurred to a supplemental bill containing statements and charges, which, if answered, would subject him to penalties. The demurrer was allowed; and under leave given, the plaintiff amended the bill by striking out the interrogatories, and leaving the statements and charges upon which they were made. The defendant took exceptions to the amended bill for impertinence, but these were overruled by the Master:—Held, upon exceptions to the Master's report, that the statements and charges were not impertinent, and that the plaintiff, though not entitled to discovery from the defendant, was not precluded from proving the charges.

Held, also, in answering the interrogatory about books and papers, that the defendant could except those which might subject him to penalties: and the exceptions were overruled. *Mitchell v. Koecker*, 18 Law J. Rep. (N.S.) Chanc. 294; 11 Beav. 380; 12 Beav. 44.

Where the Master has expunged matter in a state of facts for impertinence, he should nevertheless issue his certificate thereupon, in order that the opinion of the Court may be taken if requisite.

To such certificate exceptions may be taken.

Semble—that an exception to the report for that the Master has found the said state of facts impertinent from the word &c. to the word &c., whereas the Master ought not to have so found, but ought to have found that the same was not impertinent, is sustained if any part of the passage is pertinent.

Where there is a doubt about a passage being impertinent, it should be retained and considered on the question of costs.

Where one of the principal facts relied on by the defendants, contending on a reference before the Master that a suit was not for the benefit of infant plaintiffs, was that the assets were too small to justify the proceeding,—Held, that as this fact could not be properly determined by the Court on exceptions to the report finding in favour of the prosecution of the suit, such exceptions must be overruled, reserving the costs and retaining the deposit.

But on the plaintiffs presenting a petition to confirm the report, the Court, on the defendants undertaking to offer no obstacle to the hearing, directed the petition to stand over till the hearing.

Quære, as to the proper mode of appealing from the Master's decision in such a case. *Raven v. Kerl*, 1 De Gex & S. 236.

The Master's report finding the plaintiff's bill scandalous and impertinent was, upon exceptions taken both by the plaintiff and the defendant, varied by the Court:—Held, that the 41st General Order of May 1845 did not apply to this case, and an order was made directing the Record and Writ Clerk to expunge those parts of the plaintiff's bill which the Court considered scandalous and impertinent. *Jodrell v. Jodrell*, 19 Law J. Rep. (N.S.) Chanc. 265; 12 Beav. 216.

After a Master's report had been absolutely confirmed, a petition was presented for leave to except to it. The petition was heard with the cause for further directions, and the Court, without directing a reference back to the Master, made an order in accordance with the prayer of the petition. *Jowett v. Board*, 16 Sim. 352.

(BB) SALES BY THE COURT.

The Court declined to open biddings upon an advance under 10l. per cent. *Holroyd v. Wyatt*, 2 Coll. C.C. 537.

If at a sale by auction under the order of the Court, a purchaser sell his purchase for an additional sum beyond his purchase-money, the Court will order the property to be re-sold; and, *semble*, if upon such re-sale, the property does not produce the improved price agreed to be given by the sub-purchaser, he will be responsible to the Court for the difference. *Holroyd v. Wyatt*, 2 Coll. C.C. 327.

A bidder at a sale under the decree of the Court, who is not a party to the cause nor interested in the estate which is the subject of the sale, has no right to apply to the Court to set aside a sale to another bidder on the ground of irregularity, in that the latter, though reported the purchaser, was in fact not the highest bidder.

Whether he may apply to be declared the purchaser in place of the bidder reported to be the best purchaser—*quære*. *Hughes v. Lipscombe*, 6 Hare, 142.

A purchaser under the Court obtained an order *nisi* to confirm the Master's report, but delayed to

confirm it absolutely. Plaintiffs moved, on notice to the purchaser, to confirm the same absolutely:—Held, that the plaintiffs might do so by motion of course. *Robertson v. Skelton*, 16 Law J. Rep. (N.S.) Chanc. 215; 10 Beav. 197.

Upon a sale under the Court, an order on the purchaser to pay his purchase-money into court, obtained before the title has been accepted, or the Master's report made in its favour, is irregular, and will be discharged, with costs. *Rutter v. Marriott*, 10 Beav. 33.

There is no invariable rule as to the sum to be paid into court on obtaining an order opening biddings made at a sale directed by the Court; but where a sum of 27,000l. was the last bidding made at a sale, a sum of 3,400l. was ordered to be paid into court by the applicant on his obtaining an order to open the biddings. *Manners v. Furze*, 17 Law J. Rep. (N.S.) Chanc. 485.

Where in a suit for performance of the trusts of a will, the decree directed the Master to inquire what estates passed by the will, and that such as he should find to have passed should be sold with his approbation, and the Master proceeded to sell before having made his report, it was held that the purchaser could not object to the title on this ground. *Dykes v. Taylor*, 16 Sim. 563.

(CC) PAYMENT INTO COURT.

[See INFANT, Guardian.]

[*Bartlett v. Bartlett*, 4 Hare, 631.]

The Court will not order an executor to pay into court money which he states by his answer to have retained in satisfaction of a debt due to him from the testator. *Middleton v. Poole*, 2 Coll. C.C. 246.

Unless all persons interested in a fund are before the Court, an order for payment of it into court will not be made on an undertaking by the plaintiff to make them parties, except perhaps in cases of administration of creditors' suits. Whether such an order would be made in those suits—*quære*. *Marriage v. the Royal Exchange Assurance Co.*, 18 Law J. Rep. (N.S.) Chanc. 216.

Before the General Orders of June 1848 money might be paid into the name of the Accountant General, under the 10 & 11 Vict. c. 96, without any order of Court. *In re Biggs*, 11 Beav. 27.

On a motion to pay assets of a testator into court, the Court declined to direct the payment of the income to the tenant for life to be continued, unless the executor took upon himself the responsibility of the payment. *Abby v. Gilford*, 11 Beav. 28.

A party having a contingent interest in a trust fund may, in a proper case, have it brought into court for his protection; but he must shew sufficient ground for it.

Such a motion was refused, on the ground that there was no allegation of danger, and that the fund might, if necessary, be sufficiently protected by a *distringas*. *Ross v. Ross*, 12 Beav. 89.

After the hearing and before the cause came on for further directions, the plaintiff moved, on admissions by the defendant in his answer, for payment of a sum of money into court:—Held, that such admissions were not alone sufficient to induce the Court to make the order, and the motion was refused. *Binns v. Parr*, 19 Law J. Rep. (N.S.) Chanc. 401; 7 Hare, 288.

Where a fund is carried over to a particular separate account it is released from the general questions in the cause, and becomes marked as being subject only to the questions arising upon the particular matter referred to in the heading of the account. *In re Jervoise*, 12 Beav. 209.

Though the Court will stay the payment of a fund out of court, to give a stranger an opportunity of enforcing his right against it, yet it will not for the same purpose order into court a sum directed to be paid by one party to another.

By the decree, an arrear of dividends on stock was ordered to be paid to the plaintiff by her trustee. Shortly afterwards such arrears were, under the 1 & 2 Vict. c. 110. s. 14, charged by a common-law Judge with the payment of a sum of money to A. B. A petition was presented by A. B., that the trustee might pay the amount into court and for a stop order thereon. The petition was dismissed, with costs. *Newton v. Askew*, 11 Beav. 43.

(DD) PAYMENT OUT OF COURT.

A filed a petition in the Insolvent Court for the purpose of obtaining the benefit of the act. Shortly afterwards an order was made in a suit for payment of a sum to her out of court. After the Insolvent Court had made a vesting order, but before any adjudication respecting her, A died; after her death a creditors' assignee was appointed:—Held, that the assignee and not the administrator of A was entitled to the money paid out of court. *Bruce v. Charlton*, 15 Sim. 562.

A defendant in the cause, to whose separate account a sum of money has been carried, may present a petition for payment out of court by a solicitor who was not her solicitor in the cause, without obtaining an order to change her solicitor. *Waddilove v. Taylor*, 17 Law J. Rep. (n.s.) Chanc. 384.

A petition was presented by the representatives of one of the next-of-kin of an intestate, praying for the transfer of stock which had been carried to the separate account of a party (since deceased) who was entitled for her life, and of the intestate's next-of-kin, who would become entitled at her decease. The petitioner's claim was deduced under several probates and letters of administration taken out in the Consistorial Court of London; and she was unable, under those circumstances, to procure prerogative probate. An order was made for the transfer of the stock, without requiring probate from the Prerogative Court of the Archbishop of Canterbury. *Druce v. Denison*, 17 Law J. Rep. (n.s.) Chanc. 149; 15 Sim. 356; reversing s.c. 16 Law J. Rep. (n.s.) Chanc. 443.

Where very small sums are standing to a separate account in court, and the title is simple, the Court will order payment on petition without attendance in court. *Petty v. Petty*, 12 Beav. 170.

A general authority from a party out of the jurisdiction to his solicitors to take any necessary proceedings for obtaining payment of his share of the fund in the suit out of court,—Held, on petition, not to authorize payment of it to the solicitors. *Waddilove v. Taylor*, 18 Law J. Rep. (n.s.) Chanc. 406.

A married woman having a general power of

appointment over a reversionary trust fund, subject to a previous life estate in another person, appointed it by way of mortgage, with a power of sale, under which it was afterwards sold. Her husband became bankrupt, and after the determination of the life estate, the trustees paid the fund into court, under the 10 & 11 Vict. c. 96. The purchasers thereupon presented a petition for the transfer of the fund to them. The petition was only served on the trustees. The Court made the order, subject to a direction that it should not be drawn up for a fortnight, and that the husband's assignees should be served with notice that the fund would be transferred, if no objection were made within that period. *Ex parte Stutely*, 1 De Gex & S. 703.

The purchase-money of a leasehold interest purchased by a railway company was paid into court to an account "*ex parte* the company, the account of the two lessees," and the dividends were ordered to be paid to one lessee, and the executrix of the other. The executrix married:—Held, that on a petition for payment of the dividends to the husband and the other lessee it was unnecessary to serve the company, and that the petitioners having served them must pay their costs. *Ex parte Hordern*, in re the *Grand Junction Rail. Co.'s Acts*, 2 De Gex & S. 263.

Where a fund stands to the general credit of a cause it will not be paid out in the absence of the legal personal representatives. But if after decree, and where the fund is clear, the executor dies, a supplemental bill is not always necessary, for the fund may be distributed on petition, upon the appearance of the new personal representatives. *Parsons v. Groome*, 12 Beav. 180.

Dividends of investments of purchase-money paid into court by a railway company for lands belonging to the Archbishop of Canterbury ordered to be paid to the archbishop for the time being. *Ex parte Archbishop of Canterbury*, in re the *East Lincolnshire Rail. Co.'s Acts*, 2 De Gex & S. 365.

(EE) SETTING DOWN AND HEARING CAUSE.

Causes to be set down by the registrars upon production of a certificate by the proper officer that they are in a fit state to be set down for hearing, without any fiat, order, or direction from the Lord Chancellor.

Causes for further directions, or on the equity reserved, and pleas, demurrers, exceptions, and objections for want of parties, to be set down for hearing on orders drawn up on petition to the Lord Chancellor without any fiat or direction. *Order of February* 23, 1850; 19 Law J. Rep. (n.s.) Chanc. i.; 1 Mac. & G. xii.; 1 Hall & Tw. x.

A bill had been dismissed in the court below, and on appeal the Lord Chancellor directed the cause to stand over for a year, in order that a question of usury might be tried in a court of common law. After the trial (at which the deed in question was found to be usurious) the cause was set down before the Lord Chancellor:—Held, that it ought to have been set down before the Vice Chancellor to whose court it belonged. *Flight v. Marriott*, 17 Law J. Rep. (n.s.) Chanc. 449.

In a suit for the distribution of a trust fund, one of the plaintiffs, a married woman, was entitled for

her separate use to a share in the property; her husband, who was made a defendant, not having been heard of since 1843, an application was made to have the cause set down for hearing notwithstanding the husband had not appeared. Upon an objection raised by the registrar to the jurisdiction of the Vice Chancellor, the Court refused to make the order. *Russell v. Lucy*, 18 Law J. Rep. (N.S.) Chanc. 464.

Where a bill has been retained at the hearing, with liberty to plaintiff to bring an action, he may on having the verdict in his favour obtain an order for setting down the cause on further directions, or on the equity reserved, though the time for moving for a new trial has not arrived. *Rodgers v. Nowill*, 6 Hare, 338.

A bill was filed by a legatee claiming several legacies under the will, against the executrix and the other legatees, and stating that a legatee named as a defendant was out of the jurisdiction and could not be found. Upon motion, supported by affidavits that the absent legatee could not be found to be served with process, leave was given to file a replication against the defendants who had appeared and answered; and afterwards leave was obtained to set down the cause for hearing against the same defendants. The absent legatee, who had a possible interest in only one of the legacies claimed by the plaintiff, was not proved at the hearing to be out of the jurisdiction; and the executrix took a preliminary objection that the hearing could not be proceeded with under the circumstances. The Court proceeded to dispose of the questions as to those legacies in which the absent legatee was not interested, and reserved the questions as to those legacies in which he was suggested to have an interest, directing the latter legacies to be brought into court, and referring it to the Master to inquire whether the absent defendant was out of the jurisdiction. *Mores v. Mores*, 17 Law J. Rep. (N.S.) Chanc. 311; 6 Hare, 125.

Suit by one *cestui que trust* against the trustees and some of the other parties interested, to restore a fund held in trust for a class of persons:—Held, that there must be proof at the hearing that all the persons constituting the class were before the Court. *Phillipson v. Gatty*, 17 Law J. Rep. (N.S.) Chanc. 241; 6 Hare, 26; 2 Hall & Tw. 459.

(FF) ISSUE AND CASE SENT TO LAW.

[See (X) Orders and Decrees.]

As to directing issue, *Butlin v. Masters*, 2 Ph. 290.

In a creditors' suit, plaintiff did not establish his debt at the hearing; but the Court retained the bill with liberty to bring an action. The plaintiff produced other evidence and recovered in the action. Decree made for payment of the debt and costs in equity, but no costs given for the proceedings at law. *Gregon v. Booth*, 5 Hare, 536.

On a motion on behalf of the plaintiff, for an issue *devisavit vel non*, in a suit instituted by him, praying the delivery up of a deed of settlement to be cancelled, and that an issue might be directed as to the will of the alleged testator, the Court refused the application, the defendant having stated, by her answer, that she claimed the estates absolutely for

her own use, and that the plaintiff had no title thereto, even if his alleged title, as heir-at-law of the testator, were fully established, but of which she stated her ignorance. The Court has power, in cases like the present, to grant an issue *devisavit vel non*, by way of interlocutory proceeding, but it will only be done after great care has been bestowed on the case, and on facts justifying the order. *Lancashire v. Lancashire*, 15 Law J. Rep. (N.S.) Chanc. 293; 9 Beav. 259.

If an issue is directed, an application for a new trial must be to the Court of Chancery, when all proceedings at law will be examined; but if liberty is given to bring an action, the new trial must be moved for in the court of law, and the Court of Chancery will only look to the result of the action. In the latter case, if there has been a miscarriage at law, relief cannot be obtained on the case coming on upon the equity reserved, without petition. *Hope v. Hope*, 10 Beav. 581.

A bill was filed to set aside certain securities given to a banking firm, upon the ground that they were obtained by fraud and concealment. The transaction took place between the plaintiff and a late partner in the banking-house, who had since died. Issues were directed to try the question of fraud or concealment; but an order of the Court below, directing that the plaintiff and the defendants might be examined as witnesses, was reversed; it appearing that such a direction would necessarily give the plaintiff an advantage over the defendants who were not parties to the original transaction.

The former partner, who had managed the transaction, had ceased to be a member of the banking firm and had since become bankrupt, and had been made a defendant as the executor of another partner:—Held, that his answer was not admissible as evidence against the other defendants, the continuing partners.

Where money has been paid to one of the parties to the suit, under a decree which is afterwards reversed and the money ordered to be repaid, interest on the money will not be payable unless specially ordered by the Court. *Parker v. Morrell*, 17 Law J. Rep. (N.S.) Chanc. 226; 2 Ph. 453.

The Court relieved a party from undertaking to make an admission upon a trial at law, the law on the point having since the undertaking been placed in a state of uncertainty by reason of the conflicting decisions of different Courts. *Cocks v. Purday*, 12 Beav. 451.

On the hearing, the Court expressed an opinion that the case was one which was proper for an issue, but at the request and with the consent of all parties undertook to decide the cause:—Held, that the parties had, by such consent, precluded themselves on appeal from asking for an issue, or a review of the decree of the Court below, if the question raised was one which, according to the course of the Court, ought, in the first instance, to have been sent to a jury; but the Court permitted the appellant to shew, if he could, that the case was so clear upon the proceedings that the Court might decide it without directing an issue. *Stewart v. Forbes*, 19 Law J. Rep. (N.S.) Chanc. 133; 1 Mac. & G. 137; 1 Hall & Tw. 461.

Where a matter of fact has been once litigated upon an issue directed by the Court, and the verdict

is the result of a fair trial, and is in affirmation of what by the Court directing the issue is thought to be the truth, and the unsuccessful party has not been taken by surprise, and there is no substantial ground for believing that any mistake or accident has occurred, or that on a second trial other evidence of a weighty nature bearing against the existing conclusion can and will be produced, a new trial will not be granted.

It is within the ordinary practice of the Court of Chancery to make a decree conclusively affecting the freehold and inheritance of land upon one investigation of disputed facts, as well where there must be a jury, as where it is in the discretion of the Court to dispense with a jury, and although there has been no consent or acquiescence by the unsuccessful party.

In an establishing suit and verdict in favour of the plaintiff, the heir is not entitled to more favour than a devisee, unless in the sense that the burthen of proof is in that case thrown upon the plaintiff. *Waters v. Waters*, 2 De Gex & S. 591.

Where, on the trial of an issue, the evidence of a material witness, being uncorroborated and being in other respects unsatisfactory, has been discredited by the Judge, and the jury having given a verdict against the party producing the witness, the Court, upon being satisfied by affidavits filed since the trial, that the evidence of the witness may be substantially corroborated, will grant a new trial. *Shields v. Boucher*, 1 De Gex & S. 40.

There is no absolute rule in a court of equity requiring that Court, as of course, to grant a second trial in an issue of *devisavit vel non*, when the first trial has terminated against the heir-at-law, if the Judge in equity is satisfied that no new light can be thrown on the subject by a further investigation.

Though there may be an outstanding legal estate, which compels the heir-at-law to come into equity, he cannot, on that account, claim a right to have the issue tried a second time, if the Court, in the exercise of its discretion, should deem the first verdict satisfactory.

In every such issue the Court of Equity requires that all the attesting witnesses to a will shall, if it is possible to procure their attendance, be examined.

Circumstances under which the Court of Equity, in the exercise of its discretion, was held properly to have refused a new trial. *McGregor v. Topham*, 3 H.L. Cas. 132.

The Court can, on demurrer, send a case for the opinion of a court of law. *Spooner v. Payne*, 2 De Gex & S. 439.

A testator, who was the subject of a commission of lunacy at the time of making his will and up to his death, being seised of large real estates, made his will, whereby, after giving certain benefits to his daughter and heiress-at-law, he declared, that if she or her husband, or any person on their or either of their behalf, should dispute his will, or if any proceedings should be taken by any person whomsoever, whereby his daughter or her husband might attain a larger interest in his estates than that given by his will, and she and her husband should not disavow or resist such proceedings, then he revoked the benefits thereby given to her. The daughter was married at the date of the will, and on her marriage, articles were executed, by which the hus-

band covenanted with A B, a trustee, to settle her present and future property upon trusts, for the benefit of himself, his wife and their issue. There was no issue of their marriage. In a suit by the trustee of the will, to establish it, the evidence in the cause, on the part of the plaintiffs, went to prove the competency of the testator, and there was no evidence to the contrary; and the heiress-at-law did not ask an issue:—Held, that A B had a sufficient *prima facie* title as trustee for the unborn issue; and the Court directed an issue *devisavit vel non*, the plaintiffs in equity to be plaintiffs at law, and A B to be the defendant at law. *Cooke v. Turner*; *Cook v. Cholmondeley*, 19 Law J. Rep. (N.S.) Chanc. 81; 2 Mac. & G. 18; 2 Hall & Tw. 162: affirming s. c. 15 Law J. Rep. (N.S.) Chanc. 487; 15 Sim. 611.

(GG) RECEIVER.

[*Bowman v. Bell*, 5 Law J. Dig. 641; 14 Sim. 392.]

The plaintiff, claiming real estates as heir-at-law to B, filed his bill to establish his title against the defendant, who claimed under a settlement adversely to the plaintiff, and had the legal estate. Motion for a receiver, on the part of the plaintiff, refused, on account of the absence of fraud, and doubt as to title. *Lancashire v. Lancashire*, 15 Law J. Rep. (N.S.) Chanc. 54; 9 Beav. 120.

The Court will grant an order for a receiver over a moiety of an undivided share of an estate. *Hargrave v. Hargrave*, 15 Law J. Rep. (N.S.) Chanc. 280; 9 Beav. 549.

The notice required by the 88th Order of May 1845 does not apply to proceedings for appointing a receiver, but only to his taking possession of the estates when appointed. *Dresser v. Morton*, 2 Ph. 285.

A receiver, who without the sanction of the Court, successfully defends an action brought against him by a party to the cause, is entitled to be reimbursed his extra costs. *Bristowe v. Needham*, 2 Ph. 190.

By a settlement on the marriage of A with B, certain trust funds were assigned to three trustees in trust to pay the annual income to B for life for her separate use, with remainder to A for his life, with remainder, as to the principal monies, to the children of the marriage. The trustees, on the application of A, and with the consent of B, invested the trust funds, in contravention of the trusts of the settlement, in the purchase of certain copyhold houses, in which A claimed an interest under an agreement entered into by him with the vendor, previously to the date of the purchase by the trustees. A had also expended a large sum in repairing and rebuilding part of the houses, and, from the time of the purchase until recently, had been allowed to receive the rents, and pay them over to his wife. Differences having arisen between A and the trustees, the latter directed their solicitor to receive the rents, and commence an action against one of the tenants, who refused to pay the rents to them. On a bill filed by A against the trustees, and his wife and children, praying an injunction against further proceedings in the action, and the appointment of a receiver; a motion for a receiver on his behalf was refused, with costs.

One of the trustees, who lived in the country, at a distance from the other two trustees, appeared,

by separate counsel, on the motion, and asked for his costs, which were ordered to be paid him. *Wiles v. Cooper*, 15 Law J. Rep. (N.S.) Chanc. 129; 9 Beav. 294.

It is not the practice of the Court to order a receiver's recognizance to be put in suit against the surety, where it does not appear from the Master's report that a definite sum is due.

No actual balance having been found due from the receiver, the Court refused to decree an account against his administratrix. *Ludgater v. Channell*, 16 Law J. Rep. (N.S.) Chanc. 248; 15 Sim. 479.

A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of possession without the authority of the Court.

A motion for a committal on the ground of disturbance of possession should not be made when the object is only to compel payment of costs. *Ward v. Swift*, 6 Hare, 312.

A and B were trustees and executors. A paid more than he received in expectation of repayment out of a mortgage forming part of the assets. A died and B refused to act. In an administration suit a receiver of the mortgage was appointed against A's representatives. *Palmer v. Wright*, 10 Beav. 234.

On the application of all the parties to a cause, the Court made an order appointing at once a party named by them to be receiver of the partnership estate and effects, the absolute property of the parties to the cause, without requiring him to give any other than his own personal security, notwithstanding a previous order made in the cause directing a reference to the Master in the usual form to appoint a receiver of the partnership estate and effects. *Manners v. Furze*, 17 Law J. Rep. (N.S.) Chanc. 70; 11 Beav. 30.

Rules of practice upon applications to discharge receivers and vacate their recognizances. *Lawson v. Ricketts*, 11 Beav. 627.

Receiver appointed after decree upon motion in an urgent case. *Thomas v. Davies*, 11 Beav. 29.

A receiver was appointed over a testator's real property, and afterwards, by foreclosure another estate became comprised in the property, and an order was made that the receiver should include the rents in his future accounts:—Held, that the receiver, with the approbation of the Master, had power without a special order of court to set and let the foreclosed estate, under the 64th Order of 1828. *Duffield v. Elwes*, 11 Beav. 590.

In a case of urgency the Court will appoint a receiver on the motion of the plaintiff before the defendant has appeared, and even where an injunction is not asked against him. *Meaden v. Sealey*, 18 Law J. Rep. (N.S.) Chanc. 168; 6 Hare, 620.

The plaintiff and the defendant were co-executors. The plaintiff being indebted to his testator in the sum of 300*l.* upon bond, filed his bill against the co-executor for an account and distribution of his testator's estate, and prayed for a receiver; upon the answer coming in, the plaintiff found that there was no outstanding estate, and that the debt of 300*l.* due from him alone remained unapplied. The plaintiff allowed matters to rest as they were, but the defendant gave a notice of motion, asking for the appointment of a receiver as prayed by the bill; but the application was refused, without costs. *Ro-*

binson v. Hadley, 18 Law J. Rep. (N.S.) Chanc. 428; 11 Beav. 614.

Motion refused to appoint a receiver of a partnership, where the question raised was, whether the partnership had been dissolved; but an issue directed to try the fact. *Fairburn v. Pearson*, 2 Mac. & G. 144.

Although there is no rule of practice that where a will is in contest in the ecclesiastical courts, the Court of Chancery will not grant a receiver where the property is in the hands of the executor, yet it must be clearly shewn that the nature and position of the property is such as to warrant the interference of the Court.

Under what circumstances fresh affidavits may be read on the hearing before the Lord Chancellor of a motion to discharge or vary an order of a Vice Chancellor. *Whitworth v. Whyddon*, 2 Mac. & G. 52; 2 Hall & Tw. 445.

A rector, who was also the patron of a living, gave warrants of attorney to various creditors who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest whenever execution should be issued:—Held, that the agreement pointed so particularly to making the judgments charges on the living, that the Court could not give effect to it by granting an injunction and a receiver. *Long v. Storie*, 3 De Gex & S. 308.

(HH) INFANTS' SUITS.

[See MARRIAGE, Settlement.]

The plaintiff's solicitor ought not to be appointed guardian *ad litem* to a defendant, under the 32nd Order of May 1845. The solicitor to the suitors' fund ought in general to be appointed such guardian. *Sheppard v. Harris*, 15 Law J. Rep. (N.S.) Chanc. 104.

An infant defendant on attaining twenty-one discharged the solicitor who had acted in the suit. Afterwards that solicitor was served with a subpoena for her to hear judgment, which he returned to the plaintiff's solicitor, stating that the defendant had come of age, and that he was no longer employed for her. After this the cause was heard without the defendant having been served with a subpoena to hear judgment, or any one appearing for her at the hearing; and a decree was made, in which she was described as an infant:—Held, that she was entitled to put in a new answer to the bill. *Snow v. Hole*, 15 Sim. 161.

After an infant defendant had appeared the plaintiff moved under the 32nd Order of May 1845 that a solicitor might be appointed the infant's guardian to answer the bill and defend the suit:—Held, that as the infant appeared, the Court might grant the motion on an affidavit stating merely that notice of the motion had been served on the solicitor who had entered the appearance, after the expiration of the time allowed for answering, and more than six days before the hearing of the motion. *Cookson v. Lee*, 15 Sim. 302.

Day to shew cause against a decree refused. *Walsh v. Trevanion*, 16 Sim. 180.

On an application to appoint a guardian *ad litem* to an infant resident within the jurisdiction, his appearance in court will not be dispensed with except

under special circumstances. *Baynton v. Hooper*, 10 Beav. 168.

When two suits are instituted on behalf of an infant, it is not of course when one is in the paper for hearing, to refer it to the Master to ascertain which of them is most beneficial for the infant. *Rundle v. Rundle*, 11 Beav. 33.

An order of course, obtained by the direction of the next friend of two infant plaintiffs, discharging their solicitor, and appointing a new one, a considerable time after one had attained twenty-one, though it was doubtful whether the other had attained that age, was held irregular, and was discharged, with costs to be paid by the next friend. *Brown v. Brown*, 18 Law J. Rep. (N.S.) Chanc. 388; 11 Beav. 562.

On a motion for the appointment of a guardian of infant defendants, the appearance of one of them, who was less than a month old, in court was dispensed with, on the production of an affidavit of the birth, and that it would be prejudicial to remove it. *Stuteley v. Harrison*, 18 Law J. Rep. (N.S.) Chanc. 336.

A motion to appoint a guardian *ad litem* to two infant defendants resident within the jurisdiction, without their appearance or a commission, refused. *Mower v. Orr*, 18 Law J. Rep. (N.S.) Chanc. 50.

A bill was filed to establish the right of an infant to a moiety of an estate. At the hearing of the cause an issue was directed to ascertain the legitimacy of the plaintiff, upon which his right depended. Before the trial commenced an agreement for a compromise was entered into, and signed by the counsel both of the plaintiff and the defendant, by which the estate was to be divided equally between their respective clients, each of whom was to pay his own costs. The defendant consented to carry the agreement into effect, but he subsequently refused to abide by it:—Held, that from the want of reciprocity the Court would not interfere unless it were for the benefit of the infant; but that, as this agreement was beneficial to the infant, the Court would have given its sanction to it; but, in consequence of the want of reciprocity arising from the plaintiff's infancy, the Court refused to enforce the agreement upon the withdrawal of the consent of the defendant: that the counsel of the defendant had an implied authority to enter into the agreement; that an order of Court to give effect to it was not necessary; and that the defendant must pay so much of the plaintiff's costs of preparing for the trial as became useless by the refusal of the defendant to carry out the agreement; that the former order must be continued and the trial proceeded with; and that the costs of the petition on which the order was made must be costs in the cause. *Hargrave v. Hargrave*, 19 Law J. Rep. (N.S.) Chanc. 261; 12 Beav. 408.

(II) NEXT FRIEND.

The mother of an infant plaintiff employed a solicitor to prosecute the suit. The next friend died, and the mother subsequently discharged the solicitor, who after his discharge amended the bill and nominated a new next friend without the mother's sanction. The Court ordered that, on payment by the mother of the costs incurred by the new next friend, he should be removed and another appointed, and that

the solicitor should pay the costs of the application and of the new appointment. *Lander v. Ingersoll*, 4 Hare, 596.

Where a married woman applied for leave to substitute, as a new next friend, a person who was in such circumstances that the defendants' security for their costs would evidently be prejudiced, the Court refused to make the order. *Jones v. Fawcett*, 16 Law J. Rep. (N.S.) Chanc. 497; 2 Ph. 278.

The Court refused to change the next friend of a married woman who was residing out of the jurisdiction, though the next friend was a domestic servant of the solicitor conducting the suit, and it was alleged to be his suit; there being nothing to impeach the *bona fides* of the parties.

Whether the Court will order security for costs, where all the plaintiffs are out of the jurisdiction, but one of them sues by a next friend in this country—*quære*. *Lander v. Parr*, 16 Law J. Rep. (N.S.) Chanc. 269.

(KK) LUNATIC.

[See LUNATIC—Practice.]

It is not absolutely necessary in the case of a defendant, a lunatic, but not found so by inquisition, that the solicitor to the Suitors' Fund should be appointed his guardian for the purpose of his appearing to and answering the plaintiffs' bill, but any other solicitor may be appointed his guardian who will undertake the duty of appearing to and answering the bill for the party.

In the present case the solicitor of the wife was appointed the guardian of the husband on the production of an affidavit shewing that the husband had no interest adverse to the wife. *Biddulph v. Dayrell*, 15 Law J. Rep. (N.S.) Chanc. 320.

One of three trustees under a will had disclaimed and another had become lunatic:—Held, upon the petition of the sole acting trustee and the *cestuis que trusts* in the matter of the lunacy, that the Court had no jurisdiction to appoint a new trustee in the place of the disclaiming trustee; but the Court appointed two persons trustees in the place of the lunatic.

Where stock is standing in the names of trustees, one of whom becomes a lunatic, and new trustees are appointed in his place, the Court will not order a transfer of the stock to be made to the *cestui que trust*, but it must be transferred to the old and new trustees. *In re Smith*, 17 Law J. Rep. (N.S.) Chanc. 415.

Defendants of unsound mind, but not found so by inquisition, on the last day allowed them for putting in their answer, obtained from the Master an order for two months further time to answer, and then obtained, by petition at the Rolls, an order for liberty to sue out a commission to assign them a guardian *ad litem*. An application by the plaintiff, under the 32nd Order of May 1845, to assign them a guardian *ad litem*, on the ground of default in not putting in their answer, was refused, with costs. *Saunders v. Waller*, 19 Law J. Rep. (N.S.) Chanc. 409; 2 Hall & Tw. 199.

(LL) PAUPER.

[See (PP) Appeal.]

A peeress allowed to sue *in formâ pauperis*. *Wellesley v. Wellesley*, 16 Sim. 1.

A party sued as executor will not be allowed to defend *in formâ pauperis*, though, in addition to the usual affidavit, he swears that he has been prevented by injunction from receiving any part of the testator's estate.

Semble.—A party in contempt for non-payment of costs in the suit may move for leave to defend *in formâ pauperis*. *Oldfield v. Cobbett*, 15 Law J. Rep. (N.S.) Chanc. 116; 1 Ph. 613.

A defendant in contempt is not precluded by the circumstance of his being sued as executor from obtaining the benefit of the 1 Will. 4. c. 36. s. 15. rule 7; s. c. 11 Beav. 25.

The affidavit for leave to sue or defend *in formâ pauperis*, means that the party has not *5l.* besides &c. available for the prosecution or defence of the suit, and it need not set forth the details of his means and the circumstances which render them unavailable. *Dresser v. Morton*, 2 Ph. 286.

A party in possession and enjoyment of the property in question, which was worth 140*l.* and 10*l.* a year, dispaupered. *Taprell v. Taylor*, 9 Beav. 493.

A plaintiff was entitled to an annuity of 20*l.* a-year, which her brother ordered to be secured to her. She filed a bill to have it secured, and obtained an order to sue *in formâ pauperis*. The executors of her brother, though they did not admit assets, paid the annuity, but this fact was not stated to the Court, and in consequence the order to sue *in formâ pauperis* was discharged. *Butler v. Gardiner*, 19 Law J. Rep. (N.S.) Chanc. 473; 12 Beav. 525.

The legal personal representative of a testator beneficially interested under a will, filed a bill to redeem a mortgage, offering to pay what should be found due:—Held, that she could not. *Fowler v. Davies*, 17 Law J. Rep. (N.S.) Chanc. 287; 16 Sim. 182.

(MM) PROCEEDINGS IN DIFFERENT COURTS.

[See INJUNCTION—Practice.]

[See also *Hammond v. Smith*, 15 Law J. Rep. (N.S.) Chanc. 40. *St. John v. Phelps*, 12 Beav. 606.]

[*Barrs v. Jackson*, 5 Law J. Dig. 644; 1 Ph. 582.]

Where one of the Judges of the Court of Chancery has made an order on petition for the payment out of court of monies deposited by the committee of management of a railway company under the standing orders of the House of Commons, one of the other Judges of the Court has jurisdiction, upon bill filed, to grant an injunction to restrain the committee from receiving the money. *Castendieck v. De Burgh*, 15 Law J. Rep. (N.S.) Chanc. 425.

Where a motion for the discharge of a prisoner is made before one of the Vice Chancellors in a cause attached to another branch of the court, the Vice Chancellor cannot, unless specially authorized by the Lord Chancellor, make any order though the prisoner is brought before him by *habeas corpus*—*semble*. *Newton v. Askew*, 6 Hare, 321.

Where in the vacation the Vice Chancellor heard and refused a motion for the Master of the Rolls, no application for the same purpose was afterwards allowed, though on different grounds. *Man v. Ricketts*, 9 Beav. 4.

Where two creditors' suits have been instituted in two different branches of the Court, and a decree has

been made in one of them, an application to stay proceedings in the other suit should be made to the Judge in whose court that cause is; and the Lord Chancellor will not interfere to authorize it to be made to the Judge from whom the decree in the other suit was obtained. *White v. Johnson*, 17 Law J. Rep. (N.S.) Chanc. 427.

Where a cause had been transferred from one branch of the court to another, the latter will not question the correctness of the exercise of judicial authority by the former on a previous application.

But where it appears that a plaintiff, on obtaining *ex parte* an injunction from one branch of the Court, had withheld information which might have induced it to make a different order, the injunction so obtained may be dissolved on that ground by another branch of the Court to which the cause has been transferred. *Sturgeon v. Hooker*, 1 De Gex & S. 484.

A bill for relief and a cross bill for discovery were attached to the Vice Chancellor of England's Court. The original bill was transferred to another Vice Chancellor's court, where it was heard, and dismissed, with costs. The Lord Chancellor, on appeal, reversed the decree, directed issues, and reserved the costs. The answer to the cross bill was not put in until after the original hearing, and was not used on the hearing of the appeal:—Held, that the Vice Chancellor of England had jurisdiction to dispose of the costs of the cross suit. *Watts v. Penny*, 17 Sim. 45.

Injunction granted by a Vice Chancellor in a Rolls cause cannot be dissolved by the Master of the Rolls. *Paredes v. Lizardi*, 9 Beav. 490.

By an order made at the Rolls, a solicitor was ordered to deliver his bill of costs to A, and the bill was delivered. A motion subsequently made by A, before another branch of the Court of Chancery, that the solicitor should deliver all A's deeds, &c., in his custody, to A,—Held, to be irregular. *In re Mills*, 17 Law J. Rep. (N.S.) Chanc. 102; 1 De Gex & S. 643.

A Vice Chancellor has no jurisdiction to discharge for irregularity an order made as of course at the Rolls, though in a suit attached to his own court. *Stuart v. Stuart*, 17 Sim. 44.

Where two suits have been instituted in different branches of the court having relation to the same subject-matter, the Court will, as a general rule, direct the suits to be heard by the Judge in whose branch the first suit was instituted. *Elliott v. Lyne*, *Gibbard v. Pike*, 1 Hall & Tw. 436.

(NN) PETITION OF RIGHT.

[*In re Baron de Bode*, 2 Ph. 85.]

When a petition of right is referred to the Lord Chancellor, with the indorsement, "Let right be done," if such right, supposing it to exist, be subject to certain rules of proceeding for its ascertainment and enforcement, those rules must still be followed, and the rights of the parties will be bound by all equities to which they are properly subject. *Monckton v. Attorney General*, 2 Mac. & G. 402.

Where a petition of right has received the usual royal indorsement, "Let right be done," a commission will not be issued without notice of the application being given to the Attorney General. *In re Robson*, 16 Law J. Rep. (N.S.) Chanc. 105; 2 Ph. 84.

(OO) REHEARING.

In a case in which neither fraud, collusion, nor concealment were complained of by the plaintiff, but where the plaintiff's claim was allowed by the Master twenty years previously to the plaintiff's application to re-hear an order, and where the plaintiff, by using reasonable diligence, might have known all the facts and proceedings in the suits of prior date, the Court refused a motion on behalf of the plaintiff to re-hear an order of the Court made nineteen years prior to the date of the application, but gave the plaintiff leave to renew his application at the hearing of a supplemental suit recently instituted by him seeking to vary that order. *Gwynne v. Edwards*, 15 Law J. Rep. (n.s.) Chanc. 84; 9 Beav. 22.

Service of the order for setting down an appeal is necessary to stop the enrolment of a decree.

Where a decree had been enrolled after the defendant had presented a petition of appeal, and had obtained the usual fiat of the Lord Chancellor for the re-hearing, and had left the petition with the registrar to have the order drawn up, and paid the deposit, and had informed the plaintiff's solicitor of all these circumstances, but had not obtained the order from the registrar and served it on the plaintiff's solicitor, a motion to vacate the enrolment was refused, although the enrolment had taken place a few hours only before notice was served of the order for re-hearing. *Groom v. Stinton*, 17 Law J. Rep. (n.s.) Chanc. 1; 2 Ph. 384.

The Court will not vacate the enrolment of a decree on the ground of surprise, if the party enrolling has done nothing to mislead his opponent, and so induce him not to enter a caveat. *Lewis v. Hinton*, 16 Law J. Rep. (n.s.) Chanc. 268.

A person affected by a decree, but not a party to the cause, obtained upon petition as of course an order to rehear the cause:—Held, that the petition was irregular, and it was ordered to be taken off the file, with costs.

A person not a party to the cause cannot petition for a rehearing without the special leave of the Court first obtained. *Berry v. the Attorney General*, 19 Law J. Rep. (n.s.) Chanc. 232; 2 Mac. & G. 16; 1 Hall & Tw. 520.

(PP) APPEAL.

[See PRACTICE, ON APPEALS TO THE HOUSE OF LORDS.]

The rule that there cannot be an appeal for costs alone does not apply where the error of the decision as to costs appears on the face of the decree. *Chappell v. Purday*, 16 Law J. Rep. (n.s.) Chanc. 261; 2 Ph. 227.

Mode of proceeding by a party who wishes to appeal, and to carry on the appeal *in forma pauperis*. *Clarke v. Wyburn*, 17 Law J. Rep. (n.s.) Chanc. 159.

Motion to stay proceedings to sell an estate pending appeal refused where applicant himself had not appealed. *Rowley v. Adams*, 9 Beav. 348.

Where the question in a suit was, whether a sufficient quantity of foreign stock might be appropriated for the purpose of securing an annuity for the testator's widow during her life, or whether she was entitled to have it secured by an appropriation of 3½ per cent. consols, and the Court had decided that it ought to be secured in 3½ per cent. consols, and

the residuary legatees appealed to the House of Lords, the Court stayed proceedings pending the appeal, upon condition that the shares of the appellants in the residuary estate should be liable to make good any loss which might arise in consequence of such stay of proceedings. *Prendergast v. Lushington*, 17 Law J. Rep. (n.s.) Chanc. 364.

It is competent for the plaintiff, on appeal to the Lord Chancellor, to withdraw from the evidence any portion of the answer which may have been read in the court below. *Alfrey v. Alfrey*, 1 Mac & G. 87; 1 Hall & Tw. 179.

The rule which forbids an appeal on the question of costs alone does not preclude the Court, where the appeal embraces other matters also, from varying the decree as to costs, though it affirms it as to such other matters; but such variation will not protect the appellant from the costs of the appeal. *Lewis v. Smith*, 1 Mac. & G. 417.

Where, upon an appeal, the Court is of opinion that it is proper to send a case for the opinion of a court of law, the regular course is, to reverse the order of the Court below, and then direct the case; and thereupon the cause is remitted in its subsequent stages to the Court below. *Salkeld v. Johnston*, 18 Law J. Rep. (n.s.) Chanc. 493; 1 Mac. & G. 242; 1 Hall & Tw. 329.

A party in whose favour an order has been made by one of the Vice Chancellors under the Joint-Stock Companies Winding-up Acts may enrol such order, so as to prevent the other party appealing to the Lord Chancellor, and there is nothing in either of the acts (the 11 & 12 Vict. c. 45. and the 12 & 13 Vict. c. 108.) which affects the rule of practice of the Court of Chancery applicable to such enrolment. *In re the Direct London and Exeter Rail. Co.*, 1 Mac. & G. 534; 1 Hall & Tw. 587.

(QQ) JURISDICTION OF THE COURT.

W & Co. were in the habit of consigning wools for sale to T R, a wool-factor; and bills were drawn by W & Co. upon and accepted by T R against the wools. W & Co. became bankrupt, and such bills were then outstanding to a large amount. T R, with the concurrence of the assignees of W & Co., by deed assigned certain scheduled debts, due to him in respect of such wools, to A & B, in trust to get in the same, and apply the monies in such manner as T R would by law be entitled to apply the same. T R afterwards became bankrupt. A & B, having got in the debts to a large amount, filed their bill against the assignees of W & Co. and of T R, praying that the trusts of the deed of assignment might be executed under the direction of the Court. The decree, after ordering payment into court of the funds in the hands of A & B, directed inquiries as to the scheduled debts, and also as to the bills, whether the same were drawn and accepted against the wools generally, or any particular part thereof, and who were the then holders thereof; and the Master was to be at liberty, if he should think fit, to publish advertisements for the persons claiming to be the holders of such bills to come in and make out their claims before him; and further directions were reserved. In pursuance of the advertisement, the holders of the bills brought in their claims before the Master, who, by his report, found that all the bills were drawn and accepted against the wools

generally in the hands of T R. The cause coming back upon the report, it was held, that the bill-holders were not entitled to appear on the further directions; and that the Court of Equity, by its decree, could only order the fund to be paid over to the bankrupt's estate found entitled to it, leaving the claims of the bill-holders (if any) to be settled under the administration in bankruptcy. *Laycock v. Johnson*, 16 Law J. Rep. (N.S.) Chanc. 350; 6 Hare, 199.

The Judges of the courts of common law being upon the circuit, a prohibition out of the Petty Bag Office was applied for and was granted by the Court of Chancery to the Judge of the county court, to prevent him from carrying into execution a judgment obtained therein upon a matter stated not to be within its jurisdiction. *Wright v. Cattell*, 19 Law J. Rep. (N.S.) Chanc. 527; 13 Beav. 81.

Quære—Whether the Master of the Rolls has jurisdiction to enforce the orders of the Commissioners for the Sale of Encumbered Estates in Ireland. *In re Scott ex parte Barron*, 12 Beav. 361.

The defendant in a suit, instituted by an incorporated company, appealed from a decree of the Vice Chancellor of England to the Lord Chancellor, who heard the appeal on the merits, and affirmed the decree of the Vice Chancellor of England, with costs. The defendant subsequently ascertained that the Lord Chancellor was a shareholder in the company: and on the ground that he had an interest in the matter in dispute, and that he could not be a Judge in his own cause, the defendant moved the Lord Chancellor that the decree made on the appeal might be discharged; that the petition of appeal might be restored to the paper of the Lord Chancellor; and that directions might be given, by issuing a commission, or otherwise, to hear the appeal before the Master of the Rolls, assisted by two of the Judges of the courts of common law at Westminster. The Master of the Rolls, at the request of the Lord Chancellor, heard the motion, and considered that the rule of law "that no one ought to be a Judge in his own cause" ought not to be departed from without necessity; that there might be a necessity to depart from the rule to avoid a denial or failure of justice; that where the jurisdiction is vested in a sole Judge, or in deputies, whose conclusions are not final till adopted by the sole Judge, it may be difficult to conform to the rule; that the signing a decree by a superior Judge to allow of an appeal to a still higher tribunal was a judicial and not a ministerial act; that the Lord Chancellor had no authority to issue a commission to hear appeals made to him; that the Lord Chancellor had authority to require the assistance of the Master of the Rolls in judicial matters; that it did not authorize the Lord Chancellor to depute the authority vested in him by law to reverse the decree of the Vice Chancellor of England; that if the Lord Chancellor requested the Master of the Rolls with or without assistance to hear an appeal, still the Lord Chancellor alone could make the order; that whatever his interest may be, a sole Judge in matters within his jurisdiction is not incapacitated from making a decree or order, if a refusal would be a denial or cause a failure of justice; that, with the consent of the parties interested, the hearing might be before other Judges for and instead of the Lord Chancellor, but the decree or order, as it must be

enrolled upon the Lord Chancellor's signature, would not be entirely free from objection; that if no court of appeal existed, it would be the duty of the Lord Chancellor, or other sole Judge, though interested, to hear a cause on the merits, if there was no other way of preventing a failure of justice; that the decree or order which the Lord Chancellor or other sole Judge, though interested, might make in his discretion, would not be void for incapacity, and ought not to be treated as a nullity; that it was the duty of the Lord Chancellor to enable the defendant to enrol the decree made on the appeal, and also the order to be made on this motion, and the Master of the Rolls advised the Lord Chancellor that the present motion ought to be dismissed, with costs. *Grand Junction Canal Co. v. Dimes*, 18 Law J. Rep. (N.S.) Chanc. 365; 12 Beav. 63.

The injunction having been granted, and made perpetual on the hearing of the cause, to restrain the defendant from doing any act to impede the navigation of the Grand Junction Canal, the defendant appealed from the order to the Lord Chancellor, who continued the injunction. The defendant then applied to the Lord Chancellor, by motion, that that decree might be annulled, on the ground of his Lordship being a shareholder in the company, and therefore incompetent to decide the case:—Held, upon motion to commit for breach of the injunction, that the Vice Chancellor had no power to alter or discharge an order made by the Lord Chancellor, but that such order must be taken, as it appeared to be, without reference to the power of his Lordship to make such an order.

Held, also, that the defendant, by employing a clerk to take the number of the barges that passed on the canal, and to inform the bargemen that they were trespassers, had not thereby committed a breach of the injunction; but that his having brought actions against the company in respect of such barges having passed, was contrary to the tenour of the decree, and in that respect an injunction was granted to restrain the actions. *Grand Junction Canal Co. v. Dimes*, 18 Law J. Rep. (N.S.) Chanc. 419; 17 Sim. 38.

By a decree of the Vice Chancellor of England, made in a suit by an incorporated company against the defendant, claiming an interest in lands taken by the company, a perpetual injunction was granted; and this decree was affirmed, on appeal, by the Lord Chancellor. A motion, by the defendant, that the order for the injunction might be discharged, or in the alternative, that the bill might be taken off the file, on the ground that the Lord Chancellor was a shareholder in the company, was refused, with costs. *Grand Junction Canal Co. v. Dimes*, 19 Law J. Rep. (N.S.) Chanc. 345; 2 Mac. & G. 285; 2 Hall & Tw. 92.

(RR) CREDITOR'S CLAIM.

A covenantant with a person to pay 500*l.* for the benefit of J and R, and afterwards died. In order to obtain payment of that sum a suit was instituted by J and R against the devisees of the real estate of A, and against D, who was the personal representative of the covenantant, and who had also procured a grant of letters of administration to the effects of A, limited for the purposes of this suit. The objection, that there was not a sufficient representation to the estate of A was held good: the Court being of opinion that general letters of administration might have been

procured by the plaintiffs. *Robinson v. Bell*, 17 Law J. Rep. (N.S.) Chanc. 3; 1 De Gex & S. 630.

In a creditors' suit a claim was carried in before the Master in respect of transactions which occurred as far back as the year 1793. The principal witness in support of the claim was sixty-three years of age, and the circumstances to which he deposed had taken place when he was between thirteen and sixteen years old; and, upon minute investigation of his evidence, it appeared to contain some variances and inconsistencies which were not explained:—Held, that considering the circumstances and the age of the witness, and the length of time since the event happened, the claim ought to be disallowed. *Strother v. Dutton*, 17 Law J. Rep. (N.S.) Chanc. 87.

In a creditors' suit for the administration of the assets of an intestate who had joined in a bond as surety, the bond creditor, being aware of the suit, omitted to prove till the time limited by advertisement for creditors to come in had expired, a decree on further directions had been made, the administratrix had admitted assets, and the principal debtor in the bond had become bankrupt:—Held, that he might still be let in on terms, the fund remaining undistributed.

An admission of assets by an administratrix embodied in an order made on a petition in the cause, is qualified by a declaration in a subsequent order.

Arrangement of priorities between simple contract creditors coming in within the time limited by the advertisements and bond creditors coming in subsequently. *Brown v. Lake*, 1 De Gex & S. 144.

(SS) JURISDICTION AND DUTIES OF THE MASTERS.

Attendance of Masters at the public office discontinued by the 10 & 11 Vict. c. 97; 25 Law J. Stat. 268.

A Master in Chancery may distribute the business of his office between his clerks in such manner as he may think proper; but not so as to defeat the intentions of the legislature, in requiring certain qualification for the clerk to whom the performance of particular duties is entrusted. *In re Whiting*, 15 Law J. Rep. (N.S.) Chanc. 242; 1 Ph. 650.

Under a decree to take an account of the testator's debts and to compute interest, the Master cannot allow compensation to a party for unliquidated damages on a breach of covenant; but the Court will on application direct the claim to be investigated. *Cox v. King*, 9 Beav. 530.

The Master has a discretion to give the conduct of a sale under a decree to other persons instead of the plaintiff, for the benefit of the parties interested.

Therefore, where a plaintiff, not being guilty of any default or misconduct, obtained a decree for the sale of lands vested in trustees for sale, with liberty for himself to bid, and the Master gave the conduct of the sale to the trustees instead of the plaintiff, it was held, on motion by the plaintiff, that the Master had a discretion to confide the conduct of the sale to other persons besides the plaintiff, where such course would be most beneficial to the parties interested in the proceeds, and it being shewn that considerable expense would in the present case be thereby saved, the Court refused to disturb the Master's decision. *Dixon v. Pyner*, 19 Law J. Rep. (N.S.) Chanc. 402; 7 Hare, 331.

The Masters are not themselves actors in applying the General Order of the 23rd of April 1796 against defaulting receivers; and the Court will not open accounts against such receivers for the purpose of depriving them of their poundage and the costs of passing their accounts, when the parties beneficially interested have not raised any objection to the allowance of such poundage and costs before the Master. *Ward v. Swift*, 8 Hare, 139.

(TT) PRELIMINARY INQUIRIES.

A testator died seised of a moiety of a plantation in Jamaica. A and B, the owners of the other moiety, granted a lease of it to the trustees and executors of the testator's will. He died before the lease expired. After his death, certain persons resident in Jamaica were appointed receivers and managers of the testator's estate in a suit in this country for the execution of the trusts of the will; and a merchant in London was appointed consignee and receiver of the produce of the estates. The managers and receivers took possession of the entirety of the plantation and shipped the produce to the consignee, but did not pay A and B any rent. A and B, though not parties to the suit, petitioned in it to be paid the arrears of rent due to them, out of the funds in the cause which had arisen from the balances paid in by the consignee. The Court directed a preliminary inquiry with a view to granting the prayer of the petition. *Neale v. Pink*, 15 Sim. 450.

What evidence is sufficient to justify the Court in directing the usual preliminary inquiries as to parties.

Under what circumstances the Court will hear a cause on the merits without previously directing such preliminary inquiries. *Miller v. Priddon*, 1 Mac. & G. 687.

(UU) SERVICE OF PAPERS.

[*Murray v. Vibart*, 5 Law J. Dig. 650; 1 Ph. 521.]
Service on absent defendant. *Gibson v. Ingo*, 2 Ph. 402.

Under the 28th of the New Orders, extending the time for service of a copy of the bill, it is not necessary to serve on the defendant a copy of the order extending the time. *Teuton v. Clayton*, 15 Law J. Rep. (N.S.) Chanc. 141.

Order made for service of process of the Court on the defendant's solicitor, the defendant having absconded, and not having been heard of during two years and upwards last past. *Wright v. King*, 15 Law J. Rep. (N.S.) Chanc. 178; 9 Beav. 161.

The order for the serjeant-at-arms may be served on the London agent of a solicitor. *Thornercroft v. Crockett*, 15 Law J. Rep. (N.S.) Chanc. 344.

Where all parties in a suit appeared by one solicitor, it was held sufficient to serve him with one copy only of an order nisi confirming the Master's report, allowing certain parties to be purchasers of property sold in the suit. *Gervis v. Gervis*, 15 Law J. Rep. (N.S.) Chanc. 32.

An order for leave to serve a party abroad is not irregular because the affidavit on which it is obtained states only the place of the party's residence, without other circumstances to warrant the order. *Blenkinsopp v. Blenkinsopp*, 2 Ph. 1.

A defendant appeared by his six clerk, and described himself as resident at C. After the abolition of the six clerks, he stated no address for service, as

required by the 29th Order of May 1842, and went to America. An application that service of proceedings at C should be deemed good service was refused. *Hughes v. Wheeler*, 11 Beav. 178.

Where a defendant, who had been personally served with a subpoena to appear and answer, had taken no step in the suit except serving the plaintiff with a notice of intention to change his solicitors, and the latter had some correspondence with the solicitors of the plaintiff on the proceedings, but refused to give the address of the defendant or accept service for him, the Court gave leave to serve a copy of a traversing note upon such new solicitors. *Wallis v. Darby*, 18 Law J. Rep. (N.S.) Chanc. 216; 6 Hare, 618.

Where a defendant has entered a special appearance, it is not necessary to enter a memorandum of service of the copy bill. *Attorney General v. the Donnington Hospital*, 12 Beav. 551.

An appearance was entered for the defendant, and a traversing note filed. An order was made for service of it at his last place of residence. *Horlock v. Wilson*, 12 Beav. 545.

Motion to dispense with service of a copy of a decree, taken *pro confesso*, and all other proceedings in the suit, upon a defendant who had never appeared, refused. *Vaughan v. Rogers*, 11 Beav. 165.

It is not compulsory upon a plaintiff, in serving a copy of the bill under the 23rd Order of August 1841, to omit the interrogatory part of such bill. *Mason v. Brest*, 18 Law J. Rep. (N.S.) Chanc. 105; 16 Sim. 429.

Where an appearance has been entered by the plaintiff for defendants who are within the jurisdiction, but have not put in any answer, and the plaintiff has filed a traversing note, the Court has jurisdiction to order a copy of the traversing note to be served upon the defendants personally, although the case is not provided for by the General Orders. *Moss v. Buckley*, 17 Law J. Rep. (N.S.) Chanc. 414; 2 De Gex & S. 559.

A bill having been filed by a shareholder in an Irish railway, on behalf of himself and all other shareholders, except the defendants, to restrain the improper payment by the defendants of the monies of the railway company,—Held, that, notwithstanding one only of the defendants was permanently resident in England, and all the others in Ireland, and the books and papers of the company were in Ireland, an order of the Court, directing service of a subpoena to appear and answer the plaintiff's bill on the railway company in Ireland, was valid and proper. *Lewis v. Baldwin*, 17 Law J. Rep. (N.S.) Chanc. 377; 11 Beav. 153.

A copy of the subpoena to appear and answer the bill was inclosed in a letter from the plaintiff's solicitor to the defendant. The defendant, by a letter in answer, acknowledged the receipt of the letter written to him and the subpoena, and stated that he would attend to it:—Held, that the defendant had not been properly served. *Gathercole v. Wilkinson*, 17 Law J. Rep. (N.S.) Chanc. 101; 1 De Gex & S. 681.

Quære—Whether in a suit not concerning lands, stocks, or shares within the meaning of the 2 Will. 4. c. 33. and 4 & 5 Will. 4. c. 82. the Court can by those statutes, or the 33rd Order of May 1845, order service of a letter missive on a defen-

dant out of the jurisdiction. *Anonymous*, 18 Law J. Rep. (N.S.) Chanc. 229.

Service of an order directing a defendant to transfer a sum of money into court before a specified day, ordered to be made on his solicitor in the cause, upon an affidavit of ineffectual attempts to serve, and inquiries for defendant at his residence and of his solicitor, and of other facts shewing that defendant was keeping out of the way to avoid service, and on an affidavit of the witness's belief to that effect, and of his inability to serve defendant within the time specified. *Skegg v. Simpson*, 2 De Gex & S. 454.

Order refused for service of a copy of the bill, under the 23rd Order of the 26th of August 1841, upon a defendant in Ireland. *Lorton v. Kingston*, 2 Mac. & G. 139.

(VV) DELAY.

A plaintiff was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths; and the foundation of the suit being a legal demand, the Court after such delay declined to act, unless the demand were established in an action. *Blair v. Ormond*, 1 De Gex & S. 428.

(WW) TRAVERSING NOTE.

[See (UU) Service of Papers.]

The plaintiff having served some of the defendants, residing out of the jurisdiction, under the 4 & 5 Will. 4. c. 82, and entered an appearance for them, and filed a traversing note under the 52nd Order of May 1845, moved, under the 56th Order of May 1845, that a copy of the traversing note might be served on them. Motion refused. *Anderson v. Stather*, 16 Law J. Rep. (N.S.) Chanc. 152.

Where the defendant has not taken any step in the cause, either personally or by solicitor, so that the mode of service prescribed by the 56th Order of May 1845 is not applicable to the case, the plaintiff may, by leave of the Court, serve the defendant personally with a copy of a traversing note. *Laurie v. Burn*, 17 Law J. Rep. (N.S.) Chanc. 384; 6 Hare, 308.

The time for answering expired on the 23rd of January. The plaintiff filed a traversing note on the 3rd of February. The answer was engrossed on the 5th of February. Motion to take the traversing note off the file, granted. *Towne v. Bonnin*, 16 Law J. Rep. (N.S.) Chanc. 182; 1 De Gex & S. 128.

(XX) WRITS OF FI. FA.

Where a *fi. fa.*, issued under the General Orders of May 1839, has failed to satisfy the demand, another writ may issue into another county. *Spencer v. Allen*, 2 Ph. 215.

(YY) IRREGULARITY.

A defendant, being in contempt for want of an answer, filed a demurrer and answer, and the plaintiff took an office copy:—Held, that the filing the demurrer and answer being irregular they ought to be taken off the file with costs, and that the taking an office copy was no waiver of the irregularity. *The Attorney General v. Shield*, 18 Law J. Rep. (N.S.) Chanc. 176; 11 Beav. 441.

The legal representatives of the survivor of two trustees, who had been appointed by the Court, and in whom the legal estate in real and personal estate was vested, were served with a copy of a bill of revivor, which prayed that they might be bound by the proceedings: they gave notice of their intention not to appear, as they considered the proceedings irregular, on the ground that they ought to have been served with a subpoena; but they allowed the proceedings in the causes to go on. Various orders were made, for the appointment of new trustees, maintenance, &c., and finally, for the division of the funds; and also for the delivery to the new trustees of the title deeds of the real estate, which had been brought into court by the original trustees:—Held, that the trustees, with notice, having permitted the parties to proceed, and obtain orders, without applying to the Court for leave to be heard, could not subsequently be heard to say that no valid order had been made against them.

Held, also, that they could not be prejudiced by the order to deliver the deeds out of court, as they were never in their hands; and the petition was dismissed, with costs. *Doyle v. Doyle*, 19 Law J. Rep. (N.S.) Chanc. 246; 12 Beav. 471.

(ZZ) ATTACHMENT.

In 1838 the usual four day order was made for the defendant to pay money into court, and was duly served in 1839, shortly after which the defendant became bankrupt. In October 1845, the fiat was annulled, and in July 1846, the defendant was arrested under an attachment for disobedience to the order of 1838. The attachment was discharged for irregularity, with costs, on the ground that no writ of execution of the order had been served pursuant to the practice existing before the Orders of August 1841, and that the order did not contain the indorsement required by the 12th Order of August 1841.

Semle—the plaintiff ought to have applied to the Court for a new order.

Where a party in custody is discharged on the ground of the attachment being irregular, the Court will not, in general, make it a condition of his discharge that he shall bring no action; but will restrain him if he subsequently bring an action for false imprisonment without leave. *Morison v. Morison*, 15 Law J. Rep. (N.S.) Chanc. 439.

The plaintiff having been arrested under writs of attachment out of the Court of Chancery, for non-payment of costs of less amount than 20*l.* each, was afterwards ordered to be discharged from custody by one of the Judges of the Court of Exchequer; that order was afterwards discharged by that Court, but the Court declined to re-commit the plaintiff, for want of jurisdiction. Under an order of the Court of Chancery, new writs were, on the application of the defendant, ordered to be issued in the place of the former writs; but prior to the issuing thereof, the defendant obtained a vesting order against the plaintiff from the Insolvent Debtors Court, but the plaintiff refused to file either a schedule or a list of creditors:—Held, that the obtaining the vesting order under the circumstances was no ground for discharging the plaintiff from custody under the new writs. *Wenham v. Bowman*, 17 Law J. Rep. (N.S.) Chanc. 479; 11 Beav. 138.

(AAA) ALLOWANCE OF INTEREST.

After the death of one who had covenanted to pay an annuity, a suit was instituted for the administration of his assets, pending which the annuity became in arrear. The Court refused to allow interest on the arrears. *Jenkins v. Briant*, 16 Sim. 272.

PRACTICE, ON APPEALS TO THE HOUSE OF LORDS.

To sustain a bill of review proceeding on facts discovered subsequent to the decree complained of, it must be shewn that leave of the Court to file it was regularly obtained.

To sustain a bill of review for error apparent on the decree complained of, it is not enough that it contains allegations that the decree is erroneous, but error must be shewn on the face of it. *Tommey v. White*, 1 H.L. Cas. 160.

The register of protests for non-acceptance and non-payment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. 3. c. 72. and the 23 Geo. 3. c. 18, is a public document, to which every body has a right of access, and the publication of which in a printed paper does not constitute a libellous publication.

A person whose name was upon this register applied to the Court of Session for an *interim* interdict to prevent, so far as his own name was concerned, the publication of a copy of the register. The Court decreed for the application:—Held, by the Lords, reversing that decree, that the interdict ought not to have been granted, and also that the costs in the court below should be given.

An interdict, though in form *ad interim* only, must be treated as a final judgment, and may be the subject of appeal to this House. *Fleming v. Newton*, 1 H.L. Cas. 363.

An insolvent debtor has not such an interest in property assigned under the Insolvent Debtors Acts, as to entitle him to enter into any litigation respecting it.

The circumstance that a person has been made a party to a suit in the court below, if improperly so made, will not entitle him to appeal to this House against a decree made in that suit.

W R was the owner in fee of certain estates in Ireland, which, on his marriage with E, he charged with an annuity by way of jointure. W R had issue a son, W H R, and died. For some years the annuity fell into arrear. The widow (under the terms of the settlement) entered into possession of the estates, and received the rents. W H R became insolvent, and the assignments usual under an insolvency were executed. W H R afterwards mortgaged to B his interest in the estates, without giving notice to the mortgagee of his previous insolvency. He gave, as further security, a bond and warrant of attorney, it being thereby provided that B, on redemption of the mortgage, should reconvey the lands, and sign satisfaction on any judgment which might have been entered up on the warrant of attorney. The mortgage was duly registered, and therefore, under the Irish Acts, took priority over the assignments, which had not been

registered. A bill for foreclosure or redemption was filed by B, the mortgagee, who made the jointress, the insolvent, and the assignees, parties thereto. The Court decreed the jointure to be the first charge on the estates, and the mortgage to come next, and directed accounts to be taken accordingly. The assignees did not appeal against this decree. The insolvent presented an appeal against it:—Held, that he ought not to have been made a party to the suit, and therefore had no title to appeal against the decree.

An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed till the case came on for hearing at the bar of this House: the objection was in its nature fatal. The House, therefore, dismissed the appeal; but, because the objection had not been taken till so late a period, dismissed it, without costs. *Rochfort v. Battersby*, 2 H.L. Cas. 388.

Semble—that a decree appealed from, but not adjudicated on further than the dismissing the appeal generally, may be included in a subsequent appeal.

Semble, also, that decrees and orders which have not been enrolled, may, after any length of time, on being enrolled, be brought under appeal with a recent order made in the same cause, and duly enrolled.

A judgment of the House of Lords is conclusive, and cannot be reversed or corrected, except by act of parliament. *Tommey v. White*, 3 H.L. Cas. 49.

PRACTICE, IN THE ECCLESIASTICAL COURTS.

[See WILL, Probate.]

A Judge having acted *ad instantiam partis*, and not *ex mero motu*, cannot be cited to answer to an appeal.

The admission of proctors to practise is not a matter of arbitrary discretion in a Judge.

An appeal from the admission of proctors is not perempted by the party objecting thereto not having appealed on the *simple fact* of their admission; enrolment and registration of names are a part of the admission, which is not complete without them.

A plurality of persons joined in *one* citation is irregular; but an objection thereto *after* issue joined is not fatal: if taken *before*, it would *probably* be sustained. *Fell v. Law*, 1 Robert. 726.

The *conclusion* of a cause *rescinded after publication*, to allow a party, taken by surprise, to plead and prove an exhibit to be in the handwriting of an adverse party, one of whose witnesses could not depose thereto on cross-examination. *Quait v. Manby*, 1 Robert. 752.

PRACTICE, IN THE ADMIRALTY COURT.

Where witnesses are examined *vivâ voce* in the Court of Admiralty, under the statute 3 & 4 Vict. c. 65. s. 17, the examination is to be conducted on the same system as is adopted at Nisi Prius, viz. by examination in chief by counsel for the plaintiff, and cross-examination by the counsel for the defence. *The Glory*, 3 Rob. 187.

Objection to the report of the registrar and mer-

chants sustained, and the report sent back to be amended. *The Alfred*, 3 Rob. 232.

PRACTICE, IN CRIMINAL CASES.

[See WITNESS, Examination.]

Counsel will be heard in support of the conviction, on a Crown case reserved, though no one appears on behalf of the prisoner.

A question raised in the court below in arrest of judgment, is a question arising "on the trial," and properly reserved under the 10 & 11 Vict. c. 78.

A count for receiving stolen goods in a different county from that in which the trial takes place, coupled with other counts for the larceny, under the 11 & 12 Vict. c. 46, must, by distinct and express averments, shew upon the face of it jurisdiction within the 7 & 8 Geo. 4. c. 29. s. 56.

J M and two others were charged in several counts of an indictment with sheep-stealing, and counts were also added for receiving under the 11 & 12 Vict. c. 46. The trial took place at the Sessions for the county of Dorset, and J M was convicted upon one of the latter counts, which charged him with feloniously receiving, "at the parish of T, in the county of Somerset, one wether sheep, &c. (being the same property as is mentioned in the fifth count of this indictment), of the cattle, goods, &c.":—Held, bad, in arrest of judgment, as not shewing on the face of it jurisdiction to try the offence under the 7 & 8 Geo. 4. c. 29. s. 56, although the fifth count, on which the other two prisoners were convicted, charged them with the sheep-stealing at the parish of S, in the county of Dorset. *Regina v. Martin*, 18 Law J. Rep. (N.S.) M.C. 137; 1 Den. C.C. 398; 2 Car. & K. 950.

Where the clerk of the peace executed the office by deputy clerks, one of whom had acted as such for above forty years, and signed a certificate of former conviction:—Held, sufficient proof of the conviction and sentence, under 5 Geo. 4. c. 84. s. 24. *Regina v. Jones*, 2 Car. & K. 524.

PRACTICE, IN THE PRIVY COUNCIL.

[See PRIVY COUNCIL.]

PREBENDARY.

The 28 Hen. 8. c. 11. s. 3, gives the "tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, or profits, certain and uncertain, affering, or belonging to any" dignity, prebend, or benefice therein mentioned, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Will. 4. c. 30. directs the profits of dignities or benefices, without cure of souls, becoming vacant during the existence of a certain ecclesiastical commission, to be paid to the treasurer of Queen Anne's Bounty, who is to keep an account of the receipts and expenses, and retain the balance, until he shall be otherwise ordered. "by competent authority." By a subsequent statute the Crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons

to certain prebends therein named. One of these appointees, having duly demanded from the treasurer of Queen Anne's Bounty the profits received by him during the vacancy, brought an action for money had and received, to recover them. A special verdict (on a verdict found in his favour), declared these to be "the net profits of the prebend."—Held, that a judgment for the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor shew whether they were derived from the *corpus* of the prebend to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which, as prebend, he was a member. *Repton v. Hodgson*, 3 H.L. Cas. 72.

PREROGATIVE.

An action of trespass *quare clausum fregit*, between subject and subject, having been brought in the Common Pleas, the defendant having pleaded justifying as servant of Her Majesty, and the plaintiff having traversed the title of the Crown, the cause was (after notice to and hearing the plaintiff) removed into the Office of Pleas of this court, by a rule absolute in the first instance, on the statement of the Attorney General, that the interest of the Crown came in question in the cause.

A two days' notice of the motion is sufficient. *The Attorney General v. Hallett*, 15 Law J. Rep. (N.S.) Exch. 246; 15 Mee. & W. 97; 3 Dowl. & L. P.C. 685.

Origin of the jurisdiction of the Church, in cases of testament and intestacy, not distinctly traceable.

The Church never had, at any time, in this country by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purposes.

The right to goods belonging to persons dying intestate, without leaving husband or widow, and without kindred, as *bona vacantia*, has, from the earliest times, been vested in the King, in right of his Crown.

In 1377, Edward III., by charter, granted to his son, John of Gaunt, Duke of Lancaster, the county of Lancaster, as a county palatine, within his duchy of Lancaster, "et quæcumque alie libertates et jura regalia ad Comitum Palatinum pertinentia, adeo integrè et liberè sicut Comes Cestræ infra eundem Comitatum Cestræ dinoscitur obtinere." By subsequent charters and acts of parliament, the duchy, and such rights as were originally granted with it, became vested in Her Majesty, by a title distinct from her Crown:—Held, that the words of the charter carried the right to *bona vacantia*, as *jura regalia*, to the count palatine; and that the Queen, being entitled to the duchy of Lancaster, separate from the Crown of England, was entitled to the goods of a bastard intestate, dying without next-of-kin, in right of her duchy of Lancaster, and administration granted to the nominee of Her Majesty, in right of her duchy. Held also, that it was not necessary for the Duke of Lancaster to shew an enjoyment of such right, by the Earl of Chester, as, in the absence of evidence to the contrary, the Court would presume the enjoyment of the right, by the Earl of Chester. *Dyke v. Walford*, 5 Moore, P.C. 434.

PRESCRIPTION.

[See *TITHE*.]

Where a defendant pleads an enjoyment of an easement as of right for thirty years, under the 2 & 3 Will. 4. c. 71, and the plaintiff relies on the existence of a life estate, or any of the other portions of time which, by section 7, are to be excluded from the computation of the thirty years, not being inconsistent with the actual fact of enjoyment, he is bound, under the 5th section of the above statute, to plead such life estate, &c. specially. *Pye v. Mumford*, 17 Law J. Rep. (N.S.) Q.B. 138; 5 Dowl. & L. P.C. 414; 11 Q.B. Rep. 666.

Case by reversioner for digging and widening a channel. Plea, that H and previous occupiers of G Mill as such occupiers had for twenty years enjoyed a watercourse, and had for twenty years as such occupiers of right scoured and widened the channel as often as was required. Replication, traversing the enjoyment of the watercourse and the scouring and widening of right for twenty years.

On special demurrer, the replication was held good, the *quasi* prescription in the plea not being severable.

Semble—that the plea would have been bad if it had stated the right to scour and widen, without shewing for what purpose it was enjoyed. *Peter v. Daniel*, 17 Law J. Rep. (N.S.) C.P. 177; 5 Dowl. & L. P.C. 501; 5 Com. B. Rep. 568.

Under the statute 2 & 3 Will. 4. c. 71. s. 4. a party is not entitled of right to the access and use of light over contiguous land, unless his enjoyment thereof has been for the full period of twenty years in the character of an easement, distinct from the enjoyment of the land itself. The access and use of light is in this respect placed upon the same footing as the positive easements provided for in the 2nd section of the same statute. *Harbidge v. Warwick*, 18 Law J. Rep. (N.S.) Exch. 245; 3 Exch. Rep. 552.

PRESUMPTIONS.

[See *INCLOSURE*.]

To raise the presumption of death of a *cestui que vie*, there should be evidence of his not having been heard of by persons who would naturally have heard of him if alive, or that search has been ineffectually made to find him.

An entry in a parish book, kept at the church, of a burial in the workhouse cemetery, held evidence of the death of the person named, though the entry was not made from the personal knowledge of the incumbent. *Doe d. France v. Andrews*, 15 Q.B. Rep. 756.

PRINCIPAL AND AGENT.

[See *ANNUITY—SHIP AND SHIPPING*.]

(A) POWERS, DUTIES AND LIABILITIES OF AGENT.

(B) CONTRACTS BY AGENT.

(A) POWERS, DUTIES AND LIABILITIES OF AGENT.

By the deed of co-partnership of a joint-stock company, certain forms were to be observed by any transferee of shares, before he could become a member of the company. A purchased shares, and executed some of the acts required to constitute him a member of the company; but left one of these acts unexecuted:—Held, that the execution of these acts was a duty cast on the purchaser for the benefit of the company, and that his non-execution of one of them did not enable him, as respected the company, to retire from his contract.

A joint-stock marine insurance company had declared dividends, which, as it afterwards appeared, were not warranted by the real condition of the company. The law agent of the company, who was also a member of it, when applied to for information, mentioned these dividends as proofs of the flourishing state of the company. The person to whom he so mentioned them became afterwards a purchaser of shares:—Held, that he could not relieve himself from his contract on account of these representations.

Held, also, that the law agent of the company was not its agent to bind it in such matters; nor could he bind it as a partner, for a joint-stock company is not, like an ordinary partnership, bound by the acts of any individual member of it.

If the directors of a company agree to publish false statements of the affairs of the company, under such circumstances as shew a fraudulent intent to deceive, they are not only civilly liable to those whom they have deceived and injured, but may be criminally prosecuted and punished. *Burnes v. Pennell*, 2 H.L. Cas. 497.

A Review was established by an association of shareholders, who passed certain written resolutions for its management and regulation. A committee of shareholders was appointed "to assist the editor in promoting the prosperity and circulation of the Review, and to obtain, as far as possible without expense, literary contributions, and to aid the editor as he might require in all matters connected with his department":—Held, that this resolution did not empower one of the committee to contract with any person for the supply of literary articles, or to bind the shareholders to pay for them when supplied and inserted in the Review. *Heraud v. Leaf*, 17 Law J. Rep. (n.s.) C.P. 57; 5 Com. B. Rep. 157.

The defendant ordered the plaintiff, a stock-broker, to purchase for him twenty shares in a certain railway at a certain price, which the plaintiff did accordingly. The defendant paid the amount, with commission, and the transfer was made. Before the sale a call had been made, but was not then due, and no mention was made of it. Immediately after the sale the vendor paid up the call though not then due, which it was necessary under the 8 & 9 Vict. c. 16. s. 6. to do in order to make the transfer. The plaintiff, pursuant to a rule of the Stock Exchange, paid the amount of the call over to the vendor:—Held, that the defendant in employing a stock-broker on the Stock Exchange must be taken to have contemplated that which was the rule of the Stock Exchange; and that the plaintiff was entitled to recover from the defendant the amount paid over in an action for money paid to the defendant's use.

Bayley v. Wilkins, 18 Law J. Rep. (n.s.) C.P. 273; 7 Com. B. Rep. 886.

The plaintiffs, who were London merchants, sent to the defendants, who were commission agents in China, certain goods, to be sold by the latter on the terms contained in the following letter:—"If tea is not obtainable at our limits, you may invest one half of the whole proceeds in silk, at prices not exceeding, &c. If silk is obtainable much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion":—Held, that on looking at the whole of the letter the words "you may invest" were to be construed as directory, and not as giving the defendants a discretionary power.

The declaration stated, that in consideration that the plaintiffs at London would consign to the defendants at China goods for sale and receipt of the proceeds by the defendants for the plaintiffs for reward, the defendants promised to invest and remit the proceeds to the plaintiffs within a reasonable time after receiving the said proceeds, by the purchase, to the amount of 500*l.*, of any other article than tea and silk, if the defendants thought fit; that if within such reasonable time tea could not be bought by the defendants, and silk could, within certain prices agreed upon, and if the defendants did not purchase any other article than tea and silk, then they would purchase silk to the extent of half the proceeds, and consign it to the plaintiffs. That the defendants received the goods, sold them, and received the proceeds thereof; that while they held them for more than a reasonable time, they did not invest any part of them in any other article than tea or silk within the prices so agreed on, for more than a reasonable time after they had received the proceeds. Plea, that after the defendants received the proceeds they could not have bought silk within the prices agreed upon:—Held, that the question raised on this issue was not whether the defendants could have bought silk after they had received the whole proceeds, but whether they could have bought it after they had received a part or parts, for the remittance of which more than a reasonable time had elapsed, such time commencing as soon as a part considerable enough to be remitted was received. *Entwistle v. Dent*, 18 Law J. Rep. (n.s.) Exch. 138; 1 Exch. Rep. 812.

Where A had instructed B to order certain goods for him from C, and promised to indemnify him against the consequences of the order, and goods were supplied of a kind not required by A, but without negligence on B's part, and were refused by A, but not returned at once to C, C having brought an action against B for the price, under circumstances in which C ought not to have recovered against B, and the fact of such action having been brought to A's knowledge and not defended by him,—Held, by *Wilde, C.J.* and *Maule, J.* (*dissentiente Cresswell, J.*), that these circumstances gave B an implied authority to compromise the action, exercising the best judgment he could, and that having so compromised the action he was entitled to sue A for money paid to his use.

Held, by *Cresswell, J.*, that C having no right of action against B, B was bound to defend the action, and that an authority to compromise an action which might reasonably have been defended, could not be implied.

Talfourd, J. thought there was evidence of an express or implied authority to compromise the action from the above circumstances, coupled with the fact that the defendant, shortly before the compromise, conferred with the plaintiff and his attorney about the action. *Pettman v. Keble*, 19 Law J. Rep. (N.S.) C.P. 325.

The plaintiff lent money to C, taking as security an equitable mortgage of copyhold premises, the deed whereof contained a covenant by C to surrender the premises to the use of the plaintiff. A receipt for the mortgage-money was signed by an attorney, who acted for both parties, and on the title-deeds being delivered to the attorney, a schedule of them, with a memorandum acknowledging the receipt of them, and undertaking to return them to C on repayment of the principal and interest, was shortly after the delivery signed by the attorney and delivered to C, but not in the presence of or with the knowledge of the plaintiff. The attorney, with the consent of the plaintiff, retained possession of the deed, and from time to time received and paid the interest to him. The attorney afterwards received from the plaintiff the whole of the principal money, and having appropriated it to his own use, died insolvent:—Held, first, that the plaintiff was entitled to recover the amount from the representatives of C; secondly, that the receipt of the principal money and the memorandum relating to the title deeds were receivable in evidence for the defendant. *Wilkinson v. Candlish*, 19 Law J. Rep. (N.S.) Exch. 166; 5 Exch. Rep. 91.

The plaintiff had placed goods in the warehouse of E & Co. at Huddersfield, for sale; and while they were there, he sold two parcels to the defendant, who resided in London. After the defendant had paid the plaintiff for one parcel, he received a letter from T, clerk to E & Co., inclosing the invoice of the other parcel, and requesting payment, and stating that E & Co. were authorized to receive the money for the plaintiff. The letter purported to be signed by E & Co., per procuration of the plaintiff. The defendant remitted the amount as requested, but T intercepted the letter at the office of E & Co., and appropriated the money. T only had authority from the plaintiff to receive payments over the counter for the goods deposited.—Held, that the receipt by T was no payment to the plaintiff. *Kaye v. Brett*, 19 Law J. Rep. (N.S.) Exch. 346; 5 Exch. Rep. 269.

An agent who had purchased lands of his principal, and who previously to the contract had entered into a secret negotiation for a re-sale of part of the property at a profit, declared a trustee for his principal to the extent of that profit.

In a suit by principal against agent, involving charges of fraud against the defendant, the latter was held to lie under the burden of disproving several particulars of the plaintiff's case, although the truth of those particulars was not directly proved, but rested on circumstantial evidence only. *Barker v. Harrison*, 2 Coll. C.C. 546.

(B) CONTRACTS BY AGENTS.

In a written contract for the sale of goods, the plaintiff described himself as the agent of other persons, whom he named therein. The buyer accepted the goods, and paid for part of them, having at the time notice that the plaintiff was not the agent, but

the real principal in the transaction:—Held, that the plaintiff might sue in his own name for the non-acceptance and non-payment of the remainder of the goods. *Rayner v. Grote*, 16 Law J. Rep. (N.S.) Exch. 79; 15 Mee. & W. 359.

In an action on a charter-party, which purported to be made by A B, "owner of the ship Ann," &c., it is not competent to give parol evidence that A B acted not as owner, but as agent for the real owner in making the charter-party. *Humble v. Hunter*, 17 Law J. Rep. (N.S.) Q.B. 350; 12 Q.B. Rep. 310.

There is in general sufficient privity of contract to maintain an action if the party actually making the contract with the defendant was acting for the plaintiff, and intended at the time to make the contract for him, though the defendant was not aware that the contract was made for the plaintiff.

The name in which the contract is made is *prima facie* evidence of the party for whom the contract was made; but it is not conclusive (except by the custom of trade in the case of bills of exchange). Therefore where two plaintiffs sue on a contract between them and the defendants as bankers, and it appears at the trial that the bank account was opened in the name of one only of the plaintiffs, it is competent for the plaintiffs to prove that the account was opened on behalf of them both; and it is sufficient to maintain the action if it is proved that the plaintiff who actually opened the account at the time intended it to be the account of the two, without shewing that the defendants had before the action any notice that he had so intended. It lies on the plaintiff to prove this intention affirmatively; and the fact that the plaintiffs were partners, and that the money paid into the account belonged to the partnership, is not alone sufficient evidence to go to the jury that the contract was intended to be made on behalf of the two. *Cooke v. Seeley*, 17 Law J. Rep. (N.S.) Exch. 286; 2 Exch. Rep. 746.

A party who executes an instrument in the name of and expressly as agent for another, cannot be treated as a party to the instrument so as to be sued upon it, unless he be shewn to be the real principal.

Semble—that one who contracts as agent for another, without in fact having any authority to do so, may, if he acts *malâ fide*, be liable to the party with whom he contracts, in an action on the case for falsely representing himself to have had authority. *Jenkins v. Hutchinson*, 18 Law J. Rep. (N.S.) Q.B. 274.

The plaintiffs carried on business in Manchester under the firm of J P & Co., and at Glasgow under the firm of A S & Co. M & Co. Indian agents, residing in England, ordered goods from the plaintiffs for the defendant, a member of the firm of A A & Co. in Bombay. It was arranged at the request of J P & Co. between M & Co. and the plaintiffs, who were then aware that the goods were for the defendant, that A S & Co. should draw bills on M & Co. for the amount, which was done accordingly. After the goods were shipped to Bombay, and A A & Co. debited with the bills, and before the bills became due, A A & Co. remitted large sums to M & Co. from Bombay. Before the bills became due, M & Co. stopped payment, being at that time indebted to A A & Co. in a large balance. The bills having been dishonoured, the plaintiffs brought their action for goods sold and delivered against the defendant:—Held, that M & Co. were the buyers of the goods.

That supposing the defendant to have been an undisclosed principal at the time of the order, the remittances to M & Co afterwards constituted a payment which exonerated him, although made before the expiration of the credit, and before the bills fell due, because the plaintiffs in taking M & Co.'s bills, must be understood to have been cognizant of, and parties to, the whole transaction.

Held, also, that this defence could be set up under the plea of non assumpsit. *Smyth v. Anderson*, 18 Law J. Rep. (N.S.) C.P. 109; 7 Com. B. Rep. 21.

The defendant, on the 10th of March 1847, employed the plaintiffs, who were stock and share brokers, to sell for him ten scrip certificates for fifty shares each in a projected railway company, and then delivered the certificates to them for that purpose. The plaintiffs, on the 27th of March, sold them to different purchasers, and paid the defendant the proceeds of the sales. The certificates were afterwards discovered to be forged, and the plaintiffs were called upon by the purchasers, on the 11th of May, to pay them respectively the value put on them by a resolution of the Stock Exchange committee passed with reference to the forged certificates in that railway company, of which there were several in the market, and which resolution was come to subsequently to the sales by the plaintiffs. The plaintiffs accordingly paid those sums, which were larger than the sums for which they had sold the certificates. The present action was brought to recover the sums so paid by the plaintiffs. The declaration contained a special count on an alleged warranty by the defendant that the certificates were genuine, and a count for money paid. The defendant paid into court the amount received by him from the plaintiffs, with interest.—Held, that the plaintiffs were not entitled to recover. That the first count failed, inasmuch as the law only implies a promise by a principal to indemnify his agent when acting according to his instructions, and no express promise was proved. That the common counts also failed because the sale was void on account of the forgery, and the purchasers were therefore (independently of Stock Exchange rules) entitled to nothing more from the plaintiffs than the sum the purchasers had paid them, and, consequently, that the plaintiffs could recover no more from the defendant; and that no difference was produced by the Stock Exchange resolution, it being made subsequently to the sale by the plaintiffs, and there being no rule of the Stock Exchange at the time of the sale which required brokers to be bound in respect of their contracts by resolutions to be made on the subject. *Westropp v. Solomon*, 19 Law J. Rep. (N.S.) C.P. 1; 8 Com. B. Rep. 345.

If a broker enter into a contract for an undisclosed principal, the latter may sue on such contract in his own name; and a rule of the Exchange on which the contract was made, which declares that a contract made by a broker for an undisclosed principal shall be regarded as the contract of the broker only, does not controul this right, even although the principal was cognizant of such rule. *Humphrey v. Lucas*, 2 Car. & K. 152.

In 1827, the administratrix of an intestate, who had carried on business at Calcutta, sent out letters of attorney to C & Co., to collect the assets in India. C & Co. collected the assets and remitted the pro-

ceeds in 1829 to B & Co., their correspondents in London, with directions to pay the same to the administratrix upon having a proper discharge. The letters of administration being insufficient, B & Co. refused to pay over the money. On a bill filed by the next-of-kin against the administratrix and B & Co., an injunction was obtained restraining the administratrix from collecting the assets, and B & Co. from paying over the fund. B & Co. by their answer admitted the possession of the fund, and offered to pay it upon being indemnified. No further steps were taken in the suit until 1841, when a bill of revivor and supplement was filed; and under an order in the cause, the fund, minus the expenses, was paid into court without prejudice to the question of interest. Since 1829 the fund had been lying at the bankers of B & Co. mixed up with other monies of the firm:—Held, that B & Co. were merely the agents of C & Co., and no demand having been made by a person competent to give a discharge, B & Co. were not liable to pay interest on the fund in their hands; and that B & Co. were in no default in not themselves applying to pay the fund into court, there being no personal representative, properly constituted by the Court. *Wolfe v. Findlay*, 16 Law J. Rep. (N.S.) Chanc. 241; 6 Hare, 66.

The plaintiff, who was captain of one of the East India Company's ships, sailed from London to Madras with a cargo, and there purchased from the East India Company certain cotton on his own account, which was taken by him in the company's ship to Canton, and sold there. Upon first arriving at Madras, the plaintiff had reported himself to the Government Board, and had been directed by that board to place himself under the orders of the Marine Board of Madras. The negotiations for the purchase of the cotton were carried on between the plaintiff and the Marine Board, by whom the plaintiff was allowed to ship the cotton free of freight to Canton. The contract as to freight was not confirmed by the Government Board, who had previously stated to the Marine Board that freight was to be paid by the plaintiff:—Held, upon the construction of the different negotiations between the plaintiff and the Marine Board, that the government must abide by the contract entered into by their agents, the Marine Board; and if the latter had exceeded their authority in allowing the plaintiff to take the cotton free of freight, the plaintiff, who was the innocent purchaser, was not to suffer the loss. *Smith v. the East India Company*, 17 Law J. Rep. (N.S.) Chanc. 178; 16 Sim. 76.

A shareholder in an incorporated railway company instructed a stock-broker to sell his shares. The broker agreed with a jobber for the sale of them, but the name of the purchaser was not mentioned. The jobber had been instructed to purchase by B (another broker) who, as the jobber knew, was not purchasing on his own behalf. B afterwards requested time for completion, his principal not being ready, and the jobber granted the time on B giving his own name as that of the principal. A deed of assignment was prepared from the vendor to B, who paid the price to the vendor, and took the deed of assignment executed by the vendor:—Held, upon a bill filed by the vendor, that B was bound to execute the assignment, to procure himself to be regis-

tered, and to pay the calls made since the execution of the assignment by the vendor, and to indemnify the vendor against future calls: and a decree was made to that effect. *Wynne v. Price*, 3 De Gex & S. 310.

PRINCIPAL AND FACTOR.

A declaration in assumpsit stated, that in consideration that the plaintiffs had consigned to the defendants, as factors, a cargo of wheat, to be sold by them on commission to be paid them by the plaintiffs, the defendants promised to obey the lawful orders of the plaintiffs to be given by them to the defendants in regard to the sale and disposal of the wheat. Breach, that the defendants sold contrary to orders. Pleas: third, that the defendants were under advance to the plaintiffs in respect of the cargo; that the defendants gave notice to the plaintiffs that they required repayment, or that they would sell the wheat and pay themselves; that the plaintiffs did not repay, and that for the purpose of reimbursing themselves, it was necessary for the defendants to sell the wheat; that they therefore sold the wheat for the best prices that could be obtained, and repaid themselves. Fourth, a similar plea, except that the advances were stated to have been made in respect of other consignments, and averring that the defendants had a lien on the wheat in question for such advances.

Upon special demurrer to these pleas—held, that there is no principle of law by which, independently of contract, authority is given to a factor (after notice to his principal) to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time and for that price, and that there was nothing in the pleadings in this case from which a contract of that nature could be inferred; and that the pleadings, therefore, afforded no answer to the action. *Smart v. Sandars*, 16 Law J. Rep. (n.s.) C.P. 39; 3 Com. B. Rep. 380.

A factor for sale cannot sell the goods of his principal, in the exercise of a sound discretion, contrary to the principal's orders, for the purpose of reimbursing himself for advances made to the principal, after the consignment. There is not, in such a case, an authority coupled with an interest which is irrevocable; although the advances made subsequently to the consignment might be a good consideration for an agreement that the original revocable authority to sell should become irrevocable.

The declaration (which was in assumpsit) stated that the plaintiffs had consigned a cargo of wheat to the defendants as co-factors for sale; that the defendants promised to obey the lawful orders of the plaintiffs; that the defendants sold a portion of the wheat for 6s. 4d. per bushel, and that the plaintiffs ordered them not to sell any more for less than 7s. Breach, that the defendants sold for less.

First plea.—That after the consignment, the defendants were under advances to the plaintiffs in respect of the consignment; that they gave notice to the plaintiffs to pay the amount, or that they would sell the residue of the cargo to reimburse themselves, that the plaintiffs failed to pay, and that the defendants, in the exercise of a sound discretion, for the

benefit of the plaintiffs, and to reimburse themselves, sold at the best price which could be obtained.

Second plea, that the defendants had a lien on the residue of the cargo for advances made after the consignment, and, after notice and default, sold in the exercise of a sound discretion for the best price.

On demurrer, held that these pleas were bad in substance. *Smart v. Sandars*, 17 Law J. Rep. (n.s.) C.P. 258; 5 Com. B. Rep. 895.

A principal intrusted goods to his factors T & Co., who sold them to K. K bought, knowing that T & Co. sold as factors. At the time of the sale T & Co. were indebted to K in an amount beyond the sum agreed to be paid for the goods.—Held, that in an action by the principal against the purchaser of goods from a factor "as factor," the purchaser is not entitled to set off a debt due to him from the factor. *Fish v. Kempton*, 18 Law J. Rep. (n.s.) C.P. 206; 7 Com. B. Rep. 687.

PRINCIPAL AND SURETY.

[See DEVISE, Charges—WILL, Construction.]

To an action against the defendant on his bond for 250*l.*, the defendant set out on oyer the condition of the bond, which recited that R J had agreed to become tenant to the plaintiffs of a public house; that it was stipulated that he should take from them ale, wine, &c. to be consumed there; that he should become bound with a surety to pay for the same to the amount of 50*l.* before he should have a fresh supply, as long as he should continue tenant of the plaintiffs; that when he should cease to be their tenant, the surety should be liable to the plaintiffs in such sum, not exceeding 50*l.*, as R J might then owe the plaintiffs for ale, &c. The condition then stated, that if R J should pay the plaintiffs for all ale received from them to an amount not exceeding 50*l.* before he should have a fresh supply, and when he should become indebted to them in that sum, and if he should pay them for all sums which he should owe them for ale, &c., not exceeding 50*l.*, when he should cease to be tenant, the obligation was to be void. The plaintiffs permitted R J to become indebted to them in a larger amount than 50*l.*—Held, that the defendant was not discharged by reason of the plaintiffs having supplied R J with ale, &c. to an amount exceeding 50*l.* upon credit, but that, in any event, on default of the principal, the defendant was liable to the extent of 50*l.* *Seller v. Jones*, 16 Law J. Rep. (n.s.) Exch. 20; 16 Mee. & W. 112.

The plaintiff, being a shareholder in a banking co-partnership, became surety for money advanced by the co-partnership to the defendant, who afterwards, by a composition deed, to which the plaintiff and the bank were parties, assigned his property to trustees for the benefit of creditors. By this deed the rights of the creditors against sureties were reserved.—Held, that the plaintiff, who had been compelled to pay the debt to the bank, was entitled to recover the amount from the defendant. *Kearsley v. Cole*, 16 Law J. Rep. (n.s.) Exch. 115; 16 Mee. & W. 128.

One of two co-sureties to a bond received from the principal a promissory note for the sum secured

by the bond. In an action for contribution brought by such surety against his co-surety,—Held, that it was a question of fact for the jury to say, whether the note was given in pursuance of an arrangement between the parties that the defendant should be thereby discharged, or simply as a collateral security from the principal to the plaintiff; in which latter case the defendant would not be discharged. *Dome v. Whalley or Walley*, 17 Law J. Rep. (N.S.) Exch. 225; 2 Exch. Rep. 198.

Debt on bond by the overseers of a parish against the defendants as sureties of an assistant overseer. The condition was that the principal should at all times, so long as he should continue in the office of assistant overseer, pay, &c. By a resolution of the vestry by which he was elected, his salary was to be 8*d.* in the pound for some sums collected by him, and 4*d.* for other sums, and his appointment was to continue from the 25th of March 1840 till the 25th of March 1841. Subsequently, two Justices, by their warrant of the 9th of July 1840, reciting the above resolution, and that his salary had been fixed for the execution of his office until the 25th of March then next, stated, that in pursuance of the statute 59 Geo. 3. c. 12. they appointed him assistant overseer. On the 25th of March 1841, he was re-elected by the vestry at an annual salary of 50*l.*, and was as before re-appointed by the Justices, and continued to be so re-elected and appointed by the vestry and the Justices annually on the same terms until March 1846. On ceasing to hold office in 1846 he was guilty of a default in not paying monies over to the overseers:—Held, that the sureties were not liable upon the bond. *Bamford v. Iles*, 18 Law J. Rep. (N.S.) M.C. 49; 3 Exch. Rep. 380.

The plaintiff became co-surety with K in a bond given to the defendants, the guardians of a union. The bond recited that B had been appointed treasurer to the union; and the condition of the bond was, that if B should faithfully discharge the duties of the office of treasurer, by receiving all monies tendered to be paid to the board of guardians, and placing the same to their credit; by paying out of the monies of the guardians in his hands all orders on him in their behalf; and on being removed from the office, should pay over to the guardians all balances, monies, &c. due to the union, the bond should be void. B was a partner in a banking firm. No money belonging to the defendants was paid to or received by B solely; all payments on behalf of the defendants being made to and cheques drawn upon the firm. The firm became bankrupt, and B was removed from the office of treasurer. The plaintiff was called upon to pay, and did in ignorance of the facts pay the defendants 15*l.* as the balance of monies due to the defendants from B as treasurer of the union at the time of his removal from the office:—Held, that the plaintiff was entitled to recover back the money so paid, and that K could not be joined as a plaintiff in the action. *Mills v. the Guardians of the Alderbury Union*, 18 Law J. Rep. (N.S.) Exch. 252; 3 Exch. Rep. 590.

A signed a joint and several bill of exchange as surety for a firm, on the faith that B would join as co-surety. B never signed and A was compelled to pay by action. One of the firm died and the rest became bankrupt:—Held, first, that the firm could

not avail themselves of the bill, and were liable to repay the amount and costs at law and equity. Secondly, that the claim was not proveable under the bankruptcy, and therefore not barred by the certificate. Thirdly, that the claim of A was sufficient to support a creditors' suit for the administration of the estate of the deceased partner. *Rice v. Gordon*, 11 Beav. 265.

A firm of three partners agreed to make advances to a consignor on certain terms as to commission, and as to a lien on the return proceeds of the shipments. They accepted on the faith of this agreement bills drawn on them by the consignor, and on one of those bills approaching maturity they requested the holders to give them an extension of time, which the latter agreed to do, on having the acceptance of a distinct firm of six, in which the three were also partners. A bill was accordingly drawn by the three, accepted on behalf of the six, and indorsed by the consignor to whose credit it was carried by the holders of the former bill. Afterwards the holders were parties to an arrangement between the consignor and his creditors, whereby they released the consignor and the shipments from all liability in respect of the bills:—Held, that they thereby discharged the firm of six. *Ex parte Webster re Acraman*, 1 De Gex, 414.

The estate of A having been decided to have been charged by way of surety only for securing payment of the mortgage and specialty debts of B, and to be entitled to be recouped the sums paid thereout due from B's estate, it was held, that the personal representatives of A were not entitled to interest out of the estate of B, on the sums so paid. *Lancaster v. Evers*, 16 Law J. Rep. (N.S.) Chanc. 308.

A having accepted bills for the accommodation of B, who was unable to take them up, agreed to provide for half their amount as they became due, C (a party to the agreement) charging certain property to the extent of 1,500*l.* for the benefit of A by way of security, which property C alleged to be his own, and a security amply sufficient in value above incumbrances. More than half the amount of the bills was paid by A, but the property of C proved to be heavily incumbered and insufficient:—Held, in a suit by A against the executors and devisees of C, that the misrepresentation as to the value being proved, A was entitled to have so much of the sum of 1,500*l.* and interest as the specific property was insufficient to pay, raised and paid out of C's general estate. *Ingram v. Thorp*, 7 Hare, 67.

The testator advanced 1,000*l.* to W on his bond, in which J joined as surety. W becoming involved in his affairs, arranged with his creditors to pay 1*l.* in the pound, the testator guaranteeing the payment of the composition. The assets of W would not have been sufficient for payment of the composition if the testator had enforced payment of his bond debt:—Held, upon appeal, that the effect of the transaction was to give time to the principal debtor, as the testator, after having joined in the compromise, could not have enforced his demand upon the bond to the dis-appointment of the trade creditors, and, consequently, that the surety was discharged. *Cross v. Sprigg*, 19 Law J. Rep. (N.S.) Chanc. 528; 2 Hall & Tw. 233; 2 Mac. & G. 113; reversing s. c. 18 Law J. Rep. (N.S.) Chanc. 204; 6 Hare, 552.

F & Co., bankers, were creditors of the firm of

H, B & Co., which consisted of M A H, and J B. S H, who was a married woman, having property settled for her separate use, joined as surety with J B in several promissory notes and bills of exchange to F & Co., to secure the debt due to them from the firm of H, B & Co. The firm of H, B & Co., being greatly in debt to F & Co., dissolved partnership. Articles of agreement were entered into between M A H and J B and F & Co., which provided that J B should carry on the business alone; that J B should pay the debt due to F & Co. by monthly instalments. F & Co. also agreed not to sue M A H or require payment from her of the partnership debt; but the remedies of F & Co. against the sureties of M A H and J B were expressly reserved. This bill was filed by F & Co. to make the securities of S H as surety available; and upon a motion for a receiver of the income of her separate property,—Held, that the deed made a material alteration in the relation subsisting between the creditors and principal debtors; but that from the state of the authorities respecting the reservation of the rights of creditors against sureties, the Court was bound to give effect to what appeared to have been the law as administered in this court, and if the defendant could not give security for what the plaintiffs might recover out of her settled estate, to appoint a receiver to secure the fruit of the suit if the law should be ultimately established in favour of the plaintiffs. *Owen v. Homan*, 19 Law J. Rep. (n.s.) Chanc. 549.

A bill was filed by the corporation of Berwick against the treasurer of the borough fund and three persons who were his sureties, for the purpose of obtaining an account of monies which had been paid to the treasurer. The defence of the treasurer was, that he had been proceeded against before the magistrates under a clause in the Corporation Act, and that the plaintiffs' claim could not now be enforced by a court of equity. The defence of two of the sureties was, that the corporation by their act were only empowered to appoint a treasurer from year to year, and as he had been continued beyond the first year, without a renewal of the bond of the sureties, they were no longer liable. The defence of the third surety was, that he had given notice that he would no longer continue surety, and that, although no deed had been executed by the corporation to exonerate him. It was also contended, that the sureties were not necessary parties to the suit. The Court held, that the treasurer having taken upon himself a fiduciary trust, it was the duty of a court of equity to enforce the due performance of it; that, as the bond to which the sureties were parties contained a clause extending their liability to any annual or other future election of the treasurer, that liability still remained; and that no deed having been actually executed to exonerate the third surety, he was also liable.

It was further held, that the sureties were necessary parties to the suit.

The plaintiff having examined witnesses on particular points, the defendant is at liberty to cross-examine those witnesses upon any other point he thinks fit. *The Mayor, &c. of Berwick-upon-Tweed v. Murray*, 19 Law J. Rep. (n.s.) Chanc. 281.

PRISONER.

[See BANKRUPTCY.]

- (A) PRISONS.
- (B) RIGHTS AND PRIVILEGES.
- (C) DISCHARGE.

(A) PRISONS.

The raising of money by corporations for building or repairing prisons facilitated by the 11 & 12 Vict. c. 39; 26 Law J. Stat. 75.

The expenses of providing lock-up houses on the borders of counties provided for by the 11 & 12 Vict. c. 101; 26 Law J. Stat. 263.

An act for the better government of convict prisons. 13 & 14 Vict. c. 39; 28 Law J. Stat. 67.

(B) RIGHTS AND PRIVILEGES.

To an action of trespass for false imprisonment, the defendant justified as the keeper of the Queen's Prison, under a writ of attachment against the plaintiff out of the Court of Chancery for contempt for non-payment of costs, and under the warrant of Lord Denman, made pursuant to the 5 & 6 Vict. c. 22. s. 2, for the transfer of the plaintiff from the Fleet Prison to the custody of the defendant as keeper of the Queen's Prison.—Held, that as the Court is bound to take judicial notice of the course of proceedings in Chancery, the plea was not bad for not stating a return to the writ, such writ of attachment for costs being final process. Secondly, that the writ being directed to the warden of the Fleet, no warrant of commitment was necessary. Thirdly, that the warrant of Lord Denman was legal, although there was no warrant of commitment against the plaintiff, the object of the statute being to authorize the removal of all persons in lawful custody. *Cobbett v. Hudson*, 18 Law J. Rep. (n.s.) Q.B. 233; 13 Q.B. Rep. 497.

An insolvent prisoner in the Queen's Prison was ordered to file his schedule under the 1 & 2 Vict. c. 110. s. 36, by an order made before the passing of the 11 & 12 Vict. c. 7. After the passing of that act the insolvent was removed to a ward in the first class of the prison, pursuant to the directions of the 2nd section, as a debtor neglecting or refusing to file a schedule of his property when ordered to do so by the Insolvent Court, under the 1 & 2 Vict. c. 110. s. 36.

A petition by the prisoner, under the 32 Geo. 2. c. 28. s. 11, to be removed from the first class into the general prison, on the ground that the act of the 11 & 12 Vict. c. 7. applied only to cases where the order to file the schedule had been made previous to the passing of the act, was dismissed, with costs. *Stead v. Anderson*, 19 Law J. Rep. (n.s.) C.P. 264; 1 L. M. & P. 109.

A person who has been committed to prison for default of sureties to keep the peace, and who has been discharged at the sessions, is not afterwards entitled to demand a copy of the examinations on which the commitment proceeded. Section 27. of the statute 11 & 12 Vict. c. 42. gives the right to such a copy only when the person has been bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to

prepare for trial. *Ex parte Humphrys*, 19 Law J. Rep. (N.S.) M.C. 189.

(C) DISCHARGE.

[See BARON AND FEME—TRESPASS.]

Where the defendant was detained in custody under a writ issued in July 1838, and no further proceedings having been taken by the plaintiffs in the action, in October 1839 a vesting order was made by the Insolvent Court upon the petition of one of the creditors of the defendant; it was held, that the defendant's right to be discharged from custody was not affected by section 41. of the 1 & 2 Vict. c. 110, as, at the time of the proceedings in the Insolvent Court, he was entitled to his discharge in consequence of no proceedings having been taken in the action for more than a year.

A prisoner has a right to apply *de die in diem* for his discharge, and is not prejudiced by a former application having been unsuccessfully made. *Hallett v. Cresswell*, 15 Law J. Rep. (N.S.) Q.B. 129; 3 Dowl. & L. P.C. 561.

The public officer of a banking company, who was plaintiff in an action, died after the issuing of a writ of *ca. sa.*, but before its execution:—Held, that it was not necessary to bring a *sci. fa.*; and that the defendant was therefore not entitled to be discharged on the ground that the action had abated.

Seem—that if there was no registered officer of the company after the death of the plaintiff, the defendant might apply to the Court to have one appointed in order to give the defendant a discharge. *Todd v. Wright*, 16 Law J. Rep. (N.S.) Q.B. 311.

The Court refused to discharge a prisoner out of custody on his affidavit that the plaintiff had died in 1836, and that he had been informed and believed that no legal personal representative of the plaintiff had revived the action, or had taken any proceedings whatever since the death of the plaintiff. *Taylor v. Burgess*, 16 Law J. Rep. (N.S.) Exch. 204; 16 Mee. & W. 781; 4 Dowl. & L. P.C. 708.

A writ of *ca. sa.*, issued in the lifetime of the plaintiff, was in 1844 directed to the sheriff of C, who transferred it to his successor. On the 12th of October 1846, the plaintiff died; on the 13th the sheriff issued his warrant, and on the 14th, the defendant was arrested:—Held, that the arrest was good, although made after the death of the plaintiff; and that the defendant was not entitled to be discharged out of custody. *Ellis v. Griffith*, 16 Law J. Rep. (N.S.) Exch. 66; 16 Mee. & W. 106; 4 Dowl. & L. P.C. 279.

The defendant was arrested by a Judge's order, on an affidavit of the 20th of October, which stated that an advertisement had appeared in the *Times* of the 15th of September of an edict of the Austrian consul at Smyrna on the 1st of August, stating the defendant to have absconded from Smyrna, and to stand accused of fraudulent bankruptcy, and calling on him to appear in seventy days.

The defendant, on being arrested, applied to another Judge, to set aside the order to hold to bail, and all subsequent proceedings; but the Judge refused to interfere:—Held, that whether the Judge secondly applied to was right or not in refusing to order the defendant's discharge, he was right in not ordering the *capias* to be set aside. Secondly, that the

seventy days having elapsed before the application to the Judge, the order had proceeded on insufficient grounds, and the defendant was entitled to his discharge.

A party arrested by a Judge's order may apply to another Judge for his discharge, and may appeal to the Court against the decision of the latter Judge.

Where a defendant has been arrested under the 1 & 2 Vict. c. 110. s. 6, the Court from which the process issues has power to discharge him, either by virtue of its general jurisdiction over the acts of a single Judge, or of that given by the statute, if the Judge has acted on insufficient materials, or has exercised an improper discretion. In such a case the defendant may use affidavits to explain or contradict those on which the order was granted; and the defendant's affidavits may be answered by the plaintiff on shewing cause.

Quære.—Whether, if the Judge secondly applied to should differ from the first, on the same state of facts, he has power, or ought, to order the prisoner's discharge.

Quære, also.—If it should appear on the fresh affidavits before the Court, that the person arrested was about to quit England at the time the affidavits were made, but it is not clear that he was about to quit England, or even though it be shewn that he was not, when the order was made, the Court ought to discharge him. *Graham v. Sandrinelli and Talbot v. Bulkeley*, 16 Law J. Rep. (N.S.) Exch. 67; 16 Mee. & W. 191, 193; 4 Dowl. & L. P.C. 317.

A defendant in custody on a *ca. sa.* received on Saturday, the 12th of November, an order from the creditor for his discharge. The order on being shewn to the gaoler was by him forwarded to the sheriff, who lived at some distance from the gaol. On the Sunday following a warrant of detainer, founded on a *ca. sa.* which had been issued on the previous day, was served upon the gaoler, who thereupon detained the defendant:—Held, that the defendant had no right to his discharge, as the sheriff was entitled to a reasonable time to search his office for other writs against the defendant, and that the service of the warrant on the Sunday made no difference in the case. *Samuel v. Buller*, 17 Law J. Rep. (N.S.) Exch. 54; 1 Exch. Rep. 439.

An affidavit of debt stated that the defendant was indebted to the plaintiffs in 1,050*l.*, being the balance due for principal and interest on four bills of exchange, one dated, &c. drawn by the defendant on and accepted by K for 400*l.* at three months, and by the defendant indorsed to the plaintiffs, which said bill was duly presented, &c. and dishonoured, and due notice of dishonour thereof given to the defendant—another bill for 500*l.* drawn, &c. and indorsed to the plaintiffs (no presentation or dishonour was alleged). The two other bills were for 250*l.* and 400*l.* respectively, and the affidavit shewed a good cause of action on each existing in the plaintiffs against the defendant. By order of a Judge a *capias* was sued out indorsed for bail for 1,050*l.* The defendant, after arrest, applied to the Judge to be discharged, as no good cause of action for 1,050*l.* was shewn on the affidavit. The Judge reduced the amount for which bail was to be given to 550*l.*:—Held, that the Judge's order varying the indorsement was correct, and that the defendant was not entitled to his discharge. *Cunliffe v. Maltass*, 18

Law J. Rep. (N.S.) C.P. 233; 7 Com. B. Rep. 695; 6 Dowl. & L. P.C. 723.

The 48 Geo. 3. c. 123. applies to plaintiffs in execution for costs only; and, therefore, the lessor of the plaintiff in ejectment who had been in custody for twelve months, for non-payment of costs under 20*l.*, pursuant to a rule of court, was held entitled to his discharge. *Doe d. Smith v. Roe*, 18 Law J. Rep. (N.S.) Q.B. 89; 6 Dowl. & L. P.C. 544.

An execution issued out of the Palace Court subsequently to the 1st of August 1849 is valid, not being an "action or suit" commenced after the passing of the 12 & 13 Vict. c. 101. within the meaning of section 13.

A warrant of imprisonment from the Palace Court directing a defendant to be imprisoned thirty-five days, but not naming any day for the commencement of such imprisonment, is good, as in such a case the imprisonment begins to run from the time of the defendant being taken into custody. *Braham v. Joyce*, 19 Law J. Rep. (N.S.) Exch. 1; 4 Exch. Rep. 487.

Where a Judge having made an order for the arrest of a party under the 1 & 2 Vict. c. 110. is afterwards of opinion that the party is entitled to his discharge, the proper course is not to set aside the order and *capias*, but to direct the party to be discharged out of custody. *Burness v. Guiranovich*, 19 Law J. Rep. (N.S.) Exch. 110; 4 Exch. Rep. 520.

A defendant, in a case of misdemeanour, for which he was indicted at the Quarter Sessions, and in which he was entitled to traverse, did traverse:—Held, that his traverse was to the next sessions, and not to the assizes, which came before the next sessions, and the defendant being imprisoned in the gaol on this charge, the Judge, at the assizes, would not discharge him on his own recognizance.

If a prisoner be committed to the *gaol* for trial at the Quarter Sessions which are to be held after the assizes, the Judge at the assizes will discharge him on his own recognizance if there be no indictment preferred against such prisoner at the assizes.

The Judges' commission of *gaol* delivery applies only to untried prisoners in the *gaol*, and not to untried prisoners in *houses of correction*. *Regina v. Arlett*, 2 Car. & K. 596.

The Court of Common Pleas has no power to discharge upon a *habeas* a prisoner from custody under process of the Court of Chancery, and cannot entertain any question as to the irregularity of such process. *In re Andrews*, 4 Com. B. Rep. 226.

The Court cannot discharge a plaintiff from an execution for the costs of a judgment as in case of a nonsuit, although the defendant has absconded, and his attorney consents. *Pearce v. Skaif*, 6 Com. B. Rep. 200.

A party who had been arrested and taken to the Fleet on a writ of attachment for non-payment of costs, was discharged out of custody by consent, on the ground that he was privileged at the time of his arrest:—Held, that the issuing of a subsequent writ of attachment for the same costs, and an arrest thereunder, were regular.

The voluntary discharge of a party irregularly arrested, will not prejudice the right of the other party to enforce his demand by the same process or by a new writ. *Andrewes v. Wallon*, 19 Law J.

Rep. (N.S.) Chanc. 249; 1 Mac. & G. 380; 2 Hall & Tw. 154.

The Court of Chancery refused to discharge, under the 1 Will. 4. c. 36. s. 15. r. 17, a defendant in custody under an attachment for non-payment of costs.

Semble—that the only relief is under the Insolvent Debtors Acts. *Snowball v. Dixon*, 2 De Gex & S. 9.

A defendant, in contempt for not appearing, was brought up to the bar of the court, and ordered to be handed over to the warden of the Fleet, and an appearance was ordered to be entered for him, within the first four days of Michaelmas term, the defendant having then been in custody more than thirty days, the last of which expired in the vacation:—Held, that this order was regular, and that he was not entitled to be discharged, although the time mentioned in the 10th rule, on the expiration of which he was entitled to apply to be discharged, had previously expired. *Smyth v. Tuck*, 15 Law J. Rep. (N.S.) Chanc. 367.

Where an insolvent, on his return from attending the Court of Bankruptcy on his own petition for protection under the 5 & 6 Vict. c. 116, was arrested under an attachment of the Court of Chancery, his application to the Court of Chancery to be discharged was held improper, and refused. *Plomer v. Macdonough*, 1 De Gex & S. 232.

The Lord Chancellor has jurisdiction, as the Judge of one of the superior courts of record at Westminster, to discharge a prisoner under the 48 Geo. 3. c. 123. *Lister v. Lister*, 2 Hall & Tw. 174.

PRIVY COUNCIL.

PRACTICE ON APPEALS TO.

The Charter of Justice of the Island of the Mauritius does not provide for appeals in matrimonial suits, yet upon petition for that purpose, the Judicial Committee recommended the allowance of an appeal against a decree for the restitution of conjugal rights.

Semble—if an appeal is incompetent, the respondent should move, on appeal, to dismiss the same on such ground, and not wait till the hearing to object to its competency. *Shire v. Shire*, 5 Moore, P.C. 81.

Though allowance is to be made for the technical difference of the proceedings in the courts of Canada and those of England, yet where trial by jury prevails, a special verdict ought to be the finding of facts by the jury from which the Court is to pronounce its judgment on the law, and the verdict ought not to leave facts to the Court to draw an inference; such as, whether negligence has or not been established, negligence being a question of fact and not of law.

The negligence of a bailee in disobeying the instructions of a bailor, given more than a year prior to the cause of action, and not specifically declared upon,—Held, not sufficient, though proved in the cause, to entitle the plaintiff to recover damages thereon. A *venire de novo* awarded, with liberty to amend the pleadings. *Tobin v. Murison*, 5 Moore, P.C. 110.

The Royal Court of Jersey having, on the remis-

sion of a *doléance* and petition, pronounced certain arrests and seizures made by the attorney general of the island, for alleged frauds against the revenue laws of the island, to have been illegal; the original petitioner brought a petition and remonstrance in the Royal Court of Jersey, against the attorney general, for damages thereby occasioned. The attorney general, upon being called upon to answer this remonstrance, summoned the Lieutenant-Governor, the bailiff and jurats, (who were the Commissioners of the *impôt* duties,) alleging that, as he had acted under their advice, they were proper parties to the suit, and they were joined with him as parties to the suit. The bailiff and jurats constituted the Royal Court. The attorney general then put in a plea, that the Court, thus constituted, was incompetent, as being interested in, and parties to, the suit, whereupon the Court declared itself incompetent to adjudicate in the cause. The petitioner took no further steps for two years, when he presented a *doléance* and petition, to the Queen in Council, and obtained a summons for the attorney general to appear. The attorney general petitioned to dismiss such summons, first, because no leave to appeal had been granted by the Court below; secondly, because the other parties to the suit ought to have been summoned; and thirdly, because, if it was an appeal, it had not been duly prosecuted within three months from the date of the act of the Court:—Held, by the Judicial Committee that such objections were fatal, and the summons discharged. *In re Whitfield*, 5 Moore, P.C. 157.

By the Order in Council of the 18th of December 1834, for regulating appeals from the island of Malta, to the king in Council, an appeal is allowed only where the sum or matter at issue involves, directly or indirectly, any civil rights amounting to, or of the value of, 1,000*l.* But, leave to appeal was granted by the Judicial Committee, from the decrees of the Courts of the first and second instance of the island, which directed children to be removed from the guardianship of their mother. *Camilleri v. Fleri*, 5 Moore, P.C. 161.

F, and three others, W D, F D and J D, purchased from J a herd of cattle in the following shares—F one-third, W D, F D and J D, two-thirds between them. At the time of the purchase, F and W D wrote a letter to W & Co., which, after stating the purchase, and that they had given their promissory notes for the purchase-money, at one and two years' date, proceeded thus:—"We request you to indorse these bills for the satisfaction of Mr. J, for which indorsement we will allow you the usual commission of 2*l.* 10*s.* per cent.; and will, for your security, place at your unreserved disposal the whole of the herd in question, and its increase; trusting, however, that our recommendation of allowing such part of it to be disposed of as will cover the amount of your indorsements, and confiding to J D, acting under your instructions from us, to remit you all the proceeds as they arise, will meet with your satisfaction." W & Co. assented to this arrangement, indorsed the notes, and handed them over to J. At the same time F and W D wrote a further letter to W & Co. as follows:—"In consequence of your complying with our request to indorse our bills for the purchase of J's herd, we hereby make over the said herd to you, requesting

you to give J D instructions how to dispose of the herd, and remit you the proceeds, until by such remittances your indorsement is covered." W & Co. in no way interfered with the sale of the cattle, nor was any part of the proceeds of the sale ever handed to them, and the herd was lost. Upon a bill filed by F against W & Co. seeking to make them liable, as trustees, for the loss,—Held, by the Judicial Committee, affirming the decree of the Supreme Court of New South Wales, that, under the above agreement W & Co. could not be considered as having been in possession of the cattle, as mortgagees, or as equitable assignees, and that the letter operated only as a collateral security, and that they were not liable in equity to account for the loss.

The bill, besides seeking to make the defendants liable to account, for a particular transaction, prayed for a general account. No general account, however, was asked for in the court below. Upon the Judicial Committee affirming the decree of the Court below, deciding against the liability of the defendants as to the particular transaction, they refused to decree a general account, as it had not been asked for at the hearing in the courts below.

The Charter of Justice of New South Wales, of the 13th of October 1823 (made in pursuance of the powers conferred by the 4 Geo. 4. c. 96.) gave a right of appeal from the Court of Appeals in the colony to the King in Council, where the subject at issue involved the sum of 2,000*l.* sterling. The 4 Geo. 4. c. 96. being about to expire, the 9 Geo. 4. c. 83. was passed, in which no provision was made for the continuance of the Court of Appeals; but power was given to His Majesty, by Charter, Orders in Council, or Letters Patent, to make rules for allowing appeals from the Supreme Court of the colony. No new Charter, Order in Council or Letters Patent issued under this act. In such circumstances, the Judges in New South Wales held that they had no jurisdiction to allow an appeal from the Supreme Court to Her Majesty in Council: the Judicial Committee, upon special petition, under their general jurisdiction, advised Her Majesty to admit such appeal. *Flint v. Walker*, 5 Moore, P.C. 179.

Under the Bombay Charter of Justice, the Supreme Court of Bombay is invested with full and absolute power to allow or deny an appeal in criminal cases, and no power is reserved to the Crown, by such Charter, to grant leave to appeal in such cases.

The case of *Christian v. Corren* (1 P. Wms. 329) observed upon. *Regina v. Alloo Paroo*, 5 Moore, P.C. 296; *Regina v. Stephenson*, 3 Moore, In. App. 488.

The Bombay Charter of the 8th of December 1823, (granted in pursuance of the powers conferred on the Crown, by the 4 Geo. 4. c. 71,) after providing "That in all indictments, informations, and criminal suits and causes whatsoever, the said Supreme Court of Judicature at Bombay shall have the full and absolute power and authority to allow or deny the appeal of the party pretending to be aggrieved," proceeds thus,—"And we do hereby also reserve to ourselves our heirs and successors, in our or their Privy Council, full power and authority, upon the humble petition of any person or persons aggrieved by a judgment or determination of the Supreme Court of Judicature at Bombay, to refuse or admit his, her or their ap-

peal thereupon, upon such terms and under such limitations, restrictions, and regulations, as we or they shall think fit, and to reform, correct, or vary, such judgment or determination as to us or them shall seem meet."

Upon a petition, praying for leave to appeal from a conviction for felony,—Held, by the Judicial Committee of the Privy Council, that there was no power reserved to the Crown by the charter to allow appeals in criminal cases, such appeal being confined to civil cases only.

Held also, that the charter having been granted by the Crown by force of an act of parliament, must be construed with reference to the powers conferred by the act, even though the prerogative of the Crown were limited by such construction; and that the Supreme Court alone has full and absolute power to allow or deny permission to appeal in criminal cases.

Seemle.—No appeal lies, in cases of felony, to the Queen in Council, from any of the dominions of the Crown of Great Britain, which are governed by the law of England. *Regina v. Edujee Byramjee*, 5 Moore, P.C. 276; 3 Moore, In. App. 468.

The Scotch Sequestration Act, the 2 & 3 Vict. c. 41. s. 78, enacts, "that the moveable estate and effects of the bankrupt, wherever situate, so far as attachable for debt, should, by virtue of the act and warrant of confirmation in favour of the trustee, be transferred to and vested in him, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration."

C & Co. carried on business in co-partnership in Scotland, and also in the island of Tobago. A sequestration issued against them in Scotland:—Held, by the Judicial Committee, first, that the statute 2 & 3 Vict. c. 41. extended to the colonies; and, secondly, that the interim factor and trustee under such sequestration, had a right against a creditor in Tobago, to moveables seized by the provost marshal in Tobago, under an execution, in an action brought by him against C & Co., in Tobago, subsequent to the date of the sequestration.

Quere.—Whether the Interpleading Act (1 & 2 Will. 4. c. 58.) extends to the colonies.

By an act of the Colonial Legislature of Tobago, passed in 1841, and confirmed by the Queen in Council, it was declared that such of the common law and all statutes and parts of the public and general statute laws of England as are or shall be or become applicable and suitable to the circumstances and population of the colony, should be in force in the island. *Quere*.—Whether, by this colonial act, the Interpleading Act could be held to extend to Tobago. And

Quere.—Whether, if such Interpleading Act extended to the colonies, an appeal from a judgment, entered up on a feigned issue, would lie to the Queen in Council. *The Colonial Bank v. Warden*, 5 Moore, P.C. 340.

The executors of B, parties to the suit below, had not been served with the appeal: the Court, before giving judgment, directed the appeal to stand over for six months, with liberty for them to attend, and to be heard on the appeal. *Gordon v. Horsfall*, 5 Moore, P.C. 393.

H & Co., of Newfoundland, by order of Messrs. D, of Jamaica, shipped a cargo of fish on board a vessel, chartered by Messrs. D, and consigned it, by

Messrs. D's request, to S & L, Messrs. D's factors, in Jamaica. Messrs. D were, at that time, indebted to S & L for large advances made to them; and, after they had ordered the cargo, they applied to S & L for a further advance, informing them that they might expect the cargo, and authorizing them to sell it on their account, and give them credit for the proceeds. S & L made the required advance. No agreement was reduced into writing as to the pledge of the cargo. Before the arrival of the vessel, Messrs. D, being in insolvent circumstances, informed S & L that, in the circumstances of the firm, they could not think of receiving the cargo; and, on the arrival of the vessel, Messrs. D, by letter to S & L, repeated their determination not to receive the cargo, and desired them to sell it; to render the sales to them, and to remit the proceeds, after deducting freight, &c. to H & Co. Messrs. D also wrote, to the same effect, to Messrs. H & Co., who, by letter, acquiesced in this repudiation (the letter did not arrive in Jamaica until some months after the sale). S & L offered no objection to Messrs. D's proposal, and sold the cargo; they did not then claim any lien on the cargo, but they afterwards refused to account for the proceeds to H & Co., claiming a lien on the goods as the factors and creditors of Messrs. D:—Held, by the Judicial Committee, upon a bill of exceptions to the Judge's direction, in an action of assumpsit brought by H & Co. against S & L, that S & L, having sold the cargo under the direction of Messrs. D, must be considered as the agents of H & Co., and that, if they had originally any lien on the cargo, they had, by their conduct, waived it.

Where there are questions of law raised by the proceedings in the inferior courts in the colonies, this Court will favour an application for leave to appeal direct to the Queen in Council, under the 7 & 8 Vict. c. 69, without resorting to the intermediate Court of Appeal in the colony. *Harrison v. Scott*, 5 Moore, P.C. 357.

An order made by the Judges of the Supreme Court of Madras, dismissing the Master of that Court from his office, for alleged official misconduct in the taxation of a bill of costs, reversed, upon appeal, by the Judicial Committee of the Privy Council.

Such an order, being made by the Court at its own instance, is not an appealable grievance, within the Madras Charter of Justice of December 1800.

An appeal having been allowed by the Court below, and referred by Her Majesty to the Judicial Committee for adjudication in the ordinary way, their Lordships, though of opinion that there existed no charter right of appeal, thought it a fit case for the allowance of a special appeal; and having heard the case upon the merits, directed a petition for special leave to appeal to be presented to Her Majesty; of which, on its being referred to them, they recommended the allowance, and that the appeal be placed in the same plight and condition as that originally referred to them. *In re Minchin*, 6 Moore, P.C. 43; 4 Moore, In. App. 220.

By the 35th section of the rules respecting appeals from the Vice Admiralty Courts abroad, made under the authority of the statute 2 & 3 Will. 4. c. 51, all appeals are to be asserted within fifteen days after the date of the decree appealed from. In March 1846, a decree was pronounced by the Vice Admi-

ralty Court at Saint Helena, restoring a vessel seized by a British cruiser for an alleged infraction of the Slave Trade Act, and referring the amount of costs and damages to the Registrar. No appeal was asserted by the seisor's proctor, who attended before the Registrar under the decree. In the month of December of that year, a petition of appeal was brought in by the Queen's proctor, on behalf of the seisor, which the Registrar (in consequence of the appeal not having been asserted within fifteen days) refused to receive. On an application made *ex parte*, supported by affidavits stating that it was the seisor's proctor's ignorance of the rule for asserting the appeal which alone prevented him from appealing, leave was given to appeal, subject to a counter petition being presented by the respondent to dismiss the appeal. Upon an act on protest against the right of appeal by the respondent:—Held, by the Judicial Committee, that there was no sufficient reason to enable them to allow the appeal. *Regina v. Joze Alves Dias (The Aquila)*, 6 Moore, P.C. 102.

If an instrument contains distinct engagements, by which a party binds himself to do certain acts, some of which are legal and some illegal at common law, the performance of those which are legal may be enforced, though those which are illegal cannot.

By a deed of settlement, a joint-stock banking company, called "the Bank of Australia," was established as a bank of issue and deposit, at Sydney, in New South Wales. The deed contained clauses conferring powers upon the directors, "for the better management of the concerns of the said company," &c., whereby it was declared that they shall have, and be expressly invested with, "full power and authority to superintend, order, conduct, regulate and manage all and singular the affairs and business of the said company, to the best of their discretion and judgment, under and subject to the provisions hereinafter contained." Such board of directors were further empowered to "devise and make such provisions, rules, orders and regulations, touching the government, carrying on, and management of the affairs of the said company, the same not being repugnant to the general rules and regulations therein contained, as they should think expedient." In the year 1843, the Bank of Australia became involved in pecuniary difficulties, whereupon the directors at Sydney applied to the Bank of Australasia for a loan, and borrowed from that bank, at various times, the sum of 154,000*l.*, for which the directors gave their promissory note. Upon the negotiation of this loan, the directors of the Bank of Australia entered into an agreement with the Bank of Australasia, whereby they stipulated that the Bank of Australia should cease to be a bank of issue, deposit and discount, and should become a loan company; and that no transfer of shares or stock should be made without the consent of the Bank of Australasia; they also agreed to wind up, and get in their capital as a loan company. Payment of the note for 154,000*l.* was refused by the shareholders of the Bank of Australia, on the ground that the stipulations contained in the agreement were *ultra vires* of the directors. On an action brought by the Bank of Australasia on the promissory note against the chairman of the Bank of Australia, the Supreme Court at New South Wales, at a trial at

bar, found for the defendant. Upon appeal,—Held, by the Judicial Committee (reversing the verdict and judgment of the Supreme Court), first, that the directors of the Bank of Australia had the powers of managing partners in an ordinary banking partnership, and that, amongst these, was the power of borrowing money for the purpose of discharging the existing liabilities of the bank till the assets should be realized, and of discontinuing the bank if they thought such conduct essential to the interests of the shareholders.

Secondly, that the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were *ultra vires*, did not discharge the bank from liability to repay the loan, as the only effect of those stipulations was, that they could not be enforced.

Held, also, that the proceeding before the Judicial Committee from the verdict of the Supreme Court was in the nature of an appeal, and not a writ of error, and that this Court had power, under its common law jurisdiction, to give subsequent interest upon the judgment debt.

Although no power is given by the Charter of Justice or the act of parliament creating the Supreme Court at New South Wales, to allow an appeal to the Queen in Council from that Court, yet, to prevent a failure of justice, this Court will, upon a special petition for that purpose, grant leave to appeal from a judgment of that Court. *Bank of Australasia v. Breillat*, 6 Moore, P.C. 152.

Appeal allowed, under the statute 7 & 8 Vict. c. 69, direct to Her Majesty in Council, upon a bill of exceptions, to prevent the delay and expense of bringing a writ of error returnable before the Governor and Council of the Island of Jamaica. *Attorney General of Jamaica v. Manderson*, 6 Moore, P.C. 239.

By the Charter of Justice of the 23rd of December 1823, establishing the Supreme Court at Bombay, that Court was prohibited (in like manner as the Supreme Court at Calcutta, under the 21 Geo. 3. c. 70. s. 8), from entertaining any jurisdiction in any matter concerning the revenue, under the management of the Governor and Council, or any act done in the collection thereof.

In an action of trespass brought against the collector of revenue at Bombay, for distraining for arrears of government "quit-rent," the defendant pleaded "not guilty" only. The Supreme Court at Bombay held, that the "quit-rent" was not "revenue" within the meaning of the charter, and that the act complained of was not warranted by the usage of the country and the company's regulations, and that the Court had jurisdiction to entertain the action, and found for the plaintiffs:—Held, reversing such finding and judgment, first, that the "quit-rent" was part of the revenue of the East India Company at Bombay; and

Secondly, that it being a matter concerning the revenue and the collection thereof, the Supreme Court had no jurisdiction, and that the Court being excluded by the charter from any matter concerning the revenue, the plea of "not guilty" was sufficient; and that the Judge ought at the trial to have directed a nonsuit or a verdict to be entered for the defendants.

A plea in abatement to the jurisdiction of the Court must point out another Court before which

the matter is cognizable. A plea in bar, if well founded, is sufficient, without pointing out the Court in which the suit ought to have been brought.

If a party *bonâ fide*, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the legislature intended for him, although he has done an illegal act.

The Supreme Court in overruling the objections to the jurisdiction of the Court refused leave to appeal; the subject-matter of the action being trifling, and under the amount required by the rules of the Privy Council. Upon petition, the Judicial Committee granted leave to appeal, but upon the terms of the East India Company paying the respondent's costs of the appeal, to enable him to appear to prevent the question being argued *ex parte*. *Spooner v. Juddow*, 6 Moore, P.C. 257.

Leave to appeal in *formâ pauperis* allowed, and sureties for prosecuting appeal dispensed with. *Brouard v. Dumaresq*, 6 Moore, P.C. 412.

After the institution of an appeal from the Arches Court, in a suit against a clergyman for adultery, fornication, or incontinence, this Court refused to receive additional articles charging acts of adultery, alleged to have been committed subsequently to the close of the case in the Arches Court, or to examine *vivâ voce* the witnesses examined in the court below, upon the allegation that they had been tampered with previous to their examination. *Craig v. Farnell*, 6 Moore, P.C. 446.

Bounties awarded under the statute 6 Geo. 4. c. 49, to the commander, officers, and crew of Her Majesty's ship *Samarang*, upon the capture and destruction of piratical prahus, in the Straits of Giliolo, in respect of the piratical crew on board the prahus.

Leave to appeal against an interlocutory decree of the Admiralty Court, awarding such bounties, granted to the Admiralty proctor, on behalf of the Crown, notwithstanding an appeal had not been interposed within due time, the circumstances of the case entitling the appellants to such indulgence. *Regina v. Belcher*, 6 Moore, P.C. 471.

Parties to an appeal agreed to compromise the same, and that the appellant should have paid over to him a certain sum of money, the amount of compensation in respect of slaves attached to an estate, the subject of the appeal. Upon petition to dismiss the appeal, an order of dismissal was made, containing also an order for the Accountant General of the Court of Chancery to pay to the appellant the compensation money in question. *M'Turk v. Douglas*, 6 Moore, P.C. 500.

To an action for recovery of arrears of rent due to the plaintiff, under a sub-lease of 2 *pergunna*, the defendant pleaded, that the sub-lease was part of a loan transaction, for the purpose of securing to the plaintiff an illegal interest upon the loan, and was void, under Reg. XV. of 1793. The Courts in India held that it was an usurious transaction, and dismissed the action. Upon appeal, this decision was confirmed by the Judicial Committee of the Privy Council.

No appearance having been entered by the respondents to an appeal from India, and the appellant's case being ready to lodge for hearing, their Lordships, upon the application of the appellant,

made an order that the respondents should be served with notice that unless they brought in their case without delay the appeal would be heard *ex parte*; giving the appellant liberty to proceed in the court below, to render such service effectual; and the Court was ordered to certify to the Judicial Committee what had been done with respect to the same. *Wise v. Kishenkoomar Bous*, 4 Moore, In. App. 201.

Their Lordships declined to hear an appeal from the Sudder Dewanny at Madras, *ex parte*, without evidence of the respondent having been personally served with notice that the appeal was pending; and ordered the appeal to stand over, with leave for the appellant to proceed in the court below, to render service of such notice effectual. *Konadry Valabha v. Valia Tamburati*, 4 Moore, In. App. 213, n.

PROCHEIN AMI.

When an infant plaintiff is nonsuited, a rule for an attachment absolute in the first instance will be granted against the *prochein ami*, if after personal service of the Master's allocatur for the costs in the action, and demand made, he does not pay them.

If the affidavit in support of the motion states a demand of the costs in the allocatur, it is good, although it does not specify the amount.

It is not necessary that the affidavit should state the place where the demand was made.

The *prochein ami* was a barrister, and attended at the Central Criminal Court, at the Old Bailey, as counsel for the prosecution in an indictment about to come on for trial. He was conversing with the prosecutor in the passage between the Old and New Courts, when the demand of payment of the costs was made:—Held, that the demand was good. *Newton v. the London, Brighton and South Coast Rail. Co.*, 19 Law J. Rep. (N.S.) Q.B. 12; 7 Dowl. & L. P.C. 328.

PRODUCTION AND INSPECTION OF DOCUMENTS.

[See BILL OF EXCHANGE, Evidence—PRACTICE, IN EQUITY, Production of Documents.]

In an action against the Bank of England for not paying dividends upon certain stock, the Bank admitting that the stock had, up to a certain day, stood in the Bank books in the plaintiff's name, alleged that the plaintiff had, on that day, transferred it. Upon the affidavit of the plaintiff, that she had never signed or authorized any transfer, and that if such alleged transfer existed it was a forgery, the Court made absolute a rule allowing her to inspect the particular entry in the transfer book, purporting to transfer the stock. *Foster v. the Bank of England*, 15 Law J. Rep. (N.S.) Q.B. 212; 8 Q.B. Rep. 689.

In a town cause, a service of a notice to produce by putting the notice into the letter-box at the office of the attorney in London, on the evening before the trial, is not a good service.

Semble—that in an action in the Exchequer, a notice to produce is not bad by reason of its being entitled "In the Common Pleas." *Lawrence v.*

Clark, 15 Law J. Rep. (n.s.) Exch. 40; 14 Mee. & W. 250; 3 Dowl. & L. P.C. 87.

The plaintiff, an allottee of railway shares, brought an action for money had and received against the defendant, a director of the company, to recover his deposit. The subscribers' agreement and parliamentary contract, signed by the plaintiff and the defendant, were in the possession of the attorneys for the railway company. The Court ordered the defendant to give the plaintiff an inspection and copy of the documents, upon an affidavit, stating that they were necessary for the purpose of framing the plaintiff's case. *Steadman v. Arden*, 15 Law J. Rep. (n.s.) Exch. 310; 15 Mee. & W. 587; 4 Dowl. & L. P.C. 16; s.r. *Ley v. Barlow*, 17 Law J. Rep. (n.s.) Exch. 105; 1 Exch. Rep. 800; 5 Dowl. & L. P.C. 375.

By section 9 of the 7 Geo. 2. c. 8. "every broker shall keep a book and enter therein all contracts, &c. which he shall from time to time make in buying and selling stock, and shall produce such book when thereunto lawfully required."

Plaintiff, a sworn broker, brought an action as indorsee of a bill of exchange against the defendant as acceptor. On application by the defendant for a rule calling on the plaintiff to produce his book, the affidavit alleged that the bill was accepted for the accommodation of the drawer, who indorsed the bill to the plaintiff in payment of monies due on illegal contracts in the public stocks:—Held, that the defendant was not directly interested in the document he applied to inspect, and the Court refused the rule.

Per Wilde, J.—That the intention of the statute was that the broker should be compelled to produce the book to be inspected by his principals. *Pritchett v. Smart*, 18 Law J. Rep. (n.s.) C.P. 211; 7 Com. B. Rep. 625.

In an action by the secretary against provisional committee-men for arrears of salary, a judge at chambers having ordered that the defendant should be at liberty to inspect and take copies of resolutions passed by the managing committee, being referred to in the plaintiff's particulars as the foundation of his claim, the Court refused to rescind the order, the plaintiff not satisfactorily shewing that it was not in his power to comply with it. *Shaw v. Holmes*, 3 Com. B. Rep. 952.

Notwithstanding a statement in the defendant's answer that a deed of conveyance, the production of which is sought by the plaintiff for his inspection, is his title deed, and does not in any manner evidence the plaintiff's title, the deed will be ordered by the Court to be produced if it appear on the face of the answer that its contents may prove material to the plaintiff's case.

A partition was made, prior to the reign of King Henry VIII., of an ancient manor, by dividing it into two reputed manors, to which divers tenements were respectively allotted in severalty, but a considerable portion of waste lands of the original ancient manor continued undivided, the property of the two lords of the reputed manors, as tenants in common. The information stated that part of the defendant's ancient freehold tenements, situate within one of the reputed manors, consisted of uninclosed lands, and that some portion thereof was waste land held of the ancient manor, and that of

such the informant was tenant in common with the defendant: the defendant admitted, by his answer, that there were such waste lands, but stated that the same were allotted, and formed part of the defendant's ancient freehold tenements, and that the defendant, in the year 1829, obtained from the lord of the reputed manor in which his ancient tenements were situate, a conveyance of the manorial and other rights, fine rents, &c. belonging to the lord over those tenements, except the right to tin-stuff and sporting. The information insisted that the uninclosed lands, except the ancient tenements, were held by the two lords as tenants in common, and were subject to tin-bounds, and that waste and unallotted lands only were subject to tin-bounds. The defendant stated that there was a difference of opinion, as to whether lands subject to tin-bounds were always waste lands, and insisted that the deed of conveyance of 1829 was the title deed of the defendant, and in no manner evidenced the informant's title. The deed and the map delineated thereon, were, notwithstanding, ordered to be produced for the informant's inspection. *Attorney General v. Lambe*, 17 Law J. Rep. (n.s.) Chanc. 154; 11 Beav. 213.

An information charged that the defendants claimed under some charter, &c., and that certain charters and documents were in the possession of the defendants relating to the matters aforesaid (that is, the plaintiff's title), and that none of such documents contained any grant to the defendants of, or recognition of their title to, the matters in question in the suit:—Held, that the defendants were bound to answer, whether they claimed under some charter, and as to the possession of such documents, and whether or not they contained any such grant or recognition, and that they could not excuse their production by stating their belief that such documents did not contain evidence of the plaintiff's title, but must distinctly negative the grounds upon which the plaintiff called for their production.

It is not sufficient for a defendant, in order to protect himself from production of documents, to negative the plaintiff's title; but he must set out such a title in himself as, if proved, would shew that he is entitled, and not the plaintiff.

An agent claiming an adverse title, proved by acts of ownership, must distinctly negative the conclusion that such acts of ownership are to be attributed to his character of agent. *Attorney General v. London (Corporation)*, 19 Law J. Rep. (n.s.) Chanc. 314; 2 Mac. & G. 247; 2 Hall & Tw. 1; affirming s.c. 18 Law J. Rep. (n.s.) Chanc. 314, 339; 12 Beav. 8, 171.

PROHIBITION.

[See PRACTICE, IN EQUITY, Jurisdiction of the Court.]

- (A) WHEN IT LIES.
- (B) SETTING ASIDE.
- (C) PLEADING AND PRACTICE.

(A) WHEN IT LIES.

The Judge of a county court, notwithstanding an admission by the plaintiff that a plea of judgment recovered in another court for the same debt was true, gave judgment for the plaintiff.

This Court refused to grant a rule *nisi* for a prohibition, the question decided being within the jurisdiction of the Judge. *Ex parte Rayner*, 17 Law J. Rep. (N.S.) C.P. 16; 5 Dowl. & L.P.C. 342.

The defendant having been sued in the county court, without any notice of the proceedings, judgment was given against him and his goods seized in execution. He then applied to the Judge under the 80th section of the Small Debts Act, the 9 & 10 Vict. c. 95, to set aside the judgment and execution; but the Judge having imposed certain terms to which the defendant declined to accede, the latter paid the debt and costs under protest, and moved this Court for a prohibition:—Held, that the Judge had jurisdiction over the matter, and that no prohibition ought to issue. *In re Robinson v. Lenaghan*, 17 Law J. Rep. (N.S.) Exch. 174; 5 Dowl. & L.P.C. 713; 2 Exch. Rep. 333.

The plaintiff, the indorsee of two bills of exchange amounting together to 23*l.*, brought a plaint in a county court to recover from the defendant, whose wife had accepted the bills in her husband's name, the sum of 4*l.* 19*s.*, as the balance remaining due on the bills.

The plaintiff treated as part payment of the bills the proceeds of the sale of some articles of jewelry belonging to the defendant which had been obtained from the defendant's wife by the drawer of the bills, and by him handed over to the plaintiff. The defendant produced evidence to shew that his wife had no authority to accept the bills or to deliver the articles, and that the plaintiff had no right to sell or appropriate the proceeds of the sale in payment of the bills; and he contended that as the original amount of the bills exceeded 20*l.*, the Judge of the county court had no jurisdiction. The Judge, however, held the defendant liable on the bills, and treated the giving of the articles as part payment, and gave the plaintiff judgment for the balance claimed.

The defendant applied for a prohibition to restrain the Judge of the county court from proceeding further in the plaint; but as the plaint stated a matter within the Judge's jurisdiction, and the objection to the jurisdiction arose on contested facts, and he had clearly power to inquire into the facts which raised that question, and as also the decision on the merits turned on the very point on which the question of jurisdiction arose, and as the affidavits were conflicting, the Court refused the motion. *Joseph v. Henry*, 19 Law J. Rep. (N.S.) Q.B. 369; 1 L.M. & P. 388.

Under the 9 & 10 Vict. c. 38, 'An Act to empower the Commissioners of Her Majesty's Woods to form a Royal Park in Battersea Fields,' a jury was regularly impanelled before the sheriff of Surrey, to ascertain what recompence should be made to a claimant for the value of certain lands required for the purposes of the act, and found a verdict for the sum of 750*l.*, which the sheriff then gave judgment for and ordered to be paid to the claimant. Thereupon the claimant applied for a

writ of prohibition to prohibit the sheriff and the Commissioners from entering and recording the said verdict and judgment and further acting upon or making available the same, on the ground of an excess of jurisdiction and misdirection by the sheriff, and was ordered to declare in prohibition.

Held, upon demurrer to such declaration, that the verdict and judgment were valid and conclusive in themselves, and that neither the recording of them under section 30. of the act, nor the proceeding which the Commissioners were empowered to take under section 40, were acts in respect of which the prohibition could be granted.

Semle—that the case was not one to which a writ of prohibition was at all applicable. *Chabot v. Lord Morpeth*, 19 Law J. Rep. (N.S.) Q.B. 377; 15 Q.B. Rep. 446; and see *In re Chabot*, 17 Law J. Rep. (N.S.) Q.B. 336.

(B) SETTING ASIDE.

A Judge of a county court having ordered the defendant in a plaint before him to pay the amount recovered or to be committed to prison, notwithstanding the defendant, after the judgment, and before the last-mentioned order, had obtained his discharge from the Insolvent Court, and had inserted the debt in his schedule; the defendant by an *ex parte* application obtained a writ of prohibition out of the Petty Bag Office of the Court of Chancery to prohibit the county court from executing the judgment.

This Court, on motion, set aside the writ; first, because no ground for prohibition was stated therein; and secondly, because there was no excess of jurisdiction, since the order of the Insolvent Court did not take away the jurisdiction of the county court, though it might entitle the defendant to be relieved from payment of the debt. *Still v. Booth*, 19 Law J. Rep. (N.S.) Q.B. 521; 1 L.M. & P. 440.

A writ of prohibition issued out of the Court of Chancery is a proceeding within the meaning of the 12 & 13 Vict. c. 109. s. 39, and a motion to set such writ aside may be made in either of the superior courts at Westminster.

It is no answer to such motion that the attorney of the applicant has not entered his name and address in a book at the Petty Bag Office, pursuant to the 12 & 13 Vict. c. 109. s. 44. *Baddeley v. Denton*, or, *In re Baddeley*, 19 Law J. Rep. (N.S.) Exch. 44; 4 Exch. Rep. 508.

(C) PLEADING AND PRACTICE.

The declaration, in prohibition, stated, (amongst other things) that the defendants, by their libel in the spiritual court, alleged that the parish of F was within the parish of B, and that there was a custom for the inhabitants of F to contribute to the repairs of the parish church of B, "and all expenses necessarily laid out by the churchwardens of B" in a certain proportion. It also stated that the plaintiff, by a "negative issue" in that court, "denied the allegations of the libel," and also by his "personal answer" traversed in terms both the parochiality and the custom, and then went on to state that the plaintiff afterwards "articulately propounded" that F was a distinct parish, and that it was untrue alleged that F had contributed to the sums raised by the churchwardens for the repair of

the church of B, or in due execution of their office as churchwardens, for that the truth and fact was, that there was no such custom "of the inhabitants of F contributing towards the maintenance and reparation of the parish church of B."

To this declaration the defendants pleaded that there was a custom for the inhabitants of F "to contribute to repairs of the parish church of B" in the proportions already specified in the libel:—Held, that the plea was no answer to the declaration, which clearly shewed that the spiritual court was proceeding to try a different custom from that stated in the plea, and also a question of parochial boundary. *Dolby v. Rimington*, 15 Law J. Rep. (n.s.) Q.B. 326; 9 Q.B. Rep. 179.

A declaration in prohibition stated that before and at the time of exhibiting the libel after mentioned, the plaintiff was not impropiator or proprietor of the tithes of T, that T was not a parish, and that the chancel did not belong to the impropriate rectory in the libel mentioned, nor was the plaintiff in possession of the said chancel; that from time whereof, &c. there had been a custom in T that the inhabitants of T should repair, and still of right ought to repair, at their own cost, the chancel; and that from time whereof, &c. there was another custom in T, that when any repairs were necessary in the said chancel the chapelwardens had given directions and paid for such repairs; that neither the plaintiff nor any of his ancestors had ever repaired or paid for the repairs of the said chancel; that from time whereof, &c. there was another custom in T that church and chapel rates for the repairs of the church or chapel of T had been collected in T by the chapelwardens thereof, and that the repairs of the said chancel had been paid for out of the said rates by the said chapelwardens; that from time whereof, &c. there had been another custom in T that the chapelwardens of T passed their accounts with the inhabitants of T; that church-rates had always been paid in respect of the tithes of T, and that the plaintiff had agreed to accept 70*l.* per annum in lieu of tithes, leaving the remainder, about 15*l.*, to be taken in lieu of church and other rates. It then averred that the defendants exhibited against the plaintiff in the spiritual court a libel on articles alleging that the plaintiff was impropiator of the parish of T, and that the chancel of the said church belonged to the rectory, and was in possession of the plaintiff, and that the rectorial tithes were sufficient to sustain the said chancel; that the chancel was dilapidated, and that the plaintiff had refused to repair; that the plaintiff appeared in the spiritual court, and pleaded a negative issue, and also put in a responsive allegation alleging the customs and matters before mentioned; that the said Court was proceeding to determine the said customs and matters, &c.

The defendants traversed that there was a custom that the inhabitants of T should, at their own cost, repair, or that they had, in fact, repaired the said chancel, *modo et forma*, and also traversed that there was a custom that the costs of repairing the chancel had been paid for out of the rates, *modo et forma*. Issues were joined on these traverses, and the defendants had a verdict upon both issues. Upon a rule to enter judgment *non obstante veredicto*,—

Held, first, that the alleged customs that the chapelwardens of T ordered and paid for the repairs of the church of T, and that the chapelwardens of T accounted to the inhabitants of T for the money collected and expended by them on account of chapel-rates, were only incidental to, and evidence of the customs which were traversed; and were immaterial and irrelevant to the question to be decided in the spiritual court; and that the omission to traverse these customs afforded no ground for a prohibition.

Secondly, that the question whether T was or was not a parish was not properly triable in the spiritual court, and that the allegation to that effect in the declaration was material, and if admitted, would entitle the plaintiff to judgment.

Thirdly, that the defendants having traversed two only of the allegations in the declaration, leaving wholly unanswered a material allegation, the plaintiff was entitled to a replader, but not to judgment *non obstante veredicto*, because the immaterial pleas, being traverses merely, contained no more than a conditional admission of the allegations not traversed, in case the plaintiff proved the allegations traversed, which he did not. *Duke of Rutland v. Bagshawe*, 19 Law J. Rep. (n.s.) Q.B. 234.

PROMISSORY NOTE.

In a suit for the administration of the estate of A, B, one of his executors, produced, in the Master's office, a promissory note, signed by A, whereby A promised to pay B 1,000*l.* on demand, for value received, and claimed a proof of debt on it. In support of his claim B made the following case: about 1822 A lent C 1,000*l.*, but declared that C should hold it in trust for B. In 1836 C became insolvent. In 1837 A, B and A's solicitor, had an interview in respect of the loss of the 1,000*l.*; and a few days after, A gave the note in question. Interest had always been paid by A to B, from the time of the loan until A's death. A died in 1841:—Held, that B had a right of proof on the note. *Burkitt v. Ransom*, 15 Law J. Rep. (n.s.) Chanc. 174; 2 Coll. C.C. 395.

PROTECTOR.

Form of petition, evidence and order on an application to the Court to consent as protector of the settlement to the barring of an entail. *In re Gravenor*, 1 De Gex & S. 700.

Under section 3. of the 3 & 4 Will. 4. c. 74. the Lord Chancellor of Great Britain has jurisdiction, as protector, to consent to the enlargement by the tenant in tail of a base fee in lands in England, the tenant for life being a lunatic so found in Ireland, and resident there.

The Lord Chancellor, however, refused his consent in the absence of the remainder-man, and where the effect of such consent would have been to vest the estates in the husband of the tenant for life, to the exclusion of her issue, and also of the brother of the lunatic, that brother being the remainder-man. *In re Graydon*, 1 Mac. & G. 655; 2 Hall & Tw. 182.

PUBLIC WORKS.

[See LANDS CLAUSES CONSOLIDATION ACT.]

Provisions of the 1 & 2 Vict. c. 117. as to the custody of monies paid under the standing orders by subscribers to works or undertakings to be effected by authority of parliament, repealed and re-enacted by the 9 Vict. c. 20; 24 Law J. Stat. 61.

Money advanced out of the Consolidated Fund for carrying on public works, fisheries, and the employment of the poor by the 9 & 10 Vict. c. 80; 24 Law J. Stat. 198.

Provisions usually contained in acts respecting the constitution and regulation of Commissioners for carrying on undertakings of a public nature, consolidated by the 10 Vict. c. 16; 25 Law J. Stat. 43.

QUARE IMPEDIT.

A statute, regulating the building, &c. of a new church in a parish, enacted, that during the life of the incumbent of the old church, the curate of the new church should be appointed by such incumbent, and that, after his death, the new church should become the mother church, with all the rights, &c., and the old church should become a chapel of ease thereto, to be served by a minister capable of having cure of souls, and the patronage of or right of presentation to the same chapel, as well as the patronage of or right of presentation to the said new church, should be vested in the patron of the rectory, so nevertheless that the minister of the said chapel should not be removable at pleasure:—Held, that the right of appointment to the chapel given by this statute was presentative and not donative.

Semble—that if it had been a donative, it would have ceased to be such, after a single presentment by the patron. *Regina v. Foley*, 15 Law J. Rep. (N.S.) C.P. 108; 2 Com. B. Rep. 664.

In *quare impedit* the Bishop has no right to counterplead the patron's title, by setting up title in the Queen by lapse.—[Confirming *Elvis v. Archbishop of York*, Hob. 315, and *Apperley v. Bishop of Hereford*, 9 Bing. 681.]

The incumbent of a parish church presenting himself to a district church within the parish, established under the 58 Geo. 3. c. 45. and the 59 Geo. 3. c. 134, and the yearly value of the two livings exceeding 1,000*l.*, the parish church, under the provisions of the 1 & 2 Vict. c. 106. ss. 4, 11, becomes *ipso facto* void. *Storie v. Bishop of Winchester*, 19 Law J. Rep. (N.S.) C.P. 217.

QUEEN'S PRISON.

The act establishing the Queen's Prison amended by the 11 Vict. c. 7; 26 Law J. Stat. 20.

The Master of the Rolls cannot inquire whether the keeper of the Queen's Prison obeys the regulations established for the government of the prison, or give directions as to the mode of treating a person committed for contempt. *Oldfield v. Cobbett*, 11 Beav. 258.

QUO WARRANTO.

[*Rowley v. Regina*, 5 Law J. Dig. 665; 6 Q.B. Rep. 668.]

A proceeding by information in the nature of a *quo warranto* will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with consent of parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others. The office of treasurer of the public money of the county of the city of Dublin is an office for which an information in the nature of a *quo warranto* will lie. *Darley v. Regina*, 12 Cl. & F. 520.

An affidavit stating that the deponent had seen the defendant "present at meetings of the town council, and acting as town councillor," is sufficient to ground a rule for an information in the nature of a *quo warranto*.

A rule *nisi* had been obtained for such an information, on affidavits stating the badness of several votes given for the defendant. In shewing cause against it, the defendant produced affidavits, impeaching such a number of votes given for the other candidate, as would leave him (the defendant) in a majority, if all the votes attacked on both sides were struck off. The Court made the rule absolute, declining to try the right between the parties on these affidavits. *Regina v. Quayle*, 10 Law J. Rep. (N.S.) Q.B. 231; 11 Ad. & E. 508.

In 1556 certain lands were demised by Sir J P to trustees, for the purpose of providing a weekly allowance and almshouses for six poor men in the parish of E; and also for finding a schoolmaster, who was to preach twice a year in the parish church of E. By charter of King James I. the hospital and school were incorporated by the name of "the master, schoolmaster, &c. of Sir J P," and the charity and appointment of master was subsequently regulated by private act of parliament:—Held, that an information in the nature of a *quo warranto* would not lie in respect of the office of master. *Regina v. Mousley*, 15 Law J. Rep. (N.S.) Q.B. 89; 8 Q.B. Rep. 946.

Upon a *quo warranto* information for exercising the office of coroner for a borough (appointed under the 5 & 6 Will. 4. c. 76.) judgment having been given for the Crown,—Held, that the relator was not entitled to costs by the 9 Anne, c. 20. *Regina v. Grimshaw*, 17 Law J. Rep. (N.S.) Q.B. 19; 5 Dowl. & L. P.C. 249.

RAILWAY.

[See COMPANY—EJECTMENT—LANDS CLAUSES CONSOLIDATION ACT—PRACTICE, AT LAW, Particulars of Demand—PRODUCTION AND INSPECTION OF DOCUMENTS—STAMP.]

Notices given and plans and sections of an intended railway deposited, in pursuance of the standing orders of the Houses of Parliament, previous to an application for an act, are not to be regarded in construing that act afterwards, unless they are so referred to as to be incorporated therewith.

A vertical deviation of the level of a railway,

not exceeding five feet, calculated with reference to the *datum* line shewn on the plans and sections deposited in pursuance of the standing orders of the Houses of Parliament, is within the powers of deviation conferred by the Railways Clauses Consolidation Act for Scotland (8 & 9 Vict. c. 33. s. 11), although the deviation may exceed five feet, calculated with reference to the surface line shewn on the said plans and sections. *North British Rail. Co. v. Tod*, 12 Cl. & F. 722.

The Railways Clauses Consolidation Act does not impose on a railway company, acting as carriers, any further liabilities than those which attach to common carriers. Therefore, although the company carry coals and other goods for hire from one end of their line to the other, and carry goods other than coals from an intermediate station, they are not bound to carry coals from that station, unless they have publicly professed to do so; and even if they have held themselves out as carriers of coals from that station, no action for refusing to carry coals from it will lie, unless it be shewn that the company have conveniences at the station for receiving and carrying the coals. *Johnson v. Midland Rail. Co.*, 18 Law J. Rep. (N.S.) Exch. 366; 4 Exch. Rep. 367.

By the Railways Clauses Consolidation Act 1845 (8 Vict. c. 20.) it is provided, by section 49, that where any railway is carried by a bridge over any turnpike road, the width of the arch is to be such as to leave thereunder a clear space of not less than thirty-five feet; and by section 51. where the former average available width of the road for the passage of carriages is less than thirty-five feet, the width of the arch need not be greater than such average available width, but so as not to be less than twenty feet; provided that if the average available width of the road be afterwards increased, the railway company shall, if required, increase the width of their bridge to an extent not exceeding the width of the road so widened, or the maximum width therein or in the special act prescribed for a bridge. By the special act (9 & 10 Vict. c. ccxxxiv.) it was provided "that in every case in which the railway shall cross a specified road otherwise than at right angles, the bridge shall be made with skew arches so as not in any manner to alter the direction of, or interfere with, the line of the roads, or the footpaths to the same."

Held, that the latter section applied only to the case of a road being turned so as to carry it at right angles under a bridge and again bending it back after passing the bridge to its original direction, but that it did not affect any question as to the width of the bridge or the narrowing of the road.

Held, also, that the meaning of the above clauses of the general act is, that where the average available width for the passage of carriages on any road exceeds thirty-five feet, it may be narrowed to thirty-five feet under the arch; where it is less than thirty-five feet, the arch may be of the same width as the road, so as it be not less than twenty feet, and if the road be afterwards increased, the arch must be proportionably widened up to, but not beyond, thirty-five feet.

A turnpike road, with footpaths on each side, was crossed by a bridge having a skew arch. The average available width for the passage of carriages

was unaltered, and the arch exceeded twenty feet in width. The piers projected upon and narrowed the footpaths by the side of the road, and were built parallel to the line of the carriage road.

Held, that the acts had been complied with, and that the footpaths could not be taken as part of the turnpike road over which the arch was to be thrown, within the meaning of the acts. *Regina v. Rigby*, 19 Law J. Rep. (N.S.) Q.B. 153.

The holder of a railway bond, transferred to him in pursuance of the 8 & 9 Vict. c. 16. ss. 46, 47, must sue upon it in his own name. *Vertue v. East Anglian Rails. Co.*; *Mills v. East Anglian Rails. Co.*, 19 Law J. Rep. (N.S.) Exch. 235; 5 Exch. Rep. 280.

An agreement was entered into between a landowner and a railway company, that the former should not oppose a projected railway, on condition that there should be a reference to arbitration for, among other purposes, defining the line of approach to his premises from a turnpike road which it was proposed to divert. After the award indicating such approach had been made, it became expedient for the company further to divert the turnpike road, but within the limits of deviation, and consequently necessary to alter the line of approach to the landowner's premises.—Held, that the company were not precluded from making such alteration. *Wood v. North Staffordshire Rail. Co.*, 1 Mac. & G. 278; 1 Hall & Tw. 611.

By a clause in a special railway act, after reciting that plans and sections of the railway, shewing the respective lines and levels thereof, and also books of reference, containing the names of the owners, &c. of the lands through which the respective lines of railway were intended to pass, had been deposited with the clerks of the peace, it was enacted that, subject to the provisions in that and the recited acts contained, it should be lawful for the company to make and maintain the railway and works on the line and upon the lands delineated upon the said plans. On the said plans was shewn by a cross-section the manner in which a street, intersected by the railway cutting, was to be carried across by means of a bridge, and also the ascent to the same bridge as 1 in 40. The company, in executing these works, proceeded to make the approach to the bridge by an ascent of 1 in 115, whereby the embankments were extended at a higher level along the front of the plaintiff's premises, to his damage.—Held, that the recital of the plans deposited did not incorporate them into the special act so as to preclude the company from exercising the power of altering the level of streets, &c. given by the 16th section of the Railways Clauses Consolidation Act.

Also, that the plans deposited were referred to as shewing the *datum* line and level of the railway itself, and constituted no contract between the parties, except so far as they were incorporated into the act.

The words "other engineering works," in the 14th section of the Lands Clauses Consolidation Act, refer to engineering works *ejusdem generis*, that is, in the formation of the railway itself.

Rules by which the Court is guided in putting a construction upon two sections of a statute which are apparently inconsistent with each other.

Where an order for an injunction was discharged upon an appeal, the defendants were held entitled to the costs of the original motion. *Beardmer v. London and North-Western Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 432; 1 Mac. & G. 112; 1 Hall & Tw. 161.

A railway act (incorporating the Railways Clauses Consolidation Act) authorized the construction of a railway in the line and upon the lands delineated in the plans deposited, and crossing a turnpike road on a level, as represented in the plans. By an agreement with a landowner, it was recited that the company had purchased the land for the purpose of constructing the railway "according to a certain plan and section deposited."—Held, that they had power to carry the turnpike road under the line instead of on a level. *Breynton v. London and North-Western Rail. Co.*, 10 Beav. 238.

Payment of or security for compensation in respect of damage consequential upon the execution of certain works by a railway company, is not, under the Railways Clauses Consolidation Act, 1845, made a condition precedent to the commencement of such works. Therefore, where a company, in the lawful execution of its powers, commenced the construction of works, by which the enjoyment of an easement by a neighbouring occupier of land might be interrupted, and damage sustained, a bill by such occupier to restrain by injunction the further progress of the works until the prospective damage should be ascertained, and the amount thereof paid or secured by the company, pursuant to the Lands Clauses Consolidation Act, 1845, was dismissed, with costs. *Hutton v. London and South-Western Rail. Co.*, 18 Law J. Rep. (N.S.) Chanc. 345; 7 Hare, 259.

RAPE.

Where, on the trial of a case of rape, it was wished on the part of the prisoner that the jury should see the place at which the offence was said to have been committed, and the place was so near to the court that the jury could have a view without inconvenience, the Judge allowed a view, although the prosecutor did not consent to it. *Regina v. Whalley*, 2 Car. & K. 376.

An acquittal on an indictment for a rape could not be successfully pleaded to a subsequent indictment for an assault with intent to commit a rape, nor could an acquittal on an indictment for feloniously stabbing with intent to do grievous bodily harm, be successfully pleaded to an indictment for an assault, although, in each case, the transaction was the same, and the accused might have been convicted of an assault, under section 11. of the statute 1 Vict. c. 85. *Regina v. Gisson*, 2 Car. & K. 781.

RATE.

[See STATUTES.]

(A) CHURCH RATE.

- (a) *Validity of.*
- (b) *Persons and Property rateable.*
- (c) *Recovery of.*

(B) POOR RATE.

- (a) *Validity of.*
- (b) *Publication.*
- (c) *Persons and Property rateable.*
 - (1) *In general.*
 - (2) *Exemption under the 6 & 7 Vict. c. 36.*
- (d) *Rateable Value.*
- (e) *Audit of Accounts.*
- (f) *Re-valuation.*
- (g) *Right to Copy.*

(C) COUNTY RATE.

- (D) BOROUGH RATE.
- (E) HIGHWAY RATE.
- (F) PAYING RATE.
- (G) SEWERS RATE.
- (H) RETROSPECTIVE RATE.
- (I) DISTRESS FOR RATES.
- (K) COMMITMENT FOR NON-PAYMENT OF RATES.

Overseers and surveyors of highways enabled to recover the costs of distraining for rates by the 12 Vict. c. 14; 27 Law J. Stat. 16.

A mode of levying and collecting rates in parishes situated partly within and partly without the limits of boroughs not liable to such rates provided by the 12 & 13 Vict. c. 65; 27 Law J. Stat. 91.

An act for better assessing and collecting poor and highway rates on small tenements, 13 & 14 Vict. c. 99; 28 Law J. Stat. 294.

(A) CHURCH RATE.

(a) *Validity of.*

The Court will not interfere by mandamus to enforce the making of a valid church rate, on the ground that the irregularity of the proceedings at the vestry, at which a church-rate has already been voted, has rendered such rate wholly void, it not appearing that such rate was actually made.

Seem, also that, were it made, the Court is not the tribunal to decide on its validity. *Regina v. Churchwardens of St. John the Baptist, Cardiff*, 16 Law J. Rep. (N.S.) M.C. 54.

The obligation of the parishioners to repair the body of the church is by the common law, and is not qualified or voluntary, but absolute and imperative; and when repairs are needful the only question on which the parishioners in vestry can by law deliberate is, how the obligation may be best, most effectually, most conveniently, and fairly between themselves carried into effect.

If at a vestry meeting duly convened under a monition from the ecclesiastical court, calling upon the parishioners to make a rate for the repair of the church, the majority refuse to make any rate, no question being made as to the necessity and amount of the rate required, the minority can make a valid rate. So held, per *Platt, B.*, *Cresswell, J.*, *Maule, J.* and *Alderson, B.*, affirming the judgment of the Court of Queen's Bench, (16 Law J. Rep. (N.S.) Q.B. 201; 7 Q.B. Rep. 406.) *Dissentientibus Rolfe, B.*, *Parke, B.* and *Wilde, C.J.*

At a meeting of the parishioners of Braintree, duly assembled in vestry, in pursuance of a monition from the ecclesiastical court directing them to make a rate for the necessary repair of the church, a rate of 2s. in the pound was duly proposed and

seconded. No one disputed the necessity of the repairs, or objected to the amount of the estimate, or questioned the propriety of the amount of the rate; but an amendment was proposed, put from the chair, and carried by the majority on the show of hands, objecting to all church-rates on general principles, and declaring that the vestry refused to make a rate. The question was then put, whether any other amendment was proposed, or any proposition as to the amount of the rate was made; and no answer was given. The original proposition was not again formally moved or put from the chair; but the churchwardens and the minority proceeded then and there to make the rate of 2s. in the pound:—Held, *per Platt, B., Cresswell, J., Maule, J. and Alderson, B.*, affirming the judgment of the Court of Queen's Bench (*ubi supra*) (*dissentientibus Rolfe, B., Parke, B. and Wilde, C.J.*), that such rate was valid, because the conduct of the persons refusing to make such rate was equivalent to taking no part in the proceedings, and could not prevent the minority from obeying the law and performing their duty by making the necessary rate.

In prohibition to prevent the rate being enforced, the declaration, after stating the above proceedings until the question was put, whether there was any other amendment or proposition, averred that no answer in the affirmative was given, and "that the majority of the said vestry having by the acts and means aforesaid refused to furnish the churchwardens of the said parish with the necessary funds as aforesaid, the now defendants, the churchwardens aforesaid and others of the rate-payers and parishioners of the said parish then and there present in vestry, on &c. did, in obedience to the aforesaid monition, and in discharge of the aforesaid obligation, cast upon them and the other parishioners of the parish of Braintree by the law and custom of this realm, at the said meeting of the said parish, and while the parishioners continued as aforesaid in vestry assembled," make the rate of 2s. in the pound:—Held, *per Platt, B., Cresswell, J. and Rolfe, B.*, that it sufficiently appeared that the rate was made by persons other than the majority, who had previously voted for the amendment; and *per Alderson, B. and Parke, B.*, that if the matter were left doubtful prohibition ought not to be granted; but *per Wilde, C.J.*, that the prohibition ought to be granted, because the question had not been properly put to the meeting, and the rate did not appear to have been made by any majority of the vestry constituted in any manner.

Semble—*Per Cresswell, J., Maule, J. and Alderson, B.*, that a rate is the only mode by which the parishioners in vestry assembled can compel the repair of the church. *Gosling v. Veley*, 19 Law J. Rep. (n.s.) Q.B. 111; 12 Q.B. Rep. 328.

A chapel rate, duly made, but objectionable from extrinsic circumstances, can only be questioned in the ecclesiastical court.

Where a chapel-rate was laid on the occupiers of land in the chapelry, excluding the owners and occupiers of mills and houses,—Held, that an occupier of land in the chapelry who had been summoned for non-payment of the rate, and had not objected to it before the Justices, could not question its validity in an action of replevin after distress on his goods under the Justices' warrant.

An order of Justices for payment of a chapel-rate need not state the proceedings to have been on oath. *Ramsbottom v. Duckworth*, 19 Law J. Rep. (n.s.) M.C. 74; 1 Exch. Rep. 506.

(b) *Persons and Property rateable.*

By an act for rebuilding a parish church, (the preamble of which recited, that the steeple, by falling on the body of the church, had utterly demolished the same,) trustees were empowered to borrow money, and for payment thereof to make rates upon the yearly rent of all "lands, houses, shops, warehouses, vaults, mills, or other tenements within the parish." By other clauses one half of the rate was payable by the owner or landlord of the premises so assessed, and the other half by the occupier or tenant thereof, and the tenant was to pay the whole of such rate, and deduct one half of the rate out of the rent to the landlord. If any person assessed should quit his land, dwelling-house, warehouse, shop, vault, mill, or other tenement, without payment, the collector was authorized to follow and distrain the goods of such person. By another clause, the collector was at liberty to inspect the books of the poor-rates or land-tax, in order to ascertain the rates and assessments to be raised and levied by virtue of the act:—Held, that under the first-mentioned clause, the vicar was not rateable in respect of the tithes. *Regina v. Neville*, 15 Law J. Rep. (n.s.) M.C. 33; 8 Q.B. Rep. 452.

(c) *Recovery of.*

A proposition for a church-rate having been rejected by a majority of the parishioners assembled in vestry pursuant to a monition from the ecclesiastical court, the churchwardens proceeded to lay a rate of their own authority, with the consent of the minority of the vestry meeting. The plaintiff, who was a rated inhabitant of the parish, having refused to pay his proportion of this rate, was summoned by the churchwardens before two Justices, and his liability and default having been proved, he was asked if he had anything to say against payment of the rate; when he said, he should not try the validity of the rate before the Justices, but that he would put in a written notice, which he accordingly served on the Justices before making the order. The notice stated, first, a protest against church-rates in general, as being unscriptural and oppressive; secondly, a declaration that the plaintiff would not contest the validity of the rate in the ecclesiastical court; and, lastly, that he would commence actions in the courts of common law against all persons concerned in any proceedings connected with the rate which he might be advised were illegal. At the time of the hearing, the Justices were aware that the plaintiff disputed the right of the minority to impose a church-rate:—Held, that this amounted to a notification of an intention to dispute the validity of the rate so as to oust the jurisdiction of the Justices under the 53 Geo. 3. c. 127. *Dale v. Pollard*, 16 Law J. Rep. (n.s.) Q.B. 322; 10 Q.B. Rep. 504.

Though the Justices, under the 53 Geo. 3. c. 127. s. 7, have no power to inquire into the goodness of a church-rate, yet the Court will not grant a mandamus to compel Justices to convene a party before

them for non-payment of a rate, which is bad or very questionable on the face of it.

Semble—that a church-rate, which purports in the heading of it to be made “for and towards the repairs of the church, and other incidental charges of the said parish and hamlet,” is a rate bad on the face of it. *Regina v. Byron*, 17 Law J. Rep. (N.S.) M.C. 134; 12 Q.B. Rep. 321.

In an indictment for disobeying an order of two Justices made under the statute 53 Geo. 3. c. 127, for the payment of a church-rate, an averment, stating (*inter alia*) by way of inducement, that a rate was duly made as by law in that behalf required, and that the same was afterwards duly allowed as by law in that behalf required, &c., and that the defendant was in and by the said rate duly rated, &c. is sufficient, without setting out the facts which constituted the alleged due making, allowance, and rating aforesaid.

Such an averment would not be sufficient, where it purported to be an allegation of the matter of the offence itself, and not merely by way of inducement.

Where the same count of the indictment, after the above averment by way of inducement, went on to aver (*inter alia*) an information by the proper parties to the Justice by whom the warrant was issued, that the said rate was duly made, &c., and that the same was afterwards duly allowed, &c., and that the defendant was duly rated, &c., and that the party refused to pay, such information as above will give jurisdiction to the Justices making the order, irrespective of the truth of the facts deposed to; and that, therefore, the count would have been sufficient, even had the above averment by way of inducement been insufficient or omitted.

Under the statute 53 Geo. 3. c. 127. s. 7, the fact of a rate duly imposed on a party, and the non-payment of it by such party, are not conditions precedent to the jurisdiction by the Justices to make an order for payment; and, therefore, an order purporting to be made on such an information as is above given would be valid, and could be enforced, whether *de facto* there was a proper rate, and a proper demand and refusal, or not.

It is sufficient in an indictment to aver that the churchwardens were authorized to collect and receive the rate at the time of refusal, without averring that they were so at the time of the demand.

A warrant (by way of summons) whereof the mandatory part is substantially set forth, but the inducement merely as follows:—“after reciting as is therein recited”—is sufficiently averred: such warrant need not be dated.

It will be intended in favour of an order, that the above warrant was served a reasonable time before the day of appearance; as otherwise the Justices would have acted unjustly in making the order, which will not be presumed.

The order need not be set out according to the tenour; the substance of it is sufficient.

If in the indictment it sufficiently appears by implication that the rate was in force when the order was made, that fact need not be positively averred.

Semble—under the statute 43 Eliz. c. 2. s. 4. in a special plea by a Justice to an action of trespass, it would be enough to state “a poor-rate duly pub-

lished, and that the plaintiff was an occupier and rated, and that there was a complaint on oath by the overseer, that he did not pay on demand, and that such fact was proved to the satisfaction of the Justice,” even though it might turn out, on further inquiry, that there had not, in truth or fact, been any such demand and refusal as was alleged before the Justice. *Regina v. Bidwell*, 17 Law J. Rep. (N.S.) M.C. 99; 2 Car. & K. 564; 1 Den. C.C. 222.

(B) POOR RATE.

(a) Validity of.

To an action of trespass for breaking and entering the plaintiff's mill, and taking his goods, the defendants pleaded a justification under 1 Vict. c. lxxix. (local), that the defendants, as commissioners under the act, completed one of three reservoirs mentioned therein; that the plaintiff's mill was benefited by the supply of water therefrom; that a certain rate was made, and that the trespass was committed and the goods were taken as a distress for the non-payment of the rate. The plaintiff replied that only one reservoir had been completed. General demurrer. The 38th section enacts, that “no rate shall be levied or assessed under the provisions hereinbefore contained, until the said reservoirs shall be actually made and in use, and water supplied therefrom.”—Held, on error in the Exchequer Chamber, (affirming the judgment of the Court of Exchequer), that, upon the true construction of the act, the completion of one reservoir entitled the commissioners to levy a rate on the class of persons mentioned in the act actually benefited by it; and therefore that the plea was good. *Sidebottom v. the Commissioners of the Glossoop Reservoirs*, 1 Exch. Rep. 611.

The district of D, which is locally situate within the parish of W, before the dissolution of the monasteries, had a chapel with a chantry and an endowment of land. The chapel and lands were granted in the 31 Eliz. to trustees, who always nominated the minister to the exclusion of the vicar of W. Before the 43 Eliz. c. 2. the chapel had all parochial rights, and its own churchwardens separate from W. The inhabitants of D have never contributed to the repair of the church of W, and D has always had its own surveyors of highways and constable. The titheable lands within D have always paid tithes to the vicar of W. The minister of the chapel is supported by the profits of the land with which it is endowed, but never received any tithes. There was originally only one overseer appointed for D, but since 1785 two overseers have been appointed. Separate poor-rates have always been made for D and W, and the poor in each have been maintained separately as to out-door relief. The amount in the pound raised has always been the same in both districts, the overseers of D taking the amount fixed by the overseers of W, or consulting with them as to the amount to be fixed, according as their rate was made subsequent or prior to that of W. There is no workhouse in D, but its poor were sent to the workhouse of W, and there maintained out of the rate levied on the parish. At the end of the year, the officers of D and W compared accounts, and the balance was handed over. The accounts of D, after being allowed by their own vestry, were submitted to the

vestry of W, and allowed by them, but not *vice versa*.

Held, under these circumstances, that D was not, within the 13 & 14 Car. 2. c. 12, entitled to make a distinct rate.

That D was not at the time of the 43 Eliz. c. 2. a parish or reputed parish separate from W, in regard to the maintenance of its poor.

The fact of the Poor Law Commissioners, under the 4 & 5 Will. 4. c. 76, and the auditor, under the 7 & 8 Vict. c. 101, having treated these districts as separately maintaining their own poor, will not alter their actual relation to each other. *Regina v. Clayton*, 18 Law J. Rep. (n.s.) M.C. 129; 13 Q.B. Rep. 354.

The St. Pancras local act, 59 Geo. 3. c. xxxix, empowers seven or more of the vestrymen to meet and make a poor-rate, and a notice of such meeting and of the purpose thereof is to be given on the Sunday immediately preceding. The rate so made is to be signed by seven or more of the vestrymen and to be allowed by two Justices.

After due notice given, a meeting of vestrymen took place on the 12th of August, and it was unanimously resolved by those present, more than seven in number, that a rate of 1s. in the pound should be made and laid according to law and collected forthwith. On account of the size of the parish the assessment on each parishioner could not then be ascertained, but the meeting was continued by several adjournments until the 14th of September, when the rate was produced written out in four books, according to the form required under the Parochial Assessment Act, and was then signed by nine of the vestrymen. Notice of this meeting and of the purpose thereof had been given to the vestrymen by letters of summons, but not such notice as was requisite for making a rate, and it was then resolved that an application should be made to the Justices to allow and confirm the rate.

Held, that if the rate was duly made by vestrymen *de facto*, it was not invalid because they had not been lawfully elected, or because notice of the meetings had not been given to those persons who by reason of the election of the other vestrymen being void continued vestrymen *de jure*.

Held, also, that the rate was made on the 12th of August, although not signed until after several adjournments of that meeting, and although contained in four books.

Held, also, that due notice having been given of the original meeting and the purpose thereof, no notice of the purpose of the adjourned meetings was necessary.

Held, also, that the signatures of eight vestrymen to a declaration that the rate was true and correct as far as they knew, as required by the Parochial Assessment Act, was a sufficient signing under the local act.

To a declaration in replevin for taking the goods of a party rated, the avowry alleged a rate made under the provisions of the said St. Pancras local act on the 12th of August, and that after the making, and before the allowance thereof, to wit, on the 14th of September, at another meeting then held, the rate so made was duly signed:—Held, that the facts above stated proved the avowry, inasmuch as the meeting of the 12th of August

was continued by the several adjournments, and after the assessment was presented complete on the 14th of September, the meeting then holden might, if necessary, be considered as another meeting for the purpose of the rate being signed. *Lorant v. Scadding*, 19 Law J. Rep. (n.s.) M.C. 5; reversing *Scadding v. Lorant*, 16 Law J. Rep. (n.s.) M.C. 163; 9 Q.B. Rep. 858.

(b) Publication.

An ancient chapel in the township of T having fallen into decay, a new church was built and consecrated in the year 1832, and divine service had been regularly performed there since, but parish meetings were sometimes held, and christenings and burials performed in the chapel. There was also a school-house in the township where divine service was performed on Sundays:—Held, that the new church was *de facto* the church of the place, and that the publication of a poor-rate by affixing the notice required by the 1 Vict. c. 45, at or near the principal door thereof only, was sufficient. *Ormerod v. Chadwick*, 16 Law J. Rep. (n.s.) M.C. 143; 16 Mee. & W. 367.

(c) Persons and Property rateable.

[*Regina v. Trustees of Taunton Market*, s.c. nom. *Regina v. Badcock*, 5 Law J. Dig. 683; 6 Q.B. Rep. 787.]

[*Regina v. Hull Dock Co.*, 5 Law J. Dig. 683; 7 Q.B. Rep. 2.]

[*Regina v. Paynter*, 5 Law J. Dig. 683; 7 Q.B. Rep. 255.]

(1) In general.

Bethlem Hospital is an institution for the reception and cure of poor lunatics, and by charter of the 38 Hen. 8. the mayor, &c. of London are constituted trustees, keepers, and governors of the hospital, and pursuant to the statute 50 Geo. 3. c. xcvi. certain lands held by them in the parish of G were demised to trustees, and a new hospital, for the reception of lunatics, erected thereon. The hospital is for the reception of indigent lunatics, as many of whom are admitted as the building will hold; but none possessed of any estate or money sufficient to maintain them elsewhere are received. The patients are provided with maintenance, medicine, and every necessary, except clothing, for twelve months or more, free of all charge; if not cured, then they are admitted into the incurable class, for some of whom their friends or the parish officers make payments towards their maintenance, but in no instance sufficient to afford any profit to the hospital. Part of the hospital is appropriated to the reception of criminal lunatics, detained under warrant from the Crown, and under the controul of and paid for by government. All the funds of the hospital (including the sums paid for the incurable patients, and by government for the criminal patients) are applied to the general objects of the charity. The governors derive no emolument at all from the hospital.

Bridewell Hospital was instituted by charter of Edw. 6. for the purpose of harbouring, correcting, and employing destitute persons and vagabonds, and was granted to the mayor, &c. of London, who were directed to commit destitute persons and vaga-

bonds to the house of occupations in Bridewell, which they were ordered to erect, and to make rules for their government. A house of occupations was erected on lands situate in the parish of G, and demised to trustees for that purpose; and has ever since been used for the reception of destitute persons, vagabonds, &c. of both sexes, from any place whatever, found in London, Middlesex, or part of Surrey, who are maintained entirely at the charge of Bridewell Hospital, and are employed as directed by the charter, in "learning and exercising honest sciences and occupations." The raw materials necessary for exercising the trades practised are bought by the governors of the hospital, and manufactured by the inmates; such articles as are not required for consumption in Bridewell and Bethlem Hospitals are sold, and the proceeds form part of the general fund for the purchase of other materials to be manufactured, and no profit is made by such sale. All the funds of Bridewell Hospital are applied solely for the purpose of the charity, and the governors derive no profit therefrom whatever:—Held, that the occupation by the corporation of London of Bethlem Hospital and of the house of occupations was for public purposes only, and not a beneficial occupation, and that they were not rateable under a local act, which imposed a rate upon all persons who should hold, use, occupy, or possess land, &c. in the parish of G. *Regina v. St. George the Martyr, Southwark, (Bethlem Hospital and Bridewell Hospital)*, 16 Law J. Rep. (n.s.) M.C. 129; 10 Q.B. Rep. 852.

By a private inclosure act of the 25 Geo. 2. it was enacted, that an annual rent or sum of 90*l.* should be vested in the rector of the parish of N and his successors for ever, issuing out of and charged upon the lands and grounds intended to be inclosed, as well such as should be allotted to the rector in lieu of his glebe lands lying in the common fields, &c. as the lands of the other landowners in the said common fields, &c., "and should be paid and contributed free and clear of and from all deductions, defalcations, or abatements for or in respect of re-prizes and *outgoings* whatsoever, other than and except such proportion of the tax charged upon land by authority of parliament as the said annual rent of 90*l.* shall bear to the yearly value of the lands thereby charged with or made liable to the payment of the same rent." And it was declared that the yearly rent of 90*l.* should be in lieu and satisfaction of all tithes, &c. arising and renewing in the said common fields, &c. and payable by the inhabitants of the town of N, with certain exceptions; but the rights of the rector to the tithes of other parts of the parish of N were reserved as before. For the tithes of these last-mentioned portions of the parish, the rector had always since the passing of the act been rated to the poor:—Held, that he was not rateable in respect of the yearly sum of 90*l.* *Regina v. Shaw*, 17 Law J. Rep. (n.s.) M.C. 137; 12 Q.B. Rep. 419.

By a private act of parliament commissioners were appointed for the purchase of land for making reservoirs, &c. for supplying the parish and township of H with water, at a fixed rate, and to borrow money on mortgage of the works and water rents; and it was provided that in order to compensate the owners and occupiers of certain mills,

&c. in the township of L, which had been previously supplied by water from the springs proposed to be diverted and used for the purpose of the act, one reservoir should be provided at the expense of the commissioners, in the township of L, for the purpose of impounding and keeping back a certain supply of water available to the purposes of such owners and occupiers; and it was further provided, that when the whole of the principal and interest due on the mortgages should be paid off, the water rents should be reduced so as the proceeds should only cover the current expenses.

Under the powers of the act the commissioners borrowed money, and constructed two reservoirs, one for supplying the township of H with water, and one in the township of L, for compensating the owners of mills in that township.

The water rents had been applied to the purposes directed by the act, and had been reduced to half their original amount:—Held, that the commissioners, though no profit was derived from the works, were rateable to the poor of the township of L. *Regina v. the Churchwardens of Longwood*, 18 Law J. Rep. (n.s.) M.C. 65; 13 Q.B. Rep. 116.

The Baptist Missionary Society occupy premises solely for religious and charitable purposes. Other religious societies also occupy portions of the same premises, for which they contribute sums equal only to the expenses of lighting, firing, and cleansing, no profit being made from such contributions. Works published by the Baptist Missionary Society are sold upon the premises under cost price, and the proceeds devoted to the general purposes of the society. The whole income is applied to religious and charitable objects, and no member derives any private advantage whatever from the connexion with the society:—Held, that the society had such a beneficial occupation of the premises as rendered them rateable to the relief of the poor. *Regina v. Baptist Missionary Society*, 18 Law J. Rep. (n.s.) M.C. 194; 10 Q.B. Rep. 884.

Under the powers of a local act (22 Geo. 3. c. lvi.) certain trustees, on behalf of the parish of St. Luke, purchased land in the parish of St. Leonard for the purpose of building a workhouse; and it was by that act provided that the said land, immediately after it should be conveyed to the said trustees, or any workhouse to be erected thereon for the reception of the poor of St. Luke's, should not be liable to pay any greater parochial or parliamentary taxes, rates, or assessments (during such time as it should be used for the said purposes) than to such amount as such land, &c. was assessed before it became vested in the said trustees. By the 48 Geo. 3. c. xcvi. the 22 Geo. 3. c. lvi. was repealed, and all conveyances made under it were confirmed; and by section 74. all workhouses, &c. which by virtue of former acts (specifying the 22 Geo. 3. c. lvi.) had been vested in trustees for the parish of St. Luke, for or towards the relief, &c. of the poor were vested in the guardians of the poor of the said parish, constituted by that act, as fully, effectually, and beneficially, and in as large and ample a manner and form, and to all intents and purposes as they were vested in and possessed by the former trustees (subject only to be held on the former trusts). By the 53 Geo. 3. c. cxii. it was provided, that a rate for the parish of St. Leonard should be laid upon

all persons who inhabit, hold, or occupy any land, &c. or other building, tenement, or hereditament within the parish, according to the annual rent or value of all such messuages, &c. respectively:—Held, that the 48 Geo. 3. c. xcvi. had the effect of keeping alive the special mode of rating the work-house provided by the 22 Geo. 2. c. lvi., and that the 53 Geo. 3. c. cxii. did not alter the mode of ascertaining the annual value for the purposes of rating. *Regina v. Inhabitants of St. Leonard, Shoreditch*, 19 Law J. Rep. (N.S.) M.C. 71.

(2) *Exemption under the 6 & 7 Vict. c. 36.*

A society is not exempted from rates under the 6 & 7 Vict. c. 36. s. 1, unless it has among its laws an express provision, prohibiting the making any dividend or bonus in money among its members. It is not sufficient that no dividend has, in fact, ever been made, and that the making a dividend would be altogether hostile to the constitution and spirit of the society.

Semble—the Religious Tract Society is not a society instituted for the purposes of science, literature, or the fine arts exclusively, and is therefore, on that ground, not exempt from rates under the same section. *Regina v. Jones*, 15 Law J. Rep. (N.S.) M.C. 129; 8 Q.B. Rep. 719.

A society was established for promoting the education of the labouring classes, and its rules provided, that a school was to be maintained by it to educate children; it was to support and train up young persons for supplying teachers to the inhabitants of all such places in the British dominions at home and abroad as should be desirous of establishing schools on the British system; and a normal school formed the principal part of the institution. No member of the committee was to receive any pecuniary advantage from the society, nor was any dividend, &c., either in money or otherwise, to be made to any of the members. It was supported in part by voluntary contributions, but the teachers in the normal school and some others paid a weekly sum towards their board, but such payments did not amount to the expenses incurred; and no profit was made by the sale of books:—Held, that the society was not instituted for the purposes of science, literature, or the fine arts exclusively, within the statute 6 & 7 Vict. c. 36, and was therefore liable to be rated to the poor and other rates.

Held, also, that under section 6. an appeal might be entered against the certificate of the barrister, which allowed the exemption, within four months after the first assessment made after formal notice of the granting and filing the certificate had been given to the parties who made the rate, though this was some months after the filing of the certificate. *Regina v. Pocock*, 15 Law J. Rep. (N.S.) M.C. 132; 8 Q.B. Rep. 729.

The statute 6 & 7 Vict. c. 36. s. 1, exempts from rateability persons occupying buildings for the purposes of science, literature, or the fine arts exclusively: provided such society shall be supported wholly, or in part, by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, &c. between its members; and provided it shall obtain the certificate of the barrister appointed to

certify the rules of friendly societies that it is entitled to the benefit of the act.

Section 5. provides, that in case such certificate is refused, the Quarter Sessions may order the rules of the society to be filed, which is to have the same effect as a certificate.

Section 6. gives an appeal to the Quarter Sessions against the certificate to any person assessed to the rate, who is to state the grounds of his appeal, and the Sessions may, if they think the certificate was granted contrary to the act, annul it, and their determination is to be conclusive and binding on all parties to all intents and purposes.

Held, that the certificate is not made conclusive proof of the other requisites of the statute having been complied with; but is merely one of the several conditions precedent, which must all concur to give a right of exemption.

The "Birmingham News Room" is a society by which the periodical publications and newspapers of the day are taken in and supplied for the perusal of subscribers. Share lists and advertisements of sales, &c. are laid on the table by subscribers and others for perusal. Any individual (not personally objectionable) is permitted to become a subscriber on complying with the rules of the society. The library contains several statistical and topographical works and directories for the use of commercial persons who are subscribers. The society is supported by the annual subscriptions of members. One of the rules provides for the receipt of fees for notices and advertisements put up in the news-room, and the keeper thereof is to account for and dispose of the balance of such receipts as the committee may direct. No surplus of receipts or expenditure has ever arisen. The building was erected from a fund subscribed in shares by the proprietors, who let the news-room and library to the news-room subscribers at an annual rent, in whom the possession of the news-room is vested:—Held, not to be a society instituted for the purposes of science or literature exclusively, nor one which might not by its laws make a dividend or gift among its members, and therefore not exempt from liability by the 5 & 6 Vict. c. 36. *Regina v. Phillips*, 17 Law J. Rep. (N.S.) M.C. 83; 8 Q.B. Rep. 745.

A society called "The Greenwich Society for the Acquisition and Diffusion of Useful Knowledge," and originally established for those purposes only, and for which the barrister had given a certificate under the 6 & 7 Vict. c. 36, was possessed of a lecture hall, library, and reading-room, which were open to the use of the members of the society, a librarian attending daily, but no person resided there. The society did not make any dividend, gift, division, or bonus between its members; and was prohibited by its rules from so doing. The hall had on several occasions been let by the society for meetings relating to church-rates, the corn laws, the people's charter, and building societies; for the exhibition of a dwarf and the North American Indians, and for sales by auction, &c. The money accruing from such lettings of the premises was applied to the purposes of the society, and formed one-fourth part of the income, the remainder consisting of voluntary contributions:—Held, that the trustees of the society were liable to poor-rates as not coming within the exemption relating to a

"society instituted for purposes of science, literature, or the fine arts exclusively," in the 6 & 7 Vict. c. 36. s. 1. *Purvis v. Traill*, 18 Law J. Rep. (N.S.) M.C. 57; 3 Exch. Rep. 344.

A society, called "The Birmingham New Library," was formed for creating and maintaining a library or collection of books, which the members were to have the use of either in the room or at their own houses, on payment of an admission fee of two guineas, and afterwards the annual subscription of 20s., payable on the 1st of January in advance, in each year, and by the rules it was provided that any subscriber being in arrear for three months should be deprived of all privileges of a subscriber till the subscription was paid, and also that no dividend, gift, or bonus in money should be made unto or between any of the members:—Held, to be exempt from poor-rate, under the provisions of the statute 6 & 7 Vict. c. 36.

A poor-rate made upon the occupier of the premises used by the society was duly published and allowed, but no appeal was made by the party rated:—Held, that he could not set up the statutory exemption as a ground for refusing to pay the rate, and that the magistrates were bound to issue a warrant to enforce payment of it. *Ex parte the Overseers of Birmingham, in re Birmingham New Library*, 18 Law J. Rep. (N.S.) M.C. 89; *nom. Churchwardens of Birmingham v. Shaw*, 10 Q.B. Rep. 868.

(d) *Rateable Value.*

The rateable value of land occupied and used as a cemetery, was decided by the Court of Quarter Sessions, on an appeal against a poor-rate by the London Cemetery Company, to be the gross revenue derived by the company from the cemetery, after deducting therefrom 10l. per cent. for tenants' profits, and the amount of outlay for local expenses connected with the cemetery itself, and also a sum in respect of the general management of the company, including office expenses and salaries to directors, auditors, a secretary, and an office clerk:—Held, that the expenditure for general management was collateral to the occupation of the cemetery, and an outlay of part of the revenue; and, therefore, that the Sessions were wrong in deducting the amount of such expenditure. *Regina v. Inhabitants of St. Giles, Camberwell*, 19 Law J. Rep. (N.S.) M.C. 122.

In calculating the rateable value of a brick-field, in any particular year, with reference to the statute 6 & 7 Will. 4. c. 96, the royalty payable in respect of the number of bricks made, as well as the rent, may be taken into account, and neither the circumstance of the rapid exhaustion of the material, nor the casualties to which the article is subject in the process of manufacture, can affect the principle of calculation. But if the sum for which it might be expected to let from year to year as a brick-field can be ascertained, such sum will be the true estimate of its annual value.

E W rented a brick-field of ten acres at 2l. per acre (without reference to the use made of the land), and was also liable to pay to his landlord a royalty or realty of 1s. 6d. per thousand bricks moulded on such land. The Sessions confirmed a rate at a rateable value of 159l., which they calculated on the

amount of rent and royalty, making all proper deductions; and they also found that the rent per acre, which a tenant might be expected to give for the same field, with the liberty of taking the brick earth, and without any liability to pay any royalty in respect of the number of bricks made, would be 10l. per acre, or 100l.

Held, that the latter sum, and not the former amount of 159l., was the true criterion of the rate.

H E rented a brick-field of twenty-six acres, under an agreement to pay 2s. 3d. per thousand bricks made. The Sessions confirmed a rate, at a rateable value of 550l., calculated at 1s. per thousand bricks made. It was admitted, that if the sum paid under the agreement was to be considered as a rent, 550l. did not exceed the rateable value. No statement was made as to the sum which a tenant might be expected to give. The rateable value of ordinary agricultural land in the parish was 1l. 10s., and of garden ground of 3l. 10s.

Held, that none of these amounts gave the true rateable value; but that the case must go back to the Sessions to ascertain what a tenant would give within the meaning of the statute 6 & 7 Will. 4. c. 96. *Regina v. Westbrook*, 16 Law J. Rep. (N.S.) M.C. 87; 10 Q.B. Rep. 178.

A water company possessed works, situate in several different parishes, consisting partly of works directly productive of profit (as service-pipes which deliver the water to the consumers), and partly of works indirectly productive of profit (as buildings, mains, reservoirs, &c. which assist in bringing the water to the service-pipes). The rateable value of the entire works having been ascertained by the net estimated rental (30,800l.), the proper mode of apportioning the rate in the different parishes is as follows:—The portion of the works indirectly productive of profit should be first assessed in the ordinary way, by valuing the land and buildings, and the amount so ascertained deducted from the whole rateable value, and distributed to the districts in which those parts of the works are situate. The residue of the whole rateable value should be apportioned among the parishes in which the parts of the works directly productive are situated, in the ratio of the rent to be expected if the parts situate in each parish were let separate; this ratio is correctly ascertained by the ratio of the net profits in each of the several parishes, or the ratio of the gross receipts in the several parishes wherever the total of expense is common to the whole apparatus. *Regina v. Churchwardens and Overseers of Mile End Old Town*, 16 Law J. Rep. (N.S.) M.C. 184; 10 Q.B. Rep. 208.

By act of parliament the Hammersmith Bridge Company were empowered to erect a bridge across the Thames, from the parish of F to the parish of B, and to make proper roads and approaches thereto, communicating with the high roads on each side of the river, and to take certain tolls for the use of the bridge and approaches; it was also enacted that the half of the bridge adjoining the parish of F should be deemed to be in the parish of F, and the other half in the parish of B. The company accordingly erected the bridge, and made approaches thereto on land purchased by them for that purpose, and received tolls for the bridge and approaches at one gate at the entrance to the bridge in F. The length of the approaches in F was 678 yards, and

of those in B 5,328 yards. The net rateable value at which the company ought to be assessed in the two parishes, based upon the amount of tolls actually received, after making all proper deductions, including the cost of maintaining the approaches, was 720*l.*:—Held, that the net rateable value ought to be apportioned between the two parishes in the ratio of the value produced in each parish by the transit over the bridge, *i. e.* according to the length of the bridge in each parish, which was in this case in equal moieties.

Quære—Whether the approaches to the bridge were separately rateable. *Regina v. Hammersmith Bridge Co.*, 18 Law J. Rep. (N.S.) M.C. 85; 15 Q.B. Rep. 369.

The Great Western Railway Company were the owners and occupiers of a railway, which they had constructed. They were also the occupiers of two branch railways, which they rented. They were carriers for hire upon the three railways, and used the whole as one concern. The main line passed through the parish of T, in which the company was rated on the following principle: the gross receipts on the three lines were added together, and those were divided by the total number of miles on the three lines; the expenses on the three lines, which were allowed as deductions from the rateable value, under the Parochial Assessment Act, were also added together, and divided by the total number of miles as before; the expenses on the number of miles in T, on the above calculation, were then subtracted from the receipts on those miles, and after making allowance for interest on the plant, or moveable stock, and for tenants' profits, including profits of trade, the assessment was made upon the residue. This assessment being appealed against, the following further deductions were claimed at the Quarter Sessions by the company; the propriety of which was stated in a case for this Court:—First, for stations and other erections appurtenant to the main line and the two branch lines, and necessary for the profitable enjoyment of them; but which are rated or rateable separately from the railway, and none of which are in the parish of T. Secondly, in addition to an allowance for "maintenance of way," the appellants claimed a deduction, in respect of depreciation, and wear and tear of rails and sleepers, being the solid timber and ironwork of the Great Western Railway alone. No fund had been set apart for these repairs; but the expense had been, theretofore, taken from the capital, and not from the revenue. Thirdly, a deduction of 5*l.* per cent. interest on the outlay expended in forming the Great Western Railway Company, obtaining their act of parliament, raising their capital, and other expenses. Fourthly, income tax paid by the company, in pursuance of the statute 5 & 6 Vict. c. 35, amounting in the whole to 10,000*l.* Fifthly, additional parochial assessments, not paid, but which will be payable, in consequence of the decisions of the Court on rating railways. Sixthly, the annual total loss on the two branch lines.

Held, that a further deduction was to be made in respect of the stations and other buildings, under the first item; and also in respect of the fourth item, as far as the income-tax imposed related to occupation, but not in respect of the other items.

It was also referred to this Court to find the proper mode of ascertaining the tenants' profits, in order to their deduction from the rateable value:—Held, that this was a question for the Sessions, as it involved no principle of law.

In ascertaining the tenants' profits, the rate had been made on a calculation of the per-centage on the original value of the moveable stock; but the Sessions found, that, at the time of the rate being made, that value had decreased. The respondents contended that the per-centage should be taken on the decreased, and not on the original, value:—Held, that it ought to be taken on the decreased value. *Regina v. Great Western Rail. Co.*, 15 Law J. Rep. (N.S.) M.C. 80; 6 Q.B. Rep. 179.

(e) Re-valuation.

The churchwardens and overseers of the parish of B represented, through the guardians of the Union of B (within which the parish was included), to the Poor Law Commissioners, that a survey and valuation of the rateable property in the parish was necessary under the 6 & 7 Will. 4. c. 96. s. 3. The Commissioners, under that statute, directed a survey and valuation, and ordered the guardians to appoint a person for the purpose, and to contract with and pay him; and that the money should be provided for by a charge on the poor-rates of the parish, which charge should contain the provision required by the statute for payment of principal and interest in five years. P was appointed by the guardians, and the work done by him under a contract entered into with them, upon which he sued them for non-payment. The guardians made several orders on the officers of the parish of B to provide funds, by making a separate rate for the required sum. On a mandamus to enforce obedience to these orders,—

Quære—Whether the order of the Poor Law Commissioners ought not to have been addressed to the officers of the parish, from whom the representation came, and not to the guardians of the union.

Quære—Also, whether the 6 & 7 Will. 4. c. 96. s. 3. vests the discretion as to determining the mode of raising the funds in the guardians or in the Poor Law Commissioners; but,

Held, that supposing the guardians to have such a discretion, yet they can only acquire it in consequence of a direction from the Poor Law Commissioners to them to provide for payment in one or other of the ways mentioned in the statute; and that the orders of the guardians were, therefore, bad, as being unauthorized by the Commissioners.

Quære—Whether orders of the Poor Law Commissioners, bad in themselves, must be obeyed, until quashed on *certiorari*; under the 4 & 5 Will. 4. c. 76. s. 105. *Regina v. Churchwardens and Overseers of Bangor*, 16 Law J. Rep. (N.S.) M.C. 58; 10 Q.B. Rep. 91.

(f) Audit of Accounts.

The solicitor to a parish included within an audit district, who has been elected to, and has accepted the office of auditor, must perform all the duties; and his audit of accounts, including those contained in his own bill of costs, is not, therefore, void, and his allowances, &c. are reviewable on *certiorari* under the 7 & 8 Vict. c. 101. s. 35.

The appointment, however, of such a person to the office of auditor, is not looked upon by the Court with approbation.

A rate for the relief of the poor was made by the parish officers of B in November 1842, which was subsequently abandoned by them, and a fresh rate made and published in February 1843. Both these rates were bad for want of a proper declaration under the 6 & 7 Will. 4. c. 96, but at the Midsummer Sessions 1843 an appeal against them was entered by the parish officers in the name of a friendly ratepayer, and they consented to an order quashing these rates, and directing two new rates to be made in lieu thereof, which was accordingly done, and the new rates were duly made and published. At the October sessions 1843 the G. W. Company appealed against the new rates, but the appeal was dismissed; and in December 1843 the company brought up by *certiorari* the orders made at the Midsummer and October sessions respectively, and obtained rules *nisi* to quash them. Previously to the argument of these rules the parish officers obtained a rule to quash so much of the company's *certiorari* as related to the orders of the Midsummer Sessions, which was afterwards discharged, with costs to be paid to the company. The company's rules to quash the order of Sessions were opposed by the parish, and were ultimately made absolute:—Held, that the expenses incurred in these proceedings were unnecessary and improper, and that the costs paid by the parish officers to their solicitor on account of these proceedings ought not to be allowed to them by the auditor; and that the case was not altered by the fact of all these proceedings having been sanctioned by the vestry of the parish, or of their having been adopted by the parish officers under advice of counsel.

The Court, on a rule to quash the audit and allowances under the 7 & 8 Vict. c. 101. s. 35, disallowed the above items of account, but without costs to the prosecutors, and refused to reimburse the auditor the costs of defending his allowances. *Regina v. Great Western Rail. Co.*, 18 Law J. Rep. (N.S.) M.C. 145; 13 Q.B. Rep. 327.

Although rates are not to be made retrospectively, yet when overseers, by reason of a balance in hand of an old rate, or the getting in of an uncollected rate, on which a particular debt is chargeable, are enabled to defer the making of a new rate, such debt may be properly paid out of the new rate; and this applies peculiarly to the expenses of litigation.

The solicitors for the parish of C were employed by the overseers in business connected with the parish between January and March 1845. The succeeding overseers, appointed in March 1845, also employed the same solicitors on parish business, as did also the overseers appointed in March 1846, the business on which they were employed between March 1845 and March 1846 having no connexion with the business done in the previous year. No bill was delivered by the solicitors till August 1846, when several bills amounting after taxation to 422*l.* 9*s.* 2*d.* were delivered to the then overseers, who paid them. Of the amount, 49*l.* was for business done before March 1845, and 213*l.* for business done between March 1845 and March 1846. The overseers for the year ending March 1845 handed over to their successors a sum of 457*l.*

after paying all charges on them, and there was a sum of 5,728*l.* of uncollected rate. The overseers for the year ending March 1846 handed over to their successors 11*l.* 1*s.*, and there was 3,376*l.* of uncollected rate, and the sum of 11*l.* 1*s.*, together with so much of uncollected rates as were got in before the 25th of March 1847, exceeded the amount of the costs due to the solicitors for business prior to the 25th of March 1846, after deducting all payments and liabilities. The bills were paid out of a rate made in July 1846.

The auditor having disallowed the sums of 213*l.* and 49*l.*,—Held, that he was right as to the 49*l.*, but wrong as to the 213*l.* *Regina v. Read*, 18 Law J. Rep. (N.S.) M.C. 164; 13 Q.B. Rep. 524.

(g) Right to Copy.

An overseer who refuses, upon demand, to give an inhabitant copies of the poor-rate, is still liable to the penalty imposed by the statute 17 Geo. 2. c. 3, that statute not being repealed by the 6 & 7 Will. 4. c. 96. *Tennant v. Creston*, 15 Law J. Rep. (N.S.) M.C. 105; 8 Q.B. Rep. 707.

It is a question for the jury, whether an overseer upon whom a demand has been made for a copy of the poor-rate, under the statute 17 Geo. 2. c. 3, has complied with the demand within a reasonable time. *Tennant v. Bell*, 16 Law J. Rep. (N.S.) M.C. 31; 9 Q.B. Rep. 684.

(C) COUNTY RATE.

Before the passing of the Municipal Corporation Act, the 5 & 6 Will. 4. c. 76, the borough of Marlborough was a place with a separate jurisdiction derived from charter, and also a place which, before the statute 55 Geo. 3. c. 51, was subject to rates in the nature of county rates, imposed by its own Justices, and therefore, by section 1. of that statute, exempt from county rates. After the passing of the 5 & 6 Will. 4. c. 76, the borough, which was in Schedule B of that act, had no grant of a separate Court of Quarter Sessions; but the Justices of the borough had acted in some criminal matters concurrently with the county Justices, and the town council had maintained a gaol, and repaired a bridge, and made a contract with the county for the maintenance of prisoners:—Held, that the borough was, under the provisions of the statute last mentioned, liable to be assessed to the county rate by the county Justices. *Regina v. Justices of Wilts.*, 17 Law J. Rep. (N.S.) M.C. 106; 11 Q.B. Rep. 758.

(D) BOROUGH RATE.

The town council of the borough of R made an order that a fair and equal borough rate, under the provisions of the 5 & 6 Will. 4. c. 76, should be made on the several parishes, &c. for raising 1,654*l.*, and that the proportion of that part of the parish of S lying within the limits, &c. should be 365*l.* 8*s.*, the sums to be rated at 1*s.* in the pound; and that the churchwardens, &c. should levy, collect, and pay the amounts assessed on their respective parishes, and that a warrant under the corporate seal should be directed to the town clerk authorizing him to demand, collect, and receive the amounts so rated, and for that purpose to issue his warrants to the churchwardens, &c. requiring them to levy, collect, and pay the same amounts, &c.

A warrant was accordingly issued to the town clerk, commanding him to "demand, collect, and receive" the amounts rated.

The town clerk issued his precept to the special overseer, who had been previously appointed for that part of the parish of S which lay within the limits, requiring him to "levy, collect, and pay," by a fair and equal rate, the sum of 365*l.* 8*s.*

The special overseer thereupon made a rate, headed "a borough rate, &c. upon the lands, &c. within that part of the parish of S situate within the borough after the rate of 1*s.* 2*d.* in the pound," and calculated to produce 427*l.* 17*s.*

The town council having at the same time also ordered a watch-rate to be made for raising 685*l.* 2*s.* at 6*d.* in the pound, the proportion of the parish of S being 153*l.* 7*s.*, similar proceedings were taken to raise the amount, and the special overseer made a watch-rate on the lands within that part of the parish of S, at 6*d.* in the pound, and calculated to produce 160*l.* 5*s.*

The plaintiff having refused to pay both rates, the amounts were levied by two several warrants of distress on his goods; and an action of trespass being brought,—Held, first, that the order of the town council that the overseers should levy, collect, and pay, empowered them to make rates in the above form.

Held, secondly, that the watch-rate being for the amount in the pound mentioned in the order, and free from all objection, the warrant of distress relating thereto was valid, and was a defence to the action.

Quære—If the borough-rate was good. *Cobb v. Allan*, 16 Law J. Rep. (N.S.) Q.B. 397; 10 Q.B. Rep. 683.

Where a fund has been collected by a municipal corporation by means of a rate, the Court has jurisdiction as to the application of the fund, which it treats as a trust fund; but whether the Court has also jurisdiction over the means by which the fund is proposed to be raised.—*quære*.

A municipal corporation ought to provide, as far as is practicable, for the expenses of each year out of the income of that year; but this rule will not be so strictly applied as to prevent, under all circumstances, the payment of a prior debt out of the monies raised by a subsequent rate.

An information was filed, stating that a municipal corporation having considerable corporate property, but having incurred debts which their income was not sufficient to discharge, were endeavouring to raise money for the payment of their debts by means of a rate, and an application was made for an injunction to restrain the corporation from so doing, which was opposed on the ground that the Court had not jurisdiction to interfere in such a case to prevent the rate being collected, and that the corporation was entitled to raise money by a rate for payment of their prior debts. The injunction was refused. *Attorney General v. Lichfield*, (*Corporation of*), 17 Law J. Rep. (N.S.) Chanc. 472; 11 Beav. 120.

(E) HIGHWAY RATE.

By the 5 & 6 Will. 4. c. 50. s. 27. the highway-rate is to be levied on all property liable to the poor-rate. By section 113. nothing in the act con-

tained is to be applied to any roads, bridges, &c. paved, repaired, or cleansed under any local act:—Held, that the 113th section does not exempt a bridge paved, &c. under a local act from the highway-rate.

The exemption in section 113. applies only to the interference of the surveyors of highways with such a bridge. *Regina v. Paynter*, 18 Law J. Rep. (N.S.) M.C. 169; 13 Q.B. Rep. 399.

(F) PAVING RATE.

A paving rate imposed under authority of an act of parliament is not an incorporeal hereditament, and may therefore be sued for in a county court. *Baddeley v. Denton*, 19 Law J. Rep. (N.S.) Exch. 44; 4 Exch. Rep. 508.

(G) SEWERS RATE.

Commissioners of sewers have power to join several levels, formerly assessed separately, for the purpose of drainage; and a level which derives benefit from the drainage after the union, although it derived no benefit from the junction itself, is liable to be rated in respect of the whole united district. *St. Katharine's Dock Co. v. Higgs*, 16 Law J. Rep. (N.S.) Q.B. 377; 10 Q.B. Rep. 641.

(H) RETROSPECTIVE RATE.

There is no rule of law which prohibits a retrospective rate.

In every case of rating the question is, whether the act under which a rate is made, either expressly or impliedly, prohibits such rate from being retrospective.

The 2 Will. 4. c. 50. (public local) for draining the lands of Holderness, in the East Riding of the county of York, contains no prohibition against a retrospective rate. The commissioner under that act borrowed money (on which interest became due), for the purposes of the works directed by the act:—Held, that a rate made to pay off the debt thus incurred was, under the provisions of that act, a valid rate. *Harrison v. Stickney*, 2 H.L. Cas. 108.

(I) DISTRESS FOR RATES.

A distress warrant may issue against any one of a number of tenants in common refusing to pay the amount of a rate assessed on all of them.

In a notice of allowance of a rate it is not necessary to shew how the rate was allowed. Therefore, it was not held necessary, where it appeared that the rate was allowed by a police magistrate, to allege that he had made the allowance at a police court.

A rate is not invalid under the 6 & 7 Will. 4. c. 96. s. 2, for not following in precise words the prescribed form, if it is duly signed by the churchwardens and overseers before it is allowed. *Paynter v. Regina*, 16 Law J. Rep. (N.S.) M.C. 136; 10 Q.B. Rep. 908.

A warrant of distress for poor-rates recited, that the rate was made on the 25th of November, that being in fact the date of its allowance, it having been made on the 24th of September. And it alleged the refusal of the parties to pay the rate to have been "duly proved," instead of proved on oath:—Held, that the warrant was good. *Ormerod*

v. Chadwick, 16 Law J. Rep. (n.s.) M.C. 148; 16 Mee. & W. 367.

After a highway rate for a parish has been regularly made and assessed, and an occupier of premises included in such rate has neglected to appeal within the time allowed by the statute for that purpose, he cannot afterwards successfully set up a claim to exemption from that particular rate; and under the 5th section of the 11 & 12 Vict. c. 44, the Court will grant a rule to compel the issuing of a distress warrant for the amount, where the Justices applied to for that purpose refuse to issue their warrant after hearing the grounds of such exemption, even though the claim of exemption appear to be a substantial one. *Regina v. Justices of Oxfordshire*, 18 Law J. Rep. (n.s.) M.C. 222.

A distress warrant, granted under the statute 53 Geo. 3. c. 127. s. 7, to levy the amount of a church rate from a person not a Quaker, is bad if it directs the sale of the goods distrained to be "forthwith." It ought to fix a limit of a certain time, not less than four nor more than eight days, before the sale, pursuant to the statute 27 Geo. 2. c. 20. s. 1. *Regina v. Williams*, 19 Law J. Rep. (n.s.) M.C. 126.

(K) COMMITMENT FOR NON-PAYMENT OF RATES.

The 43 Eliz. c. 2. s. 4. does not extend to costs. Where, therefore, a warrant of two Justices of the county of S commanded the constable to apprehend and take A B to the house of correction, there to remain until the payment of a sum, made up of the arrears of poor-rate due from him and of costs awarded,—Held, that such warrant was altogether bad; and that an action of trespass lay against the Justices and the constable for the arrest and imprisonment under it.

The backing of such a warrant by a magistrate, under the 24 Geo. 2. c. 55, is merely a ministerial act, and the Justices who originally issued the warrant are responsible for the arrest under it, although made in a different county from that in which it was issued.

Where a party arrested under such warrant paid under protest the whole amount mentioned therein, he was entitled in an action of trespass brought for such arrest to recover as damages the whole amount so paid by him.

Under the 24 Geo. 2. c. 44. a demand of the perusal and copy of the warrant, under which a constable has acted, which is in writing and signed by the plaintiff's attorney, is sufficient, although it has been left at the constable's place of abode by a person other than the attorney.

When, previous to such demand being made, the plaintiff has by other means obtained a copy of the warrant, that does not excuse the constable from complying with the demand, if he seek to avail himself of the protection given by that statute.

The mere fact of the Justices who issued the warrant being sued jointly with the constable, does not entitle the latter to a verdict, the last clause of the 24 Geo. 2. c. 44. s. 6. only applying to actions brought after the demand of the perusal and copy of the warrant has been complied with by the constable. *Clark v. Woods*, 17 Law J. Rep. (n.s.) M.C. 189; 2 Exch. Rep. 395.

REAL PROPERTY.

The provisions of the 11 Geo. 4. & 1 Will. 4. c. 47. as to payment of debts out of real estate extended by the 11 & 12 Vict. c. 87; 26 Law J. Stat. 226.

RECEIVING.

[See PRACTICE, IN CRIMINAL CASES.]

Where a prisoner was charged in several counts of an indictment, varying the description of the offence, with one act of larceny, and the indictment also contained other counts of a similar kind, charging the prisoner, under the 11 & 12 Vict. c. 46, with feloniously receiving the property stolen:—Held, no objection that there was more than one count for receiving, and that the counsel for the prosecution had properly not been called upon to elect upon which count for receiving he would proceed. *Regina v. Beeton*, 18 Law J. Rep. (n.s.) M.C. 117; 1 Den. C.C. 414; 2 Car. & K. 960.

Without proof of an actual taking into possession, an indictment for receiving goods knowing them to have been stolen, cannot be sustained.

Where, therefore, the evidence upon which a conviction under such an indictment had taken place, was that the prisoner (a married woman) had called at a coach-office, to which the stolen goods had been sent from a distance in a box not directed, by the thieves, her husband and another; and had there inquired for the box, and upon its being produced, claimed it as the box she had come for, and which had been sent to her; and that thereupon she was taken into custody without the box being delivered up to her:—Held, that there was no sufficient proof of a receiving, and that the conviction was wrong.

Quære—Whether the fact of the stolen goods having been sent to the prisoner by her husband could have availed her as an excuse, although she knew that the goods had been stolen. *Regina v. Hill*, 18 Law J. Rep. (n.s.) M.C. 199; 1 Den. C.C. 453; 2 Car. & K. 978.

J had employed M to load sacks of oats, the property of J, from a vessel on to the trams of K, who was to carry them on the trams to the warehouse of J. By previous concert between M and K oats were taken by M from two of the sacks and put into a nose-bag in the absence of K, and hidden under a tram. K returned in a few minutes, and took the nose-bag and its contents from under the tram and took them away, M being then within three or four yards of him:—Held, that both were principals in the larceny, and that K was not a receiver; and that, as it was all one transaction and both had concurred in it, and both had been present at some parts of the transaction, both could be convicted as principals in the larceny. *Regina v. Kelley*, 2 Car. & K. 379.

RECOGNIZANCE.

When a party is convicted at petty sessions and sentenced to imprisonment under the statute 6 Geo. 4. c. 129, which in section 12. gives a power of appeal, and provides that the execution of every

judgment appealed from shall be suspended if the person convicted shall "immediately" enter into certain recognizances with two sureties, it is not necessary that the recognizances should be taken at the time of conviction; but the prisoner is entitled to be discharged, if he makes his application to have the recognizances taken promptly and expeditiously after the conviction, regard being had to all the circumstances of the particular case. *Regina v. Aston*, 19 Law J. Rep. (n.s.) M.C. 236; 1 L. M. & P. 491.

REGISTRY.

Of Deeds.

A conveyance of lands in Middlesex by settlement upon the marriage of the settlor, registered under the statute 7 Ann. c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. *Elsay v. Lutyens*, 8 Hare, 159.

Of Births, &c.

Indictment under the 11 Geo. 4. & 1 Will. 4. c. 66. s. 20. for destroying, defacing, and injuring a register of baptisms, marriages, and burials. Objection: 1. That there was neither a destroying, defacing, nor injuring within the statutes, because the register when produced had the torn piece pasted in, and was as legible as before; 2. That the indictment was bad for uncertainty, for alleging three distinct and different offences; 3. For not containing an express averment of a *scienter*. Indictment held good on all points. *Regina v. Bowen*, 1 Den. C.C. 22.

A woman went to a registrar of births and asked him to register the birth of a child; she stated to him the particulars necessary for the entry, and he made the entry accordingly, and she signed it as the person giving the information. Every particular which she stated was false:—Held, that this amounted to the felony of causing a false entry to be made, within the statute 6 & 7 Will. 4. c. 86. s. 43, and was not merely the misdemeanour of making a false statement, under section 41. of that statute. *Regina v. Dewitt*, 2 Car. & K. 905.

RELEASE.

Where, in an action by a provisional committee suing on behalf of a railway company, one of the plaintiffs, who has a real interest in the concern, and is not a mere trustee for others, executes to the defendant a release of the cause of action, a court of law cannot interfere to prevent the defendant pleading the release. *Rawsthorne, or Rawstorne, v. Gandell*, 15 Law J. Rep. (n.s.) Exch. 291; 15 Mee. & W. 304; 3 Dowl. & L. P.C. 682.

An aunt and niece lived together, the former being devisee, residuary legatee, and executrix under her husband's will, and the latter being a legatee of 2,000*l.* under the same will. An agreement was entered into that the niece should release her legacy on the aunt devising to her part of the testator's

lands. The release and will were accordingly executed, and the will remained unrevoked until after the niece's death, when the aunt married:—Held, that the release was binding on the niece's representative. *Penny v. Watts*, 2 De Gex & S. 501.

RELIGIOUS SOCIETIES.

The titles of congregations and societies for the purpose of religious worship to property held for such purposes, simplified by the 13 & 14 Vict. c. 28; 28 Law J. Stat. 36.

REMITTER.

[See DEED, Construction of.]

RENT AND RENT-CHARGE.

Payment of chief rents, &c., for the space of any three whole years within twenty years before the passing of the statute 4 Geo. 2. c. 28, though those three years may not be consecutive, is sufficient to satisfy the provisions of the 5th section of that statute.

In replevin an avowry alleged that B was seised as of fee and right of and in an annual fee-farm rent, payable for and issuing out of the dwelling-house in which, &c., and justified the distress for arrears of the fee-farm rent. Issue was joined upon a plea in bar, denying that B was so seised of the fee-farm rent. After verdict for the defendant,—Held, upon motion in arrest of judgment, that it was too late to object that the avowry ought to have shewn the origin of the rent, this being at most a defective statement of title which was cured by verdict.

Quære—Whether the objection would have prevailed upon demurrer. *Musgrave v. Emmerson*, 16 Law J. Rep. (n.s.) Q.B. 174; 10 Q.B. Rep. 326.

The defendants in replevin avowed that Henry the Eighth was seised in fee in right of his crown of the said shop, in which, &c., and being so seised, by letters patent granted it to Sir E. W. in tail male, to be held by knight's service, paying to the king an annual rent of 4*l.* 1*l.* 4*d.* at Michaelmas in every year, whereby the said E. W. became seised in tail of the said shop in which, &c., and the said king became seised in fee of the reversion expectant on the determination of the said estate tail. The avowry then traced the title to the reversion through the successive sovereigns down to Charles the Second. That Charles the Second by letters patent (made after the 22 Car. 2. c. 6, and before the 24th of June 1672, and referring to the letters patent of Henry the Eighth) granted to certain trustees and their heirs the said annual rent of 4*l.* 1*l.* 4*d.* so as aforesaid reserved and issuing out of the said shop, in which, &c. to hold to the use of the said trustees, their heirs and assigns for ever, upon trust, to sell and convey the same as therein mentioned. That the said trustees being so seised, &c. by an indenture, for a money consideration, granted the said rent of 4*l.* 1*l.* 4*d.* to the Dean and Chapter of St. Paul's and their successors for ever, whereby the said dean and chapter became and until the 11th of October 1845,

and from thence until the said time when, &c. continued to be seised as of fee of and in the said rent of 4*l.* 11*s.* 4*d.*; that the said rent was duly paid for three years within the space of twenty years next before the session of parliament holden in the fourth year of Geo. 2, and because 27*l.* 18*s.* of the said rent for six years, ending the 11th of October 1845, at the said time when, &c., was due and in arrear to the said dean and chapter, the defendants well avowed, &c.

Held, in the Exchequer Chamber, that the Court of Queen's Bench (18 Law J. Rep. (n.s.) Q.B. 97.) had rightly decided that the avowry and cognizance could not be supported under the 22 Car. 2; and that the reversion giving the right to distrain was in the Crown, independently of that act.

Held also, (the objection being taken for the first time in error) that the want of an express averment of attornment by the terre-tenant upon the grant by the trustees was a fatal defect in the defendants' title, upon general demurrer, and one not cured after verdict, or by the Statutes of Jeofails.

And *semble*, that upon the pleadings the Court of Queen's Bench were right in deciding that the grant of Charles the Second was not void on the ground that the Crown had been deceived, inasmuch as having title only to the rent service during the estate tail, the grant was of a rent in fee. And further, that the Statutes of Mortmain did not apply to the conveyance to the dean and chapter. But that the Court were wrong in intimating that no express averment of the continuance of the estate tail was necessary. *Vigers v. Dean and Chapter of St. Paul's*, 19 Law J. Rep. (n.s.) Q.B. 84.

A testator devised his freehold estates to trustees, in trust to permit his wife to receive the rents for her life, and after her decease upon trust to permit his nephew, his heirs and assigns, to hold and enjoy the said estates and receive the rents and profits, subject to the payment of 20*l.* yearly and every year for ever to his niece, her executors, administrators and assigns; and the testator made chargeable his said freehold estates with the payment of the said sum. The annuitant died, and her devisees contracted to sell the rent-charge, which was stated to have been given to the testator's niece, her heirs, executors, administrators and assigns:—Held, that the rent-charge might be legally distrained for, and that the thing contracted to be sold was within the words of the contract; and a decree was made for specific performance. *Ramsay v. Thorngate*, 18 Law J. Rep. (n.s.) Chanc. 238; 16 Sim. 575.

A on his father's death became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death a suit was instituted on behalf of A and his younger brother (both infants), and a receiver appointed. The younger brother was made a party to the suit, as being entitled to a portion out of the estates. A died under twenty-one and without issue. At his death the estates were held, as they had been ever since his father's death, by yearly tenants under parol demises:—Held, that A's administratrix was entitled to a proportionate part of the rents which were accruing due at his death. *Kevill v. Davies*, 15 Sim. 466.

REPLEADER.

[See PROHIBITION.]

In an action of debt, the defendant pleaded five pleas. Upon demurrer to the fourth plea (pleaded to the whole declaration) the Court gave judgment for the defendant, and expressed their opinion that the declaration disclosed no cause of action. The plaintiff at the trial of the issues in fact had a verdict on the first, second, and third issues, and the defendant on the fifth, which raised an immaterial issue:—Held, that the plaintiff could not have judgment *non obstante veredicto* on the fifth issue, nor was he entitled to a replader. *Willoughby v. Willoughby*, 16 Law J. Rep. (n.s.) Q.B. 251; 6 Q.B. Rep. 722.

The declaration stated that it was agreed between the plaintiff and the defendant that the plaintiff, the defendant, and J R, the son of the defendant, should, at the expiration of a reasonable time, execute a deed by which J R was to be apprenticed to the plaintiff, and that the defendant should pay a premium; that a reasonable time had elapsed for executing the deed and paying the premium, and that although the plaintiff was ready and willing to execute the deed and to receive J R, and although the plaintiff requested the defendant to execute the deed and pay the premium, yet he refused, and the defendant exonerated and discharged the plaintiff from tendering the deed for execution. Plea—that the defendant did not exonerate the plaintiff.

A verdict having been found for the defendant, a rule *nisi* for a new trial, for judgment for the plaintiff *non obstante veredicto*, or for a replader, was refused.

And it was held, that the declaration, without the averment of exoneration, would have been bad; that the issue as to the exoneration was a material issue; and that a replader cannot be granted unless the Court does not see how to give judgment upon the issues as found on the record. *Doogood v. Rose*, 19 Law J. Rep. (n.s.) C.P. 246.

REPLEVIN.

A replevin bond which has been assigned by the sheriff, is admissible in an action against him for taking insufficient pledges, without proof of its execution, though there is an attesting witness.

The acts and declarations of the person who acted as replevin clerk are admissible against the sheriff, though there is no other evidence of his being such clerk than his acting as such on the occasion in question.

A writ of *fi. fa.*, in an action on promises for the rent is also admissible against the sheriff, to shew that the proceedings taken against the plaintiff in replevin had proved fruitless.

The costs of an action against the sureties are recoverable as damages against the sheriff.

It is sufficient for the declaration to allege that the sureties were insufficient in fact, without noticing the tenant or shewing that the sheriff did not make due inquiry or even use reasonable caution.

Whether he used due caution is a question for the jury. *Plumer v. Briscoe*, 17 Law J. Rep. (n.s.) Q.B. 158; 11 Q.B. Rep. 46.

Debt on a replevin bond. The declaration stated a removal of the plaintiff into the superior court, on the 2nd of November, and a declaration in replevin

on the 30th of April; an avowry, on the 9th of July; and the death of the plaintiff in replevin on the 16th of November; and charged as a breach that J S (the plaintiff in replevin) did not prosecute his suit without delay; but, on the contrary, delayed the prosecution of the said action for an unreasonable time, and until the said J S long after a reasonable time had elapsed for the trial, died before issue joined. This breach was traversed *modo et forma*:—Held, that the plaintiff was at liberty, under this issue, to shew a delay in the proceedings prior to the delivery of the declaration.

Held, also, that the condition to prosecute without delay may be broken by a delay which does not exceed the time for proceeding allowed by the practice of the superior courts. *Gent v. Cutts*, 17 Law J. Rep. (N.S.) Q.B. 55; 11 Q.B. Rep. 288.

Although the 9 & 10 Vict. c. 95. takes away the jurisdiction of the sheriff's county court in replevin, it is still the duty of the sheriff to take replevin bonds under the 11 Geo. 2. c. 19. s. 23; and a bond taken in the terms of that statute will be valid. But a bond taken in the form usually employed before the statute of Victoria, conditioned "to appear at the next county court of Middlesex, holden at the sheriff's office, &c., and then and there prosecute the action with effect," is insufficient since that statute, the jurisdiction being transferred by the 119th section to the new court for the district in which the distress was taken. Even if the bond would have been good otherwise, the omission of the condition to prosecute "without delay" would have been fatal.

At the trial of an action against the sheriff for taking an insufficient replevin bond, the plaintiff's counsel called for the original bond. The defendants' counsel refusing to produce it, a copy was tendered, and was about to be read; the defendants' counsel then produced the original, and objected to its being read without the evidence of an attesting witness. The Judge allowed it to be read:—Held, that the plaintiff was entitled to read the copy, and that the copy must be taken to have been read.

In an action against a sheriff for taking an insufficient replevin bond, the amount of the rent due and the expenses of the distress may be recovered as damages.

A declaration alleging that the county court had not jurisdiction at the time of the taking of the replevin bond was held to shew sufficiently, after verdict, that the Court had no jurisdiction at the time of the plaint. *Edmonds v. Challis*, 18 Law J. Rep. (N.S.) C.P. 164; 7 Com. B. Rep. 413.

In replevin, an avowry by the bailiff of a manor, justifying the seizure as a distress for an amercement, stated that the plaintiff had unlawfully obstructed the jurors of the manor in their examination of the weights and measures, and that the jury had presented that the plaintiff had so obstructed them, whereupon he was amerced, &c.:—Held, bad, on special demurrer, for not stating in what the obstruction consisted. *Frost v. Lloyd*, 16 Law J. Rep. (N.S.) Q.B. 13; 9 Q.B. Rep. 130.

Where the defence rested on several cognizances, —Held, that a person under whom one of such cognizances was made was competent to prove matters distinct from and independent of that particular cognizance. *Walker v. Giles*, 2 Car. & K. 671.

In replevin, the defendant avowed for a distress for rent, and the plaintiff pleaded that the goods were taken between sunset and sunrise, and the defendant replied that the goods were taken between sunrise and sunset, without this, that they were taken between sunset and sunrise:—Held, that, on these pleadings, the plaintiff had the right to begin.

In replevin, the plaintiff had given a bond under section 121. of the 9 & 10 Vict. c. 95. (the County Courts Act), to prosecute his suit with effect and without delay, and prove that the title to corporeal property was in question:—Held, that he was not entitled to obtain a certificate from the Judge at Nisi Prius that he had done so, if he did not succeed in the cause; and that, not having done so, he had not prosecuted his suit with effect. *Tunncliffe v. Wilmot*, 2 Car. & K. 626.

RESTITUTION.

[See LANDLORD AND TENANT.]

RESTRAINT OF TRADE.

[See STAMP, Agreement.]

RETURNED TRANSPORT.

Where a prisoner was indicted under the 5 Geo. 4. c. 84. s. 22. for being found at large in England before the expiration of a term for which he had been sentenced to be transported,—Held, that the fact of such sentence being in force at the time he was so found at large was sufficiently proved by the certificate of his conviction and sentence,—the judgment remaining unreversed,—although, on the face of such certificate, it appeared that the sentence, viz., transportation for fourteen years, was one which could not have been inflicted on him for the offence of which, according to such certificate, he had been committed, viz., larceny. *Regina v. Finney*, 2 Car. & K. 774.

REVENUE.

[See PREROGATIVE—SCIRE FACIAS.]

- (A) PREROGATIVE OF THE CROWN.
- (B) CROWN LANDS. [See RENT AND RENT-CHARGE.]
- (C) CUSTOMS AND EXCISE.
 - (a) Duties.
 - (b) Penalties.
 - (c) Officers.
 - (d) Licence.
 - (e) Information and Conviction.
 - (f) Appeal.
- (D) TAXES.

Certain customs duties altered by the 10 Vict. c. 23; 25 Law J. Stat. 75.

The collection and management of certain duties transferred from the Commissioners of Stamps and

Taxes to the Commissioners of Excise by the 10 & 11 Vict. c. 41; 25 Law J. Stat. 155.

Duties on timber, seeds, &c. altered by the 9 & 10 Vict. c. 23; 24 Law J. Stat. 64.

The laws relating to the customs amended by the 9 & 10 Vict. c. 102; 24 Law J. Stat. 275.

The Boards of Excise and Stamps and Taxes consolidated into one Board of Inland Revenue by the 12 Vict. c. 1; 27 Law J. Stat. 1.

The duties on bricks repealed by the 13 Vict. c. 9; 28 Law J. Stat. 11.

Sugar duties altered by the 13 & 14 Vict. c. 67; 28 Law J. Stat. 131.

The laws relating to the customs amended by the 13 & 14 Vict. c. 95; 28 Law J. Stat. 266.

The laws relating to the customs amended by the 12 & 13 Vict. c. 90; 27 Law J. Stat. 173.

The use of stills by unlicensed persons prohibited by the 9 & 10 Vict. c. 90; 24 Law J. Stat. 215.

The laws as to dealers in spirits and permits altered by the 11 & 12 Vict. c. 121; 26 Law J. Stat. 314.

The law as to the warehousing of spirits and the export of spirits made from malt amended by the 11 & 12 Vict. c. 122; 26 Law J. Stat. 320.

(A) PREROGATIVE OF THE CROWN.

A vessel, having a quantity of fire-arms on board, was seized by the officers of the Board of Customs, and after being detained for some time, was delivered up, unconditionally, to the owners. An action of trespass having been commenced in the Court of Common Pleas, for such seizure and detention, this Court made a rule absolute in the first instance, upon the application of the Attorney General, for the removal of the cause into this court. *Adams v. Freemantle*, 17 Law J. Rep. (N.S.) Exch. 312; 2 Exch. Rep. 463.

(B) CROWN LANDS.

[See RENT AND RENT-CHARGE.]

(C) CUSTOMS AND EXCISE.

(a) Duties.

The statute 9 Geo. 4. c. 60, repealing certain acts which laid duties on foreign corn imported for consumption in the United Kingdom, imposed new duties, to be graduated, according to the average price of British corn, which average was to be certified by the comptroller of Customs, who, for that purpose, was to strike a six-weeks' average on the prices for the last week, as ascertained from returns for that week, transmitted to him, and the averages certified by him in the five preceding weeks.

The Customs Act, 3 & 4 Will. 4. c. 56, in the table of duties inwards, has the words "Corn. See 9 Geo. 4. c. 60."

The statute 5 & 6 Vict. c. 14. repeals the statute 9 Geo. 4. c. 60. (except as to the repeal of former acts), and enacts that there shall be levied and paid, from and after the passing of the statute 5 & 6 Vict. c. 14, the duties on corn specified in the table annexed. The table graduates the duties according to the average price, "made up and published in the manner required by law." Section 28 enacts, that the comptroller shall strike a

six-weeks' average, from the prices transmitted to him for the last week, and his last five averages, and shall on every Thursday transmit a certificate of the average so struck to the collectors at the ports; and the duties to be paid shall be regulated by the last of such certificates received by the collector.

Section 30, authorizes the comptroller, till there shall have been a sufficient number of weekly returns under the act, to use his own weekly averages published before the act passed.

Held, by the Court of Exchequer Chamber, (reversing the judgment of the Court of Queen's Bench), that the statute 9 Geo. 4. c. 60. was not kept alive by the statute 3 & 4 Will. 4. c. 56. for the purpose of striking the first average under the statute 5 & 6 Vict. c. 14; and that, therefore, no duties were payable upon corn imported between the passing of the statute 5 & 6 Vict. c. 14, and the receipt by the collector of the comptroller's first certificate under the last-mentioned statute. Held also, by the Court of Exchequer Chamber, that the collector was liable, under the statute 3 & 4 Will. 4. c. 52. s. 18, to an action on the case by the importer, for not signing the bill of entry for such corn until he received a certain sum which he claimed as duty. And that the corn having been delivered up to the importer on his paying, under protest, the sum claimed as duty, the measure of damages was the amount so paid, together with the loss sustained by the detention of the corn, taking into account a fall of prices which had occurred between the refusal to sign and the delivering up of the corn. *Barrow v. Arnaud*, 8 Q.B. Rep. 595.

The 7 & 8 Geo. 4. c. 52. s. 33. imposes a penalty on any maltster treading or forcing together corn in a couch-frame. The 1 Vict. c. 49. s. 5. empowers officers of Excise to throw the corn out of the couch-frame, and return it; and if any increase be found in the gauge of the corn after its being returned and laid level in the couch-frame (in any greater proportion, &c.), the increase so found is to be deemed conclusive evidence of such corn having been trodden and forced together; and the maltster is to be convicted in the said penalty. Upon an information, and conviction, before Justices, for the above penalty, it appeared that the uniform mode recently adopted by the Excise of returning the corn was by piling it up in the centre of the couch, in the form of a cone, and then levelling it, instead of by casting the corn equally all over the floor of the couch-frame as formerly usual:—Held, by the Court of Exchequer, upon the construction of the above statutes, that the officer of Excise had some discretion—and it might be, that he had an absolute discretion—as to the mode of returning the grain, and that the above mode not appearing to be improper, an increase so found in the gauge of the corn (beyond the allowed increase) was conclusive evidence of the offence in the 7 & 8 Geo. 4. c. 52. s. 33, and that the conviction was right. *Regina v. Speller*, 17 Law J. Rep. (N.S.) M.C. 9; 1 Exch. Rep. 401.

The 74th section of the 2 & 3 Will. 4. c. 120. requires every licensed postmaster to insert in the Excise Office Weekly Account rendered by him to the Excise certain particulars of each respective

letting of horses to hire by him during that week, and in case of neglect to insert such particulars in the weekly account rendered by him, subjects him to a penalty. A count in an information framed upon that section, after stating that the defendant was a licensed postmaster, and that he had delivered to him certain blank forms of Excise Office Weekly Accounts, and that he had let to hire certain horses upon which letting to hire certain duties had become payable, stated that the defendant did not nor would at any time truly insert in the weekly account by him then made and rendered as required by the statute the particulars of such letting for hire; but on the contrary, that he neglected to insert in his said weekly account so by him made and rendered as aforesaid, each of the particulars of such letting to hire as required by the statute, contrary to the form of the statute, &c.:—Held, bad in arrest of judgment, it being consistent with the count that the defendant had not rendered any weekly account whatever. So, also, a count similar to the preceding one for several omissions, and which stated that the defendant did not insert in any weekly account, was held bad for the same reason.

The 81st section inflicts a penalty on every licensed postmaster who shall wilfully conceal the letting of any horse for hire, or who shall make or render any false or fraudulent account concerning duties payable by him in respect of such letting to hire, or who shall be guilty of any other fraudulent contrivance whatsoever, with intent to defraud the Crown of the post-horse duties:—Held, that the latter part of the clause applied to all the antecedents; that a count in an information for rendering a false and fraudulent weekly account of duties which did not contain any averment that the defendant rendered it *with intent to defraud the Crown of the duties*, was bad in arrest of judgment. *Attorney General v. Shillibeer*, 18 Law J. Rep. (n.s.) Exch. 481; 3 Exch. Rep. 71.

The 2 & 3 Vict. c. 24, s. 18, enacts, "that it shall be lawful for any person to make bricks for the sole purpose of draining wet and marshy lands, without being charged or chargeable with any duty for or in respect of such bricks, &c.: provided always, that it shall not be lawful for any person to employ or make use of any such bricks for any other purpose than in draining wet and marshy lands, and in constructing the necessary drains, gouts, culverts, arches and walls of the brickwork proper and necessarily required for effecting and maintaining the drainage of such lands," under a penalty of 50*l.*:—Held, by *Parke, B., Alderson, B. and Rolfe, B. (Pollock, C.B. dissentiente)*, that under this section the exemption from duty applied to such bricks only as were used in works *physically* necessary for the construction of drains, and not to bricks employed in works which were not necessary for the purposes of drainage, although those works would not have been constructed if the drainage had not been made. *Per Pollock, C.B.*, that the exemptions applied to all drain bricks used in constructing drains, and all gouts, culverts, arches and walls which were *physically or legally* necessary for the existence and maintenance of drainage. *Attorney General v. Walker*, 18 Law J. Rep. (n.s.) Exch. 179; 3 Exch. Rep. 242.

(b) Penalties.

The 25th and 26th sections of the Excise Licence Act, 6 Geo. 4. c. 81, impose penalties on any manufacturer of, or dealer in, or seller of, tobacco, who shall not have his name painted on his entered premises in manner therein directed; or who shall manufacture, deal in, retail, or sell tobacco, without taking out the licence required for that purpose:—Held, that the effect of those sections was to impose a penalty on an offender, for the benefit of the revenue, but that they did not render void a contract for the sale of tobacco made by a manufacturer or dealer, who failed to comply with their requisites.

If the legislature had intended to prohibit the contract itself, if only for the purposes of revenue, it would have been illegal, and no action could have been maintained on it.

A plea which alleged that the tobacco for the price of which the action was brought, was sold by the plaintiffs as *manufacturers of tobacco*, after the 6 Geo. 4. c. 81, without having a licence under that act, was held bad, on the ground that it did not sufficiently allege that the plaintiffs were manufacturers of tobacco to bring them within the provisions of the act. *Smith v. Mawhood*, 15 Law J. Rep. (n.s.) Exch. 149; 14 Mee. & W. 452.

The 6 Geo. 4. c. 80. s. 6, enacts, that no person shall keep any still whatever for making or distilling spirits without having first obtained a licence. Section 7, enacts, that such licence shall be renewed annually, and that if any person shall continue to keep or work any still, or shall distil any low wines, spirits, &c., contrary thereto, he shall forfeit 500*l.*:—Held, that a party who distils spirits, whatever may be their ulterior use, is a distiller within the meaning of the act of parliament; and therefore that the defendant, who distilled alcohol to be made into sweet spirits of nitre by the addition of nitric acid, was a distiller within the meaning of the act, and required a licence. *Attorney General v. Bailey*, 16 Law J. Rep. (n.s.) Exch. 63; 16 Mee. & W. 74.

Sweet spirits of nitre are not "spirits" within the meaning of the statutes 6 Geo. 4. c. 80. s. 101, 6 & 7 Will. 4. c. 72, and 5 Vict. c. 75.

A party buying sweet spirits of nitre from one who is not a licensed distiller, and without a permit, and removing, and receiving them after their removal, knowing that no duty has been paid in respect of them, and that they have been illegally distilled, is not liable to be convicted under the statutes 6 Geo. 4. c. 80. s. 133, 7 & 8 Geo. 4. c. 53. s. 32, and 2 Will. 4. c. 16. s. 10.

The term "spirits" within the meaning of the 6 Geo. 4. c. 80, signifies an inflammable liquid, produced by distillation, either pure or mixed only with ingredients which do not convert it into some article of commerce not known in common parlance under the generic appellation of spirits. *Attorney General v. Bailey*, 17 Law J. Rep. (n.s.) Exch. 9; 1 Exch. Rep. 281.

To assumpsit for goods sold and delivered the defendant pleaded, secondly, that the goods were spirits of wine which the plaintiff had illegally distilled and compounded with nitre and other substances, and sold and delivered to the defendant under the name of sweet spirits of nitre, and that

the goods being therefore liable to seizure before the defendant had appropriated them, were seized and condemned in the Exchequer, whereby the defendant was deprived of them, and the consideration for the promise wholly failed. The third plea stated as the ground of forfeiture, that the sweet spirits of nitre had been mixed with spirits of wine, and illegally removed and deposited. The fourth plea stated that the action was brought for the price of sweet spirits of nitre sold by the plaintiff to the defendant, and which had been mixed and compounded with spirits of wine, and afterwards removed without a proper permit:—Held, first, that sweet spirits of nitre not being "spirits" within the 6 Geo. 4. c. 80. and the 2 Will. 4. c. 16, the fourth plea was ill.

Held, secondly, that though the plaintiff was liable to a penalty for distilling the spirits of wine, under the 6 Geo. 4. c. 80, and though the article so distilled was liable to seizure, yet that there was nothing to shew that it continued liable to seizure after it had been mixed with sweet spirits of nitre, and that in that case the plaintiff could not be deprived of his right to the price by reason of the wrong condemnation of the Court of Exchequer.

Held, also, that in order to sustain the second and third pleas, it should have been shewn that the plaintiff had notice of the seizure, and had therefore an opportunity of resisting the condemnation.

Held, lastly, that the pleas did not amount to the general issue, as they admitted an actual sale and delivery. *Bailey v. Harris*, 18 Law J. Rep. (n.s.) Q.B. 115; 12 Q.B. Rep. 905.

(c) Officers.

Where a custom-house agent entered into a custom-house bond, with respect to goods consigned to him by the plaintiff, and claimed a per-centage on the sum mentioned in the bond, and no contract or usage for the payment of such was proved,—Held, that the plaintiff was not entitled to any such per-centage, and that therefore no question as to the reasonableness of the amount claimed could be put to a witness. *Hall v. Gurney*, 2 Car. & K. 644.

(d) Licence.

The act 6 & 7 Will. 4. c. 38. s. 3. extends to prevent a person who is already a publican from obtaining a licence to carry on the business of a grocer on the same premises, as absolutely as it does to prevent a person, licensed as a grocer, from carrying on in the same premises the business of a publican. *M'Kenna v. Pape*, 1 H.L. Cas. 6.

(e) Information and Conviction.

By the Excise Act, 7 & 8 Geo. 4. c. 53. s. 82, the officer or any party aggrieved by the decision of Justices has a right of appeal to the Quarter Sessions upon giving certain notices. Section 84. requires the Quarter Sessions to rehear upon oath, and to examine the same witnesses, and no others, on which the original judgment was given, and gives them power on such appeal to reverse or confirm, either in whole or in part, the judgment appealed against, or to give such new and different judgment as they in their discretion shall think fit.

An information contained four counts; and the Justices convicted the defendant on the fourth, and acquitted him on the others:—Held, that a notice of appeal by the defendant against the said judgment was limited to the judgment on the fourth count; and that, on the hearing of the appeal, the evidence must be confined to that count.

Upon a case stated under the 84th section, it is unnecessary to bring the record before the Court by *certiorari*; if the facts appear by affidavit it is sufficient.

In an information for offering a country bank-note to an Excise officer by way of bribe, *quare*, whether the value of it need be stated. *Regina v. Gamble*, 16 Law J. Rep. (n.s.) M.C. 149; 16 Mee. & W. 384.

In an Excise information, where the Crown, if successful, is entitled to full costs of suit, the Crown is entitled to full costs as in an ordinary suit between subject and subject, notwithstanding that the Crown solicitor conducting the information is employed by the Crown at an annual salary.

Where one count of an information charges several penalties, the Crown having established a right to one penalty alone, is entitled to the costs of proving that penalty only. *Attorney General v. Shillibeer*, 19 Law J. Rep. (n.s.) Exch. 115; 4 Exch. Rep. 606.

Where a maltster had by collusion, and for the purpose of exonerating himself from penalties under the revenue laws, procured a conviction of one of his servants for the same offence which he had himself committed, and a certificate of two Justices which operated as a discharge of himself, the Court, upon *certiorari*, quashed the conviction. *Regina v. Gillyard*, 17 Law J. Rep. (n.s.) M.C. 153; 12 Q.B. Rep. 527.

(f) Appeal.

Upon the hearing before Justices of an information for penalties, the officer of Excise, by whom the information was exhibited, was absent, and the case was conducted by another officer of Excise. There being an appeal on the part of the Crown to the Quarter Sessions, under the 7 & 8 Geo. 4. c. 53. s. 82,—Held, that the notices of appeal, required by the 83rd section of that act, might, by virtue of the 4 & 5 Will. 4. c. 51. ss. 22, 23, be signed by the officer who was present conducting the case.

Under the 5 & 6 Vict. c. 93. s. 3, a dealer in and retailer of tobacco is liable to the penalty of 200*l.* for having in his possession adulterated tobacco, although he had bought it as genuine, and had no knowledge or reason to think that it was not so. *Regina v. Woodrow*, 16 Law J. Rep. (n.s.) M.C. 122; 15 Mee. & W. 404.

(D) TAXES.

The effect of the statutes 43 Geo. 3. c. 99. and 43 Geo. 3. c. 161. is to make the assessment by the assessors of assessed taxes final, subject to a right of appeal, by a party charged, to the Commissioners of Assessed Taxes, and from their decision to the Judges.

Where, therefore, assessors had assessed an inhabitant of the district for which they were appointed to duties payable by him as "a horse-dealer," under the statutes 48 Geo. 3. c. 55. Sch. II.

and 52 Geo. 3. c. 93. Sch. H, and upon refusal to pay the same a distress had been levied of his goods:—Held, upon replevin brought for the goods so taken, that such an assessment was an answer to the action; and that an allegation in the avowry that the plaintiff did in fact “exercise the trade and business of a horse-dealer” was immaterial.

Quære, as to what constitutes “a horse-dealer” within the meaning of the statutes relating to assessed taxes. *Allen v. Sharp*, 17 Law J. Rep. (n.s.) Exch. 209; 2 Exch. Rep. 352.

REVERSION.

A declaration in trespass alleged that the defendants with force and arms broke and entered a dwelling-house, and seized and took divers goods of the plaintiff. The defendants pleaded that one M being seised in fee of the messuage demised it to L for twenty-one years, who demised it to defendant for the residue of the twenty-one years *less one day*; the plea then gave colour to the plaintiff in the usual form, “under colour of a charter of demise pretended to be made to him, whereas nothing passed by it,” and then justified the entry and seizure. Replication, that before L demised the dwelling-house to the defendant, he demised it to one F for three years, and that F assigned his term to the plaintiff, who entered into the dwelling-house and became possessed of it. Rejoinder, that the demise by L to F was subject to a condition of re-entry, reserved to L, his executors, administrators and assigns, in case the premises should not be kept in repair; that they were not kept in repair, and therefore that the defendant entered:—Held, upon special demurrer, first, that the defendant, being under-lessee for the remainder of a term, less one day, was an assignee within the meaning of the 32 Hen. 8. c. 34, and could take advantage of the covenants entered into by the tenant with the under-lessee; secondly, that the colour given in the plea did not shew a title in the plaintiff, notwithstanding that livery of seisin is rendered unnecessary by the 8 & 9 Vict. c. 106. s. 2; thirdly, that a breach of the peace is not to be inferred from the averment of *vi et armis*; fourthly, that the rejoinder was not a departure from the plea. *Wright v. Burroughes*, 16 Law J. Rep. (n.s.) C.P. 6; 4 Dowl. & L. P.C. 438; 3 Com. B. Rep. 685.

In an action by A against B, for an injury to the reversion of a copyhold estate, A’s reversion being put in issue by the pleadings, evidence was given of the receipt of rent by him from the tenant in possession. B proved a surrender of the estate in question, twenty-one years before the receipt of such rent by A, to a stranger:—Held, that this evidence did not throw the burthen upon A of proving a re-conveyance afterwards of such estate to him. *Daintry v. Brocklehurst*, 18 Law J. Rep. (n.s.) Exch. 57; 3 Exch. Rep. 207.

An estate was settled on A for life, with remainder to B in fee. In 1822 B sold his reversion to C. In 1830 A died. In 1846 B filed a bill to set aside the sale of the reversion on the ground of its having been sold at an undervalue. No evidence was given by B to explain or account for the delay:—Held, that B was barred by the lapse of time.

An estate was settled on A for life, with remainder to B in fee, subject to mortgages to C and D. In 1822 B sold his reversion to C. In 1823, in consideration of the mortgage debt due to C, the payment of D’s debt by C, and the payment of a sum to A by C, A, B, and D conveyed the estate to C. Whether the transaction of 1823 did not prevent B from availing himself of the rule in equity as to the sales of reversions at an undervalue—*quære*. *Sibbering v. Earl of Balcarras*, 19 Law J. Rep. (n.s.) Chanc. 252.

A reversion depending upon the contingency of a tenant for life dying without issue, the tenant for life being fifty-six and his wife in her fifty-fourth year, and the only issue of the marriage having been a still-born child eleven years previously, is the subject of estimate or calculation. *Boothby v. Boothby*, 1 Mac. & G. 604; 2 Hall & Tw. 214.

REWARD.

Where a handbill relating to a stolen parcel offered a reward to “whoever would give such information as would lead to the early apprehension of the guilty parties,”—Held, that the information must be given not in mere conversation, but with the view of its being acted on, either to the person offering the reward, or his agent, or some person having authority by law to apprehend the criminal. Where the information which led to the apprehension of the guilty person was given not by A alone to whom the communication was first made, but by A and B jointly,—Held, that both must join in an action for the reward. *Lockhart v. Barnard*, 15 Law J. Rep. (n.s.) Exch. 1; 14 Mee. & W. 674.

A party robbed put forth a handbill, in which it was stated “the above sum will be paid by A on recovery of the property and conviction of the offender, or in proportion to the amount recovered.” F, a soldier, gave the information of a confession by the offender to his serjeant, who informed the police. No suspicion had before attached to the offender. Four days afterwards, the plaintiff, a policeman, apprehended the offender, and, as the jury found, “was most active and mainly instrumental in procuring the recovery of the property and the conviction of the offender”:—Held, that the plaintiff was not the party entitled to the reward.

Semble, per *Tindal, C.J.* and *Cresswell, J.* that F was the party entitled.

Quære—per *Coltman, J.*, whether F and plaintiff might not have jointly sued. *Thatcher v. England*, 15 Law J. Rep. (n.s.) C.P. 241; 3 Com. B. Rep. 254.

SALE.

[COMPANY, SHARES—FRAUDS, STATUTE OF—INTERPLEADER—REVERSION—STAMP—VENDOR AND PURCHASER—WARRANTY.]

C & Co. and H & Co. were merchants at Calcutta. H & Co. sold to C & Co. a large quantity of indigo, through the medium of a broker, who drew up a sold note addressed to H & Co., and submitted it to H for his approval, when H having objected to a particular word remaining, the broker

took the sold note to C, and informed him of H's objection. C struck his pen through the word objected to by H, placing his initials over that erasure, and returned it to the broker, who thereupon delivered it, so altered, to H & Co. The broker delivered to C & Co., on the following day, a bought note, which differed in certain material terms from the sold note. In an action brought by H & Co. against C & Co. for non-performance of the contract contained in the sold note, the Supreme Court at Calcutta was of opinion, that the sold note alone formed the contract, and found for the plaintiffs. Upon appeal, held by the Judicial Committee, reversing such finding, that the transaction was one of bought and sold notes, and that the circumstances attending C's alteration of the sold note and affixing his initials, were not sufficient to make that note, alone, a binding contract; and that there being a material variation in the terms of the bought note with the sold note, they together did not constitute a binding contract. *Cowie v. Remfry*, 3 Moore, In. App. 448.

To an action of trover by the assignee of an insolvent, to which the defendant pleaded that the insolvent was not possessed of the goods in question, the plaintiff, for the purpose of proving that at a certain time the insolvent was possessed of the goods, gave in evidence a bill of sale of the goods made by the insolvent to the defendant, and then gave further evidence of its being fraudulent. The bill of sale in its terms gave to the defendant an absolute right of property in the goods. A verdict having been found for the plaintiff, the Master allowed him the costs of impeaching the bill of sale.

Held, that the taxation was correct; that the plaintiff was justified in giving evidence of the fraudulent character of the bill of sale, inasmuch as the 1 & 2 Vict. c. 110, which renders bills of sale void as against the assignees of insolvents, does not apply to an absolute bill of sale like the present, but to an executory bill of sale only. *Hardy v. Tingey*, 19 Law J. Rep. (N.S.) Exch. 233; 5 Exch. Rep. 294.

A custom of the Liverpool corn market, that, when corn is sold by sample, if the buyer does not, on the day the corn is sold, examine the bulk and reject it, he cannot afterwards reject it, or refuse to pay the whole price:—Held, to be a reasonable custom.

Semble—that an article sold by sample cannot in any case be rejected as not corresponding with the sample, except within a reasonable time. *Sanders v. Jameson*, 2 Car. & K. 557.

One of the members of the committee of management of a joint-stock company sold his shares to the committee on behalf of the company at a price not exceeding the market price of the shares at the time. The shares were transferred to trustees in trust for the company, and the vendor thenceforward ceased to interfere in their affairs. Three years after it was known to the shareholders generally that the shares had been sold to the company, the company having during that time continued the business, and having obtained new parliamentary powers, the plaintiff on behalf of himself and all the shareholders in the company filed his bill against the vendor to set aside the sale and transfer as fraudulent, and to obtain contribution from the vendor

towards the debts of the company.—The Court refused to disturb the sale, and dismissed the bill, with costs. *Walford v. Adie*, 5 Hare, 112.

SALVAGE.

A sailing vessel, having a licensed pilot on board, got on the Goodwin Sands, but was rescued by a steam-tug, which, after rendering her salvage services, was employed to tow the vessel to the Downs, but in consequence of the misconduct of the pilot, and the negligence of the master of the steam-tug, the vessel was run ashore on the Sandwich Flats:—Held, in such circumstances, that the steam-tug had no claim for salvage, as the master of the steam-tug was not released from all responsibility respecting the direction of the vessel towed, by reason of a licensed pilot being on board, and that it was the joint duty of the pilot and the master of the tug to do their utmost for the safety of the ship.

Held also, that the master of the steam-tug could not separate the towing of the vessel from his claim for salvage services for getting her off the sands, as it was one transaction of salvage. *Shersby v. Hibbert*, 6 Moore, P.C. 90.

Upon a tender for salvage services in getting a vessel off the Newcombe Sand, it appeared, that in order to get the vessel off the sand, both her bower anchors and chains were slipped, and that the salvors, after getting her off, called in the aid of another boat to recover the anchors:—Held, that the general salvage was completed when the vessel was off the sand, and that the getting up of the anchors formed no ingredient in the salvage services, so as to entitle those who recovered the anchors to share in the general salvage of the ship and cargo.

Where the salvors took no step in the Admiralty Court to issue a commission of appraisal of the vessel proceeded against, this Court, as the Court of final appeal, will not admit affidavits appraising the vessel. *Colby v. Watson*, 6 Moore, P.C. 334.

A shipowner who has paid a sum of money under the 9 & 10 Vict. c. 99, in order to release the ship and cargo from a claim for salvage, has a lien on the cargo for the proportion of those expenses payable to him by the owners of the goods, and an insurable interest in the cargo in respect of such lien.

The owners of goods on board a ship are bound to contribute to the salvage of the ship and cargo as in a case of general average. *Briggs v. Merchant Traders' Ship Loan and Assurance Association*, 18 Law J. Rep. (N.S.) Q.B. 178; 13 Q.B. Rep. 167.

Pilots going on board a vessel in a leaky condition and assisting the crew, and keeping down the water by pumping, entitled to be rewarded as salvors.

A tender of 42*l.* overruled, and 65*l.* awarded. *The Hebe*, 2 Rob. 246.

A person who, under an agreement with the master of a stranded vessel, had taken charge of the ship, and had succeeded in saving and warehousing a portion of the cargo, the vessel having gone to pieces, held entitled to a salvage remuneration, although his services were to be considered in the character of a meritorious agency rather than of salvage services. *The Favorite*, 2 Rob. 255.

A claim of salvors setting up an inflamed and exaggerated statement of alleged salvage services dismissed, and the salvors condemned in the costs. The crew of a vessel proceeded against coming forward *uno ore* to depose against the interest of the owners, causes a suspicion in the mind of the Court. *The Towan*, 2 Rob. 259.

Defence in a suit for salvage, that the salvors undertook to perform the alleged service for a stipulated reward, overruled, as contrary to the probabilities of the case. *Semble*, where steamers go out of port for the express purpose of rendering assistance to vessels represented to be in distress, the time and expense incurred in reaching the vessel is to be taken into the calculation in fixing the amount of the salvage remuneration. *The Graces*, 2 Rob. 294.

Rule laid down by the Court respecting the production of protests, viz., that in all cases of salvage they ought to be brought in. In cases of salvage, it is the usage of the Court to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion. It is not competent to parties to aver that the services were of greater importance to the ship than they were to the cargo, and therefore that the ship should bear the greater burthen, or *vice versa*. Tender overruled. *The Emma*, 2 Rob. 315.

The crew of a stranded vessel having taken to their boats, in making for the nearest land fall in with another vessel also stranded and abandoned by the crew. Having boarded the vessel, they succeeded in getting her off and bringing her safely to England. A claim to participate in the salvage set up by the owner of the vessel to which the salvors belonged, upon the ground that the salvors were enabled to reach the vessel saved solely by means of the boats and the use of his compass; 2ndly, that some of the salvors were his apprentices. 300*l.* awarded to the actual salvors. Claim of the owner rejected. *The Two Friends*, 2 Rob. 349.

A written agreement to stay by a vessel in distress and see her safe into port for the sum of 500*l.*, signed by the masters of the two vessels, upheld by the Court.

Plea of the salvors, that the agreement was conditional, and signed upon the understanding that the service was not to extend beyond the following morning, overruled. *The Repulse*, 2 Rob. 396.

Salvage service performed to a British ship by one of Her Majesty's cruisers on the coast of Africa.

Bill for 400*l.* as salvage remuneration, drawn by the master upon the owners in England in favour of the salvors.

In the course of the homeward voyage the vessel founders, and the bill upon presentation is refused payment by the owners.

Monition against the owners refused by the Court. *The Chieftain*, 2 Rob. 450.

A claim of salvage set up by a steam tug dismissed, and the alleged salvors condemned in the costs of the proceedings, upon the ground that by their own misconduct they had run the vessel into difficulty and danger, by towing her aground upon the Sandwich Flats. *The Duke of Manchester*, 2 Rob. 470.

The commander and crew of a vessel of war, upon

the African station held to be entitled to a salvage remuneration for putting a sailing master and two seamen on board a homeward bound merchant vessel to assist in navigating the vessel, the master and one of the mariners of the merchant vessel being invalidated with fever, and incapable of discharging the duties on board.

Deductions claimed by the owners for the value of the ship and cargo on account of freight, primage and insurance, disallowed. *The Charlotte Wylie*, 2 Rob. 495.

By the strict rule of court, where a tender has been rejected and has afterwards been adjudged a sufficient tender, the salvors are liable to a condemnation in the costs.

The inclination of the Court, however, is not to press the rule with rigidity in all cases.

Tender pronounced for, but without costs. *The William*, 2 Rob. 521.

The owners of boats rendering a salvage service, not having been personally present at the time the service is rendered, are not entitled to sue as salvors. Some remuneration, however, is due to them for the use of their boats, by way of equitable compensation. *The Charlotte*, 3 Rob. 68.

Where a fishing smack is actually taken off a lucrative employment in order to render a salvage service, the circumstance of her being so diverted from her occupation will form an essential ingredient in the salvage award. Where, however, she is not so engaged at the time, the award of the Court will not be influenced by the consideration of the earnings she might have gained during her detention in the salvage service. Where salvage money has been paid into the registry for the purpose of distribution, the Court has no power to decree from the fund in court the payment of advances made to the salvors by their agent. *The Louisa*, 3 Rob. 99.

Claim for salvage partially disallowed, upon the ground that the salvors in the performance of the salvage service had displayed great want of skill, and had brought the vessel into danger and difficulty thereby.

Semble—the deduction in the amount of the salvage award is to be measured, not by the amount of damage sustained, but in proportion to the quantum of negligence or ignorance displayed by the salvors. *The Cape Packet*, 3 Rob. 122.

Claim of the salvors overruled, upon the ground that their services, under the circumstances of the case, did not exceed a service of towage. The general rule with respect to costs, that they should follow the decision of the cause, modified and relaxed in respect to salvors. Claim of alleged salvors dismissed, without costs. *The Princess Alice*, 3 Rob. 138.

Where part of the crew of a light ship assist in rendering salvage service, the claim for salvage remuneration is confined to the persons actually engaged in the service, and does not extend to the persons left on board the light ship, as in ordinary cases of fishing smacks and other vessels. *The Emma*, 3 Rob. 151.

An agent of Lloyd's at an outport, who had undertaken to relieve a vessel from her difficulties in that character, and had merely employed the necessary hands to perform the service, without having himself incurred any personal risk in the

transaction, allowed to claim as salvor. *The Purissima Concepcion*, 3 Rob. 181.

Where salvors are embarked in a salvage service with the consent and sanction of the master of a stranded vessel, and are disturbed in their salvage operations, and are ousted from the vessel by persons illegally intruding themselves into the service, no salvage benefit can accrue to the parties so intruding themselves, for any portion of the ship and cargo they may save, but the same will accrue to the original salvors. *The Fleece*, 3 Rob. 278.

SATISFIED TERMS ACT.

In the year 1830, an owner of land, having mortgaged it, levied a fine to confirm the mortgage, and at the same time assigned a satisfied term to a trustee for the mortgagee. In 1835, the defendant purchased the land from the mortgagor, and paid off the mortgage, on which occasion indentures of lease and release were executed by the mortgagor and mortgagee, by which the legal estate and the equity of redemption were conveyed to the defendant, and the outstanding term was assigned by the trustee of the mortgagee to a trustee of the defendant to attend the inheritance. In 1845, a party, claiming by title paramount to that of the mortgagor, brought ejectment against the defendant, and laid one of the demises in the name of the defendant's trustee:—Held, that the defendant did not require the protection of the 8 & 9 Vict. c. 112; that the term ceased and determined by virtue of that act on the 31st of December 1845, and that the plaintiff could not recover on the demise of a trustee of the term.

Semble—that if the defendant had wanted the protection of the act, it would have been necessary for him to apply either to a court of equity, or to this Court to strike out of the declaration the demise in the name of the trustee. *Doe d. Cadwalader v. Price*, 16 Law J. Rep. (N.S.) Exch. 159; 16 Mee. & W. 603.

In 1838, A being seised in fee of premises, assigned them for a term of 1,000 years by way of mortgage to B, and in 1842 A mortgaged the premises in fee to C, subject to the term of 1,000 years, and on the 1st of October 1844 conveyed the equity of redemption to the lessor of the plaintiff. On the 21st of October 1844, the amount secured by the mortgages was paid off by D, to whom the term of 1,000 years was assigned by the executors of B, with a proviso for the redemption of the premises on re-payment of the mortgage-money by the lessor of the plaintiff. To an ejectment, the defendant set up a conveyance to himself in fee by A in October 1839,—Held, that the term of 1,000 years was not a satisfied term, so as to cease and determine by the operation of the 8 & 9 Vict. c. 112. *Doe d. Clay v. Jones*, 18 Law J. Rep. (N.S.) Q.B. 260.

SAVINGS BANK.

[See TRUST AND TRUSTEE.]

A was appointed to be the actuary and cashier of a savings bank. By one of the rules of the savings bank, it was declared that the bank should be open

for receiving deposits every Saturday from eleven till two, at the house of A, when the committee or some of them would attend to receive deposits and pay money out. None of the committee ever attended. A received the deposits without controul, and, at the time of his bankruptcy, was a defaulter in respect thereof to a considerable amount:—Held, that A did not receive the deposits by virtue of his office, and that the amount due from him was not payable out of his estate in priority to his other debts. *Ex parte Fleet re Jardine*, 19 Law J. Rep. (N.S.) Bankr. 10.

SCHOOL AND SCHOOLMASTER.

The acts for granting sites for schools extended and explained by the 12 & 13 Vict. c. 49; 27 Law J. Stat. 70.

The contributions of unions and parishes in school districts provided for by the 13 Vict. c. 11; 28 Law J. Stat. 12.

The relationship in the ordinary case of trustee and *cestui que trust* does not exist between the dean and chapter of a cathedral church and the head master of the grammar school attached to it, where both the cathedral and school are governed by the statutes of the founder and subject to the jurisdiction of a special visitor, and where the head master is paid out of the common funds of the endowment. Therefore, where the dean and chapter of the cathedral church of Rochester, in exercise of a power vested in them by one of the statutes of the founder, summarily dismissed the head master of the grammar school attached to the cathedral from his office without hearing him in his defence, the Court refused to interfere by injunction, either *durante lite* or otherwise, to restrain the dean and chapter from removing him from his office or appointing another head master in his stead. *Whiston v. Dean and Chapter of Rochester*, 18 Law J. Rep. (N.S.) Chanc. 473; 7 Hare, 532.

SCIRE FACIAS.

[See PATENT, Repealing—PRACTICE, AT LAW, Execution.]

Proceedings in *scire facias*. Orders of December 20, 1848, xi. to xix., 18 Law J. Rep. (N.S.) Chanc. 504.

The rule of Hilary term, 2 Will. 4. pl. 79, does not apply to a *scire facias* against the ter-tenants, which can only be founded on a previous *scire facias* against the personal representatives; and a rule *nisi* is, therefore, unnecessary, though the judgment is more than fifteen years old. *Wright v. Maddox or Madocks*, 15 Law J. Rep. (N.S.) Q.B. 81; 8 Q.B. Rep. 119.

Upon a *scire facias* to recover 262*l.* 10*s.*, found to be due to the Crown for Customs duties by an inquisition taken under a commission, it appeared by the record, that the commission (which was set out upon oyer, tested on the 21st of February, and returnable on the 15th of April 1843,) authorized the commissioners to inquire "whether J D is *now* indebted in any or what sums of money." The inquisition (also set out on oyer) was taken

and returned on the 1st of March 1843, and contained a finding by the jury, that J D was on the day of taking the inquisition justly and truly indebted to the Queen in 262l. 10s. for the duty of customs on silk imported by him between the 8th and 14th of February 1843, and that the said 262l. 10s., and every part thereof, still remained due and unpaid:—Held, that the finding of the debt in the inquisition was sufficient, and was warranted by the commission.

The *scire facias* was tested on the 30th of March 1843:—Held, that the fact of its having issued before the return day named in the commission, was merely an irregularity, and not ground of error. *Dean v. Regina*, 15 Law J. Rep. (n.s.) Exch. 236; 15 Mee. & W. 475; 3 Dowl. & L. P.C. 714.

The plaintiff having obtained a verdict against the defendants, subject to a special case, with liberty to turn the same into a special verdict, obtained judgment on the special case. The defendants then brought a writ of error; after which, on the 12th of August 1845, the then plaintiff died, having made the present plaintiff his executor. In December 1845, the judgment below was affirmed. The defendants having sued out a writ of error in the House of Lords, and assigned errors thereon, on the 6th of March 1846 petitioned the House of Lords that the present plaintiff might be a party to the writ of error. On the 11th of May the Lords ordered the record to be remitted to the Exchequer. On the 24th of August the defendants below again petitioned the House of Lords that the personal representative of the deceased plaintiff might be made a party to the judgment, but no order was made thereon. On the 10th of November the plaintiff sued out a *scire facias* to have execution. The Court refused to stay all proceedings, but allowed the plaintiff to sign judgment on the *scire facias*, with a stay of execution for six weeks. *Riddle v. the Grantham Canal Navigation Co.*, 16 Law J. Rep. (n.s.) Exch. 129; 16 Mee. & W. 882; 4 Dowl. & L. P.C. 555.

Where, under the 7 Geo. 4. c. 46. s. 13, a rule to issue a *scire facias* upon a judgment recovered against the public officer of a joint-stock banking company, had been obtained against a former member of the company, which rule was afterwards enlarged, and finally abandoned upon terms of payment of costs by the plaintiff, such plaintiff is not precluded from again coming to the Court for leave to issue such *scire facias*.

Semble—that the practice of the court, which prevents a party from moving the same rule twice, does not apply to motions for leave to issue such *scire facias*, but that a plaintiff, after such motion has been refused, may upon affidavits disclosing fresh facts renew such motion.

It is no answer to a motion for leave to issue a *scire facias* upon a judgment recovered against the public officer of a joint-stock company, against a party who was a member at the time that the contract was entered into, in respect of which the judgment has been recovered, that such judgment was fraudulently concocted; but such a defence must be raised by plea, or form the subject-matter of an application to set aside the proceedings as fraudulent.

In proceeding upon the 7 Geo. 4. c. 46. s. 13,

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the right course for the plaintiff who has recovered judgment against the public officer of a joint-stock banking company to pursue is, in the first instance, to issue writs of *scire facias* against those who are members of the company at the time the *scire facias* is applied for, and not against those who were members at the time the action was commenced.

Where a judgment has been recovered upon a contract against the public officer of a joint-stock banking company, the plaintiff will be allowed to issue writs of *scire facias* against those who were members of the company at the time the contract was entered into, if there is a reasonable certainty that execution issued against those members of the company who are primarily liable would be fruitless.

Persons who have become members of a joint-stock banking company after the contract in respect of which judgment has been recovered against the public officer of the company was entered into, and have ceased to be so at the time judgment was signed, are not within the provisions of the 13th section of the 7 Geo. 4. c. 46, and are, therefore, exempt from all legal liability. *Dodgson v. Scott*, 17 Law J. Rep. (n.s.) Exch. 321; 2 Exch. Rep. 457.

SEDUCTION.

A father or master cannot maintain an action for the seduction of his daughter or servant, without some proof of loss of service. The law does not imply damage to the father or master from the mere act of seduction. *Eager v. Grimwood*, 16 Law J. Rep. (n.s.) Exch. 236; 1 Exch. Rep. 61.

In trespass for, on divers days, assaulting and debauching S D, then and still being the servant of the plaintiff, the defendant traversed that S D was servant to the plaintiff at the said several times when, &c.:—Held, that the plaintiff could not recover upon proof of a service existing subsequently to the time when the seduction took place, but prior to the delivery of S D. *Davies v. Williams*, 16 Law J. Rep. (n.s.) Q.B. 369; 10 Q.B. Rep. 725.

In an action for the seduction of the plaintiff's daughter, to prove that her connexion with the defendant (which happened but once) was against her consent, the daughter can be asked only as to circumstances occurring immediately after the event. *Colyer v. Mayne*, 2 Car. & K. 1011.

SEQUESTRATION.

In 1834 a writ of sequestration was sued out by the plaintiffs, indorsed to levy the amount of the judgment debt recovered; in 1838, the statute 1 & 2 Vict. c. 110. was passed, by the 66th section of which judgments are to carry interest; in 1839 other execution creditors of the defendant lodged writs of sequestration with the Bishop. Under these circumstances, the Court refused to grant an application of the plaintiffs, that their writ of sequestration should be amended by a claim for interest since 1838 being indorsed thereon.

Quære—Whether, under the writ as it stood, the

Bishop would be bound to satisfy the plaintiffs this interest. *Watkins v. Tarpley*, 17 Law J. Rep. (N.S.) Q.B. 47; 5 Dowl. & L. P.C. 226.

When a return is made by a bishop to a *feri facias de bonis ecclesiasticis* issued either to himself or his predecessor, the Court will refer it to the Master to say whether the deductions made from the sum levied under the writ in respect of the sequestrator's charges are proper to be allowed. *Dawson v. Symmons*, 18 Law J. Rep. (N.S.) Q.B. 34; 12 Q.B. Rep. 830: s. r. *Morris v. Phelps*, 19 Law J. Rep. (N.S.) Exch. 165; 4 Exch. 895.

The sheriff-substitute as well as the sheriff has power to sign a renewed warrant of protection from arrest or imprisonment under the Scotch Sequestration Act, 2 & 3 Vict. c. 41. *Jones v. Anstruther*, 18 Law J. Rep. (N.S.) Exch. 131; 1 Exch. Rep. 867.

A decree of suspension pronounced in the Arches Court, and regularly enforced against a beneficed clergyman, operates for the time of its endurance in the same manner as if such clergyman were dead, or absolutely removed from his benefice.

Where, therefore, under a writ of *sequestrari facias* issued out of the Court of Queen's Bench, a sequestrator had been regularly appointed and was in the receipt of the profits of a vicarage, and afterwards a second sequestration to a different sequestrator was issued and published by virtue of a decree of suspension for eighteen months pronounced in a proceeding in the Arches Court against the vicar, under the Church Discipline Act,—Held, that such second sequestration had the effect of suspending, from the time of its publication, all right to receive the profits of the vicarage under the first sequestration. *Bunter v. Cresswell*, 19 Law J. Rep. (N.S.) Q.B. 357.

By the statute 6 & 7 Will. 4. c. 77. (passed the 13th of August 1836) orders in Council may be issued to carry into effect the recommendation of the Ecclesiastical Commissioners as to alterations in the dioceses of bishops, and by section 20. nothing therein contained, nor any order in Council made under the authority of the act, shall, for a specified period, in any manner affect or be construed to affect the jurisdiction, power, or authority of any of the existing ecclesiastical courts, but every such Court shall continue in all matters arising within its present limits to exercise the same jurisdiction as theretofore by law allowed. By the 10 & 11 Vict. c. 98. s. 6. the temporary provisions of the 6 & 7 Will. 4. c. 77. (which had been continued by subsequent acts) were to cease on the 2nd of November 1847; and by section 8, where, under the provisions of that act, any parish or place shall have been brought within any diocese to which it did not belong before the passing of that act, and any act of jurisdiction or authority shall have been exercised as to such parish, &c. since the passing of the said act, and before the 1st of November 1847, by the bishop, &c. of the diocese to which such parish, &c. belonged, either before or since the passing of the said act, which does not conflict with any similar act of jurisdiction or authority previously and since the passing of the said act exercised as to such parish, &c. by any other bishop, &c. having or claiming to have jurisdiction as to such parish, &c., the same shall be deemed as good and valid as if such parish,

&c. had been wholly and undoubtedly within the diocese and jurisdiction of the bishop by whom such act of jurisdiction or authority shall have been exercised.

The parish of H, which had before been included in the diocese of L, was by an order in Council, dated the 22nd of December 1836, transferred to the diocese of W. In 1843 a sequestration was issued by the Bishop of L, founded upon a writ of *levari facias*, against the vicar of H, under which the sequestrator received the rents up to Lady Day 1848. No other writ of sequestration had at that time been issued by the Bishop of W into the parish of H.

In an action for use and occupation by the vicar of H to recover the rent of certain premises due at Lady-day 1848,—Held, that the issuing the sequestration was an act of jurisdiction or authority exercised by the Bishop of L, to whose diocese the *Semble*—per Lord Campbell, C.J. and Erle, J., parish formerly belonged, and that it was rendered valid by the 10 & 11 Vict. c. 98. s. 8. that the sequestration was an act of the Bishop's Court, and was therefore saved by the 6 & 7 Will. 4. c. 77. s. 20.

Held, also, that the sequestration ousted the title of the plaintiff, and being a continuing execution was a good answer to the action.

Held, also, that the defence was admissible under the plea of "never indebted." *Powell v. Hibberd*, 19 Law J. Rep. (N.S.) Q.B. 347; 15 Q.B. Rep. 129.

A writ of sequestration issued by a bishop in virtue of a sentence certified to him from the Court of Arches, to which Court the case was originally sent by letters of request, must be enforced by the bishop.

Motion to decree a monition against an incumbent to shew cause why he should not pay the sequestrator, appointed by the bishop, a sum of money claimed as due; rejected by the Court of Arches. *Trower v. Hurst*, 1 Robert. 597.

A sequestration having issued against a defendant in contempt for not producing before the Master, pursuant to the decree, documents scheduled to his answer, the Court refused to order certain chattels of the defendant, seized by the sequestrators, to be sold for payment of the costs of the contempt, notwithstanding the costs of retaining possession by the sequestrators were likely to exhaust the value of the property.

On the return to the writ of sequestration, the tenants of the leasehold premises of the defendant were ordered to attorn to the sequestrators.

It is not the practice to file the return to a sequestration.

Where the process is merely a ground for ulterior proceedings, *ex. gr.* to take the bill *pro confesso*, it should not be executed; *secus*, where there is some personal duty to be enforced, as discovery, &c. *Goldsmith v. Goldsmith*, 15 Law J. Rep. (N.S.) Chanc. 264; 5 Hare, 123.

Reversionary interest in stock standing in the name of the Accountant General sold under a sequestration. *Couper v. Taylor*, 16 Sim. 314.

SESSIONS.

- (A) JURISDICTION.
- (B) APPEAL.
 - (a) Notice and Grounds of.
 - (b) Entry and Respite.
- (C) ORDER OF.
- (D) RULES OF.
- (E) FEES AT.

The procedure in General and Quarter Sessions amended by the 12 & 13 Vict. c. 45; 27 Law J. Stat. 66.

(A) JURISDICTION.

[*Regina v. Inhabitants of Sevenoaks*, 5 Law J. Dig. 699; 7 Q.B. Rep. 136.]

[*Regina v. Justices of Huntingdonshire*, in re *Ashton*, 5 Law J. Dig. 699; 7 Q.B. Rep. 169.]

Defendant having pleaded guilty at the January Quarter Sessions to indictments for misdemeanour, was thereupon bound over by recognizance to appear to receive the judgment of the Court at the next Quarter Sessions, and the judgment was respite to those sessions. At the next (April) sessions, judgment was again respite till the then next Quarter Sessions. At those sessions, held in June, judgment was given by the Court, that the defendant should be fined and imprisoned for the offences charged in the indictments:—Held, on error brought, that the Court of Quarter Sessions, being a continuing court, had power to respite the case from one sessions to another.

The record alleged, that at the January sessions it was "considered and adjudged" that the defendant should enter into recognizances:—Held, that these words did not give the order to enter into recognizances the effect of a judgment, so as to oust the Sessions of their jurisdiction to pronounce the subsequent judgment at the June sessions. *Keen v. Regina*, 16 Law J. Rep. (n.s.) M.C. 180; 10 Q.B. Rep. 928.

The 7 & 8 Vict. c. 71. s. 2, which empowers the Justices of Middlesex to try appeals at General Sessions in the same manner as at the General Quarter Sessions, only confers an optional jurisdiction, and the appellant may proceed, therefore, as before, to the Quarter Sessions, and is not bound to go to the General Sessions. *Regina v. Justices of Middlesex*, 17 Law J. Rep. (n.s.) M.C. 111; 5 Dowl. & L. P.C. 581.

The power of Justices of the Peace of a county or of a recorder of a borough to try prisoners at Quarter Sessions, is not suspended or affected by the fact of the Judges sitting under the usual commissions of assize, oyer and terminer, and general gaol delivery for the same county.

The suspension of all other authorities by the Court of Queen's Bench coming into any county, is due to the fact of its being the court of appeal from all other criminal courts.

Quare—Whether any such effect was produced by the coming of Justices in eyre into a county.

A subsequent commission determines altogether a prior commission of the same nature.

Justices of the Peace do not sit at Quarter Sessions under a commission of oyer and terminer,

but under a permanent commission of the Peace, with an *assignavimus* enabling them to hear and determine felonies, &c. *Smith v. Regina*, 18 Law J. Rep. (n.s.) M.C. 207.

The Licensing Act, 9 Geo. 4. c. 61. s. 27, provides, that every person who shall think himself aggrieved, &c. may appeal to the next General or Quarter Sessions of the Peace, &c., unless such sessions shall be holden within twelve days, &c., and in that case to the next subsequent sessions, and not afterwards, and the Court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the Court shall seem meet; and the judgment of the Court shall be final and conclusive to all intents, &c. An order of Sessions, under this act, purported to be made at the General Sessions of the Peace, holden in and for the county of Middlesex, on the 5th of May, and continued by successive adjournments, until the 22nd, and recited that, at the General Quarter Sessions of the Peace, held in April then last, W B had exhibited his petition of appeal against the refusal of certain Justices to grant him a licence, at which said Quarter Sessions the said appeal, and the hearing and determination thereof, was adjourned unto "this present General Sessions," and proceeded to adjudge that, "upon hearing, &c., the Court did dismiss the appeal, and affirm the judgment of the Justices, and order and adjudge that the said W B should pay to the said Justices 16l. 19s. 2d., for costs, &c." The facts were that, at the April sessions, the appeal was heard, the judgment of the Justices affirmed, and the licence refused:—Held, that by the words of the act of parliament the power of adjudicating on the appeal was confined to the April sessions; and that the order made at the May sessions was, therefore, without jurisdiction.

Semble, also, that, at the April sessions, the appeal had been in point of fact disposed of, and that the order was on that ground also bad. *Regina v. Belton*, 17 Law J. Rep. (n.s.) M.C. 70; 11 Q.B. Rep. 379.

(B) APPEAL.

[*Regina v. Inhabitants of Latchford*, 5 Law J. Dig. 700; 6 Q.B. Rep. 567.]

(a) Notice and Grounds of.

[*Regina v. Inhabitants of Ripon*, 5 Law J. Dig. 703; 7 Q.B. Rep. 225.]

[*Regina v. Inhabitants of Rothwell*, 5 Law J. Dig. 703; 7 Q.B. Rep. 574, n.]

Where sessions are held on certain fixed days at different places for different divisions of a county, and the practice of the Sessions is to try all matters arising in each division at the Sessions held for that division, the notice and statement of grounds of appeal, under the 4 & 5 Will. 4. c. 76. s. 81, must be given at least fourteen days before the first day of holding the sessions at the first place, and will not be in time if given only fourteen days before the adjourned sessions at which the appeal is to be tried. *Regina v. Justices of Suffolk*, 16 Law J. Rep. (n.s.) M.C. 36; 4 Dowl. & L. P.C. 628.

Where an appeal against an order of removal has been entered and respite to the following Sessions, that Court has power further to respite the hearing

of the appeal, although no notice or grounds of appeal have, prior to such sessions, been served upon the respondents.

Therefore, where, under the above circumstances, the Sessions had refused to further respite the appeal, although it appeared that in the exercise of their discretion, they would have done so if they had considered that they had the power, this Court granted a mandamus, commanding the Justices to hear the appeal. *Regina v. Justices of Lancashire*, 17 Law J. Rep. (N.S.) M.C. 45; 5 Dowl. & L. P.C. 264.

On an appeal to the Court of Quarter Sessions against a poor-rate, one of the grounds of appeal was, that the appellants were rated in a higher proportion than certain other persons in the parish (who were named), inasmuch as the appellants were rated on the gross estimated rental of their lands, &c. in the parish, whereas the other persons in question were respectively rated on amounts less than the gross estimated rental of their premises. The Sessions decided that under this ground of appeal the persons named in it were entitled to notice of appeal, and as none had been served on them, refused to hear the appeal; although the appellants offered to abandon that ground of appeal, and proceed with the case on the other grounds of appeal.

Held, that, as the language of the ground of appeal would bear the construction put on it by the Sessions, this Court would not review their decision; that, as notice of appeal was not given to the parties entitled to it, the Sessions were justified in refusing to hear the appeal; and that the Sessions were not bound to allow the appellants to abandon the ground of appeal affecting those persons, and to hear the case on the remaining grounds of appeal. *Regina v. the Justices of Cambridgeshire*, 19 Law J. Rep. (N.S.) M.C. 130; 1 L. M. & P. 47.

A poor-rate having been made on the 7th of December 1848, the London and North-Western Railway Company, on the 21st of the same month, paid a portion of the sum for which they were assessed to such rate, and on the 12th of July 1849, gave notice of appeal to the special sessions for hearing appeals against rates, to be holden on the 9th of August 1849. Three previous special sessions had intervened between the making of the rate and the 9th of August 1849. When the appeal came on for hearing, the Justices refused to hear it on the ground that it had not been brought to the next practicable special sessions, or within a reasonable time.

Held, that under the 6 & 7 Will. 4. c. 96. s. 6, the Justices were right, and could not be compelled to hear and adjudicate upon the appeal. *Regina v. Justices of Lancashire*, 19 Law J. Rep. (N.S.) M.C. 199.

(b) Entry and Respite.

The Sessions are bound, by the statute 9 Geo. 1. c. 7, to receive and adjourn an appeal made to the next sessions, after an order of removal, if no notice has been given to the respondents, although the appellants might have given notice, and have tried the appeal at those sessions.

The statute 4 & 5 Will. 4. c. 76. ss. 79. and 81. makes no difference in the practice in this respect.

Regina v. Justices of London, 15 Law J. Rep. (N.S.) M.C. 127; 9 Q.B. Rep. 41.

(C) ORDER OF.

[*Regina v. Morice*, 5 Law J. Dig. 705; 2 Dowl. & L. P.C. 952.]

An order of Sessions was made for dismissing an appeal against a rate, and that the appellants, "upon service of the said order or a true copy thereof, should pay the respondents the sum of 91l. 9s. 10d. for their costs and charges by reason of the said appeal." An indictment for disobeying this order stated, that a true copy of the said order was, on &c., served on the defendants, and that they then and there had notice of the said order:—Held, on motion in arrest of judgment, that such statement was sufficient.

Held, secondly, that such allegation was sufficiently proved by proof of service of a copy of a formal document, containing the terms of the order drawn up from the minutes of the Sessions, such document being shewn to the defendants at the time of service.

Held, thirdly, that no notice to produce such copy was necessary.

Held, lastly, that it was no objection to the order that the amount of the costs was inserted in it at an adjournment of the Sessions, on a day subsequent to that on which the order was made; as both parties must be taken to have assented that the exact amount of costs should be fixed at a day subsequent to the making of the order. *Regina v. Mortlock*, 14 Law J. Rep. (N.S.) M.C. 153; 7 Q.B. Rep. 459.

At the hearing of a respited appeal against a poor-rate, the appeal was dismissed, on the non-appearance of the appellants, and the Sessions made the following order: "Surrey, to wit.—At the General Quarter Sessions of the Peace, holden at St. Mary, Newington, on &c. Whereas, at the last General Quarter Sessions of the Peace, holden in and for the county of Surrey, appeal was then made at this court." The appeal was then recited, and the entry and respite thereof "until the next General Quarter Sessions, to be holden in and for the county of Surrey." It then ordered the appeal to be dismissed, and further "that the said appellants do forthwith pay to the said respondents the sum of 115l. costs":—Held, on motion for a *certiorari*, that the order was good, although no notice had been given that more than nominal costs would be asked for; that it sufficiently shewed that it was made at the Quarter Sessions holden in and for the county of Surrey; and that the term "costs" shewed, with sufficient certainty, that they were costs of the appeal. *Ex parte London and Brighton Rail. Co. v. London, Brighton, and South Coast Rail. Co.*, 17 Law J. Rep. (N.S.) M.C. 119.

By the statute 6 & 7 Vict. c. 36. scientific societies certified to be entitled to the benefit of that act, are exempted from "county, borough, parochial, or other local rates or cesses," and an appeal is given, to any person, "assessed to any rate from which any society shall be exempted by the act," to the Quarter Sessions, within four calendar months next after the first assessment made after the certificate.

An order of Quarter Sessions annulling a certificate stated "whereas E. L. of the parish of B, &c.,

hath presented his petition and appeal [stating the making of the certificate], by which certificate the petitioner, as a parishioner and rate-payer of the parish of B, in which the said society is situate, conceives himself aggrieved, &c. Now, upon hearing the said petition and appeal in the presence and hearing of all parties concerned, &c., it is ordered, &c." The above order having been brought up on *certiorari*,—Held, that it sufficiently appeared that the appellant was a person assessed to some rate from which the society was exempted, and that the order of Sessions therefore shewed jurisdiction.

An objection, that the Sessions erroneously annulled the certificate on a preliminary technical objection appearing on its face, cannot be taken advantage of on a rule to quash the order of Sessions for insufficiency, although the certificate, as well as the order annulling it, be returned on *certiorari*. The proper mode of proceeding is by mandamus to the Sessions to hear the appeal on the merits. *Regina v. Stacy*, 19 Law J. Rep. (N.S.) M.C. 177.

(E) RULES OF.

If a Court of Quarter Sessions make a general rule that 40s. costs only be allowed on appeals, and, on an application for costs by an appellant parish at whose instance an order of removal has been quashed, adhere to their general rule, and give them 40s. costs, and decline to consider the merits of the particular case, this Court will grant a mandamus to compel the Justices to consider and award to the appellants such costs as the Justices in their discretion shall think reasonable and just. *Regina v. Justices of Glamorganshire*, 19 Law J. Rep. (N.S.) M.C. 172; 1 L. M. & P. 336.

(F) FEES AT.

The statute 8 & 9 Vict. c. 114, abolishing certain fees in future, does not apply to defendants convicted, or to fees payable upon traverses. *Regina v. Coles*, 15 Law J. Rep. (N.S.) M.C. 10; 8 Q.B. Rep. 75.

SET-OFF.

[See EXECUTOR—PARTNERS—STAMP, Lease—TRUCK ACT.]

- (A) RIGHT OF.
- (B) PLEAS OF.
- (C) PARTICULARS OF.

(A) RIGHT OF.

Innes, consignee of a West India estate, was appointed trustee thereof by B, the tenant for life, for the purpose of keeping down incumbrances. Innes was also a private agent and banker for B, with the understanding that B was not, nor were his funds, to be liable for advances made by Innes for the estate; Innes, becoming embarrassed, was declared bankrupt, and assignees were appointed:—Held, by the Lords,—reversing orders of the Court of Chancery, on a bill filed by B, and the other owners of the estate, to remove Innes from the possession and management,—that a sum found due from Innes to B, on their private dealings, might be set off

against a sum found due to Innes in respect of his advances and payments for the estate. *Baillie v. Edwards*, 2 H.L. Cas. 74.

The defendant pleaded to the further maintenance of the action a set-off of a debt due from the plaintiff to the defendant, after the commencement of the suit and before plea:—Held, that the plea was ill. *Richards v. James*, 17 Law J. Rep. (N.S.) Exch. 277; 2 Exch. Rep. 471.

A replication to a plea of set-off that since the plea of set-off the plaintiffs had paid the defendant the amount of the set-off, is good.

To make a set-off good the debt sought to be set off must continue due down to the time of trial. *Eyton v. Littledale*, 18 Law J. Rep. (N.S.) Exch. 369; 4 Exch. Rep. 159.

A declaration in assumpsit by the assignees of G, a bankrupt, stated in substance, that G before the bankruptcy paid to a banking company, of which defendant was public officer, a sum of money for the specific purpose of providing for a bill of exchange for that amount accepted by G, payable at their banking house; and that they, instead of applying the money according to their instructions, refused payment of the bill when due and presented for payment, before G's bankruptcy, whereby G sustained damage in his trade and business, &c. Plea, mutual credit by way of a set-off. Demurrer and joinder in demurrer:—Held, that the declaration was for unliquidated damages, sustained by G by reason of the breach of promise on the part of the banking company to pay the bill of exchange when due and presented, and that the plea of set-off could not be allowed. *Bell v. Corey*, 19 Law J. Rep. (N.S.) C.P. 103; 8 Com. B. Rep. 887.

[See post, (B) Pleas of.]

(B) PLEAS OF.

A declaration in assumpsit contained various counts upon promissory notes, and also the common counts. The third count was for 15*l.*, the balance unpaid upon a bill of exchange for 210*l.* The defendant, by pleas, the issues on which were found for him, answered the whole of the plaintiff's demand, except that under the third count, and on a further plea of set-off to the whole declaration, he proved that the plaintiff was indebted to him in a sum exceeding 15*l.*, but less than the amount of the plaintiff's claim in the whole declaration:—Held, that as the pleas, taken together, answered the whole of the plaintiff's demand, the defendant was entitled to a verdict on the plea of set-off, and to judgment upon the whole record. *Ford v. Beech*, 16 Law J. Rep. (N.S.) Q.B. 100; 11 Q.B. Rep. 842.

Where a set-off is pleaded to the whole declaration, and the amount proved under it does not cover the plaintiff's demand, the sum proved will go in reduction of damages, but the defendant will not be entitled to a verdict on the plea for the amount proved.

The plaintiffs and the defendant having dissolved partnership, the former agreed to take all the debts on themselves, and release the defendant therefrom, the latter giving them a bond for a sum of money payable by instalments. The plaintiffs having failed to pay the debts, the defendant was sued by a creditor, and the sheriff, having taken his goods in execution, paid the debt out of the proceeds.

Semble—that in an action by the plaintiffs, on the bond, the defendant was entitled to set off, as *money paid*, the amount so paid by the sheriff. *Rodgers v. Maw*, 16 Law J. Rep. (N.S.) Exch. 137; 15 Mee. & W. 444; 4 Dowl. & L. P.C. 66.

In an action of debt, a plea of set-off to the whole amount stated in the declaration is not supported by proof of a less amount, although it equal the sum claimed in the particulars of demand. *Roche v. Champagne*, 16 Law J. Rep. (N.S.) Exch. 249; 1 Exch. Rep. 10; 5 Dowl. & L. P.C. 121.

(C) PARTICULARS OF.

The usual order for particulars of set-off with dates, is not sufficiently complied with by a delivery of particulars without dates, although not objected to by the plaintiff; and the defendant will, in such case, be precluded, at the trial, from giving evidence of his claim; but after verdict for the plaintiff, the Court granted a new trial on an affidavit of merits, and on payment of costs and bringing the money into court. *Ibbett v. Leaver*, 16 Law J. Rep. (N.S.) Exch. 208; 16 Mee. & W. 770; 4 Dowl. & L. P.C. 716.

A Judge's order for the delivery of particulars of set-off, and in default precluding the defendant from giving evidence of his set-off, makes such evidence inadmissible at the trial. *Young v. Geiger*, 18 Law J. Rep. (N.S.) C.P. 43; 6 Com. B. Rep. 552.

The particulars of set-off are merely explanatory of the plea of set-off, and the plaintiff by putting them in evidence to prove his case, *ex. gr.* to rebut the defence of the Statute of Limitations, does not thereby admit the correctness of their contents. *Burkitt v. Blanshard*, 18 Law J. Rep. (N.S.) Exch. 34; 3 Exch. Rep. 89.

SETTLEMENT.

[See MARRIAGE.]

- (A) GENERALLY.
- (B) CONSTRUCTION OF.
- (C) COVENANT TO SETTLE.
- (D) FAILURE AND REVOCATION OF.
- (E) SETTLEMENT BY THE COURT OF CHANCERY.

(A) GENERALLY.

A settlement of a trust fund, whereby no legal estate was affected, restored by a declaration in the decree, without a reference, or the execution of any fresh instrument; and the form of such order. *Tebbit v. Tebbit*, 1 De Gex & S. 506.

A B invested a sum, which was subject to the trusts of his settlement, in the purchase of real estate, and added 500*l.* of his own:—Held that, under the circumstances, he had devoted that sum to the trusts of the settlement for the benefit of the parties entitled thereunder. *Ouseley v. Anstruther*, 10 Beav. 461.

(B) CONSTRUCTION OF.

[*Davies v. Ashford*, 5 Law J. Dig. 709; 15 Sim. 42.]

Lands, held in fee simple were, by settlement made in 1752, conveyed to trustees, to the use of

the settlor for life; remainder to the use of his three daughters for their lives, as tenants in common; remainder to the use of trustees to preserve; remainder, as to the share of each daughter, to the use of her first and other sons successively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor, during their or her respective lives or life, as tenants in common in case of two survivors, with remainder, in like manner as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to the use of their daughters as tenants in common in tail; and in case one or two of the settlor's daughters should die without issue, the share or shares of such daughter or daughters to go to the use of the daughters of the survivors or survivor, as tenants in common in tail general; and in case all three should die without issue, then remainder over, with ultimate remainder to the use of the settlor in fee. The settlor died soon after without disposing of the reversion:—Held, that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was a good contingent remainder, and therefore not void for remoteness:

And also, that the words "survivors or survivor" were to be read "others or other," and, consequently, the limitation over to the daughters of one of the settlor's daughters, who had issue, was not defeated by the death of that daughter in the lifetime of another, who subsequently died without issue, but that limitation took effect as a good cross-remainder. *Cole v. Sewell*, 2 H.L. Cas. 186.

The trusts of a term in a post-nuptial settlement of real estates were: "After the decease of the husband and wife (the settlors), to raise 1,000*l.* for the portion of every daughter and younger son, to be paid to sons at the age of twenty-one, and to daughters at that age or marriage, if such ages should be attained or marriages had after the decease of the survivor of the settlors, and not sooner: And if any younger son died, or became an eldest or only son before twenty-one, or any daughter died before that age unmarried, or before his or her portion became vested, the portions provided for such son or daughter, so dying, &c., before his or her portion became payable as aforesaid, should survive and accrue to the survivors of such daughters and younger sons, to be equally divided between them, and paid when their original portions should become payable." Then followed a proviso for the issue of a younger son or daughter dying in the lifetime of the settlors, or after their death before his or her portion became due and payable; and a trust, after the death of the settlors, for maintenance of such sons and daughters, or their issue, entitled to portions as aforesaid, until his or her portion became payable, with cesser of the term, on payment of the portions, or in case there should not be any younger children or issue of them living at the death of the survivor of the settlors. The settlors had seven children (besides an eldest son), four of whom died in the lifetime of their parents, under the age of twenty-one, and unmarried:—Held, by the Lords, reversing a de-

cree in Chancery, that the three survivors were entitled to have the portions of the four deceased children raised for them, in addition to their own. *Evans v. Scott*, 1 H.L. Cas. 43.

Prior to the marriage of E M H and W B, certain lands, of which E H, the mother of E M H, was seised in fee, were settled to the use of W H, the husband of E M H, for his life, with remainder to the use of E H, for her life, and then with remainder to the use of the said W B, for his life, and then with remainder to the use of E M, his intended wife, for her life, with remainder to the use of all and every the children of the body of the said W B on the body of the said E M H, his intended wife, to be begotten, to be equally divided among them, share and share alike, to take as tenants in common, and not as joint tenants, and of the several and respective heirs of the bodies of all and every such children lawfully issuing; and in case one or more of such children should happen to die without issue of his or their body or bodies, then as to the share or shares of him, or them so dying without issue, to the use of the survivors or others of them, share and share alike, to take as tenants in common, and not as joint tenants, and the several and respective heirs of their bodies lawfully issuing; and in case all such children but one should happen to die without issue, or if there should be but one such child, then to the use of such surviving or only child, and of the heirs of his or her body lawfully issuing, and for default of such issue, then to the use of the said E M H, the wife of the said W B, and of her heirs and assigns for ever. The marriage was duly solemnized. There was issue of it eight children, three of whom died in infancy, unmarried, and in the lifetime of their parents. E M, the wife of W B, survived both W H and his wife, E H:—Held, that the word “share” included every interest which each child took under the limitations of the settlement, and that cross-remainders were created by apt words as well in respect of the accruing as of the original shares. *Edwards v. Alliston* not followed. *Doe d. Clift v. Birkhead*, 18 Law J. Rep. (N.S.) Exch. 441; 4 Exch. Rep. 110.

By marriage settlement, executed at Bath before the act for assimilating the currencies of England and Ireland, an annuity or yearly sum of 1,000*l.* “sterling lawful money of Ireland” was directed to be raised and paid to the intended wife:—Held, that the annuity must be paid in sterling English money, and the words “of Ireland” must be excluded. *Cope v. Cope*, 15 Law J. Rep. (N.S.) Chanc. 274; 15 Sim. 118.

By a marriage settlement a sum of 30,000*l.* was vested in trustees, upon trust out of the interest, &c. of two equal third parts of it, together with the interest, &c. of the remaining third part, to make up the annual sum of 500*l.* and pay such annual sum to the husband and wife during the life of A:—Held that the husband and wife were entitled, during the life of A, to the income of the remaining third part, whether it did or did not exceed 500*l.* a year.

A person, who by mistake had received for some years a less income than he was entitled to under his marriage settlement, held under the circumstances entitled to have the difference made up to

him out of the estate of the deceased settlor. *Davis v. Morier*, 2 Coll. C.C. 303.

In 1832 Sir R R transferred 2,197*l.* stock into the names of trustees, and executed a voluntary deed, declaring trusts in favour of his daughter and her children. In 1840 he executed a second deed, which, without noticing the first deed, recited that he had transferred 2,197*l.* stock into the names of these trustees, and declared trusts somewhat different, and gave a life interest to his wife:—Held, first, that the stock intended to be settled by the two deeds was the same. Secondly, that the trusts of the first deed could not be altered by the second; and, thirdly, that the second deed failing to operate gave no right against the assets of the settlor. *Newton v. Askeu*, 11 Beav. 145.

By a settlement dated the 14th of February 1842, trustees were directed to stand possessed of a sum of stock on trust for the settlor for life, and, after his decease, on trust, to pay the dividends to B for his life, or until he should become bankrupt; and, on his becoming bankrupt, then to pay the dividends to the wife of B for her life, for her separate use. On the 7th of February 1842 (seven days before the date of the settlement), a fiat in bankruptcy issued against B, who obtained his certificate in December 1842. The settlor died in 1845:—Held, that (to the exclusion of the assignees of B,) B's wife was entitled to the dividends for her separate use for her life. *Manning v. Chambers*, 16 Law J. Rep. (N.S.) Chanc. 245; 1 De Gex & S. 282.

The trusts of some stock were, by a settlement, declared to be for A, B, C, and D, equally; with a proviso, that the shares of females should not be paid to them, but should be invested, and the income paid to them for their lives, and that, after the death of each such female, the trustees should stand possessed of her share for such persons as she should by will appoint, and, in default of appointment, for the executors or administrators, or other the personal representatives or representative of such female:—Held, that each female had an absolute interest in her share, and had a right to a transfer. *St. John v. Gibson*, 17 Law J. Rep. (N.S.) Chanc. 95.

Under a marriage settlement certain property was conveyed to trustees for the benefit of the husband and wife for life, and afterwards for the children of the marriage; and powers of sale and exchange were given to the trustees, with consent of the husband and wife. The husband having alienated his life interest in the property, it was held, nevertheless, that his power of consenting to the sale by the trustees was not extinguished. *Warburton v. Farn*, 18 Law J. Rep. (N.S.) Chanc. 312; 16 Sim. 625.

Conveyance in a marriage settlement by A, of Whiteacre and Blackacre, on the usual trusts, and covenant by A that the property was worth the annual sum of 200*l.*, and that he was seised of it in fee simple, free from incumbrances. A was entitled in fee simple to Whiteacre, which was worth 50*l.* a year, but had only an estate for life in Blackacre, which was worth 190*l.* a year. In a suit by the only child of the marriage against the executors of A,—Held, that the plaintiff was entitled, out of A's estate, not merely to a sum that would

produce the difference between 50*l.* a year and 200*l.* a year, but to a sum that would produce 190*l.*, the annual value of Blackacre.

If a bill on behalf of an infant does not ask for all the relief that he is entitled to, the Court will order a new bill to be filed. *Wace v. Bickerton*, 19 Law J. Rep. (N.S.) Chanc. 254.

A deed recited an intention to provide for A and her children, and declared that trustees should hold a fund for A for life, and upon her death or doing any act to incumber her interest, the trustees were to stand possessed, "if there should be one child of A then living," of the said stock to be an interest vested in such child at twenty-one, and to be paid accordingly, if such age should happen after the death of A, and if not, immediately on her death or making any charge. And if there should be two or more such children, the stock to be transferred among such children in equal shares, at the age of twenty-one, if A should be dead; but if not, then immediately after her decease or having made such incumbrance. The deed contained clauses of survivorship in case of any child dying under twenty-one, as to "the share intended to be thereby provided for such child dying," and also clauses for maintenance, advancement, and accruer. There were several children; one attained twenty-one, and died in the lifetime of A:—Held, that her representatives did not participate in the fund. *Skipper v. King*, 12 Beav. 29.

By a marriage settlement certain funds were vested in trustees by the intended husband, in trust for himself for life, with remainder to his intended wife for life, remainder to the children of the marriage, and, if there should be no children, then in trust for such persons as the settlor should appoint, and in default of appointment, "in trust for the next-of-kin or personal representatives of the settlor, in a due course of administration, according to the Statute of Distributions." The marriage took effect, but there were no children, and the settlor died before his wife, having by his will disposed of his general personal estate, the residue of which he bequeathed to certain charities. The property of the wife was settled exactly in the same manner as that of the husband, and with a like ultimate limitation to her next-of-kin. On the death of the wife, her personal representative claimed her share as widow in the fund settled by the husband, in opposition to the claims of the representative of his next-of-kin at his death, and also to the residuary legatees:—Held, that the next-of-kin were entitled to the fund under the settlement, to the exclusion of the widow; and that the fund did not pass by the will, and the charities were not entitled. *Kilner v. Leech*, 16 Law J. Rep. (N.S.) Chanc. 503; 10 Beav. 362.

Real estate was settled on A for life, with remainder to B for life, with remainder to trustees for 1,000 years, with remainder to C (the eldest son of B) for life, with remainder to the first and other sons of C in tail, with remainder to D (the second son of B) for life, with remainder to the first and other sons of D in tail, with remainders over. The trusts of the term were declared to be, that the trustees should raise 15,000*l.* for the portions of the children of B (not being and besides an eldest or other son of B, who at the decease of B and A

should be entitled to the same estate), the portions to be paid to such younger child and children, if sons, at their ages of twenty-one, and if daughters at their ages of twenty-one or marriage. C and D both attained twenty-one. Then B died. Then C died without issue. Lastly, A died, whereby D became entitled to the estates in possession:—Held, that both D and the personal representatives of C were excluded from sharing in the 15,000*l.* raiseable under the trust term. *Gray v. Limerick (Earl)*, 17 Law J. Rep. (N.S.) Chanc. 444; 2 De Gex & S. 370.

A settlement of trust funds for the benefit of a husband and wife for their lives, with remainder to the children of the marriage equally, provided that if the husband should during his life advance any monies for the advancement of any child of the marriage, or in case any lands, monies, &c. should descend or come by or from him for the benefit of any such child, then such monies, &c. and the value of such lands should be accounted as part or in full of the portion provided by the settlement, unless the husband should by writing declare the contrary:—Held, that the advances referred to in the first part of the clause were payments made and perfected in the lifetime of the husband, and that the lands, &c. referred to matters not perfected or not having effect until after his death.

Property accruing during the coverture to the husband and wife, in right of the wife and settled on the children as the husband and wife or the survivor should appoint (but not otherwise reduced into possession by the husband) was not to be accounted for by the children to whom it was appointed.

Neither the value of a leasehold house assigned by the husband during his life to one of the children for his more comfortable maintenance, nor an advance by the husband in his lifetime of a sum of money to one of his daughters for the purpose of apprenticing her son, affected the share of such child in the trust fund. *Douglas v. Willes*, 7 Hare, 319.

Trustees of a settlement were to stand possessed of a fund, in trust, as to one share, for the settlor's daughter A for life, and then for her children, who were to take vested interests, if sons at twenty-one, and if daughters at twenty-one or marriage; and if A should have no children who should live to attain a vested interest, then to stand possessed of A's share, as to one moiety for his daughter B and her children, and as to the other moiety for his daughter C and her children, under the same limitations and restrictions as were imposed on the gift to A and her children. Then followed similar dispositions of the remainder of the fund in favour of B and her children, and C and her children, with limitations over of each share (in the event of B or C dying without leaving children who should attain a vested interest) in moieties to the other daughters and their children, as before. But in case there should be no children of A, B, and C who should attain a vested interest, or any part thereof, then the trustees were to pay, assign, and transfer the whole fund unto the next-of-kin of the settlor. The settlor died, having made A, B, and C his residuary legatees. After his death C died without issue—then B died without issue, leaving A surviving her, who had two children, one a daughter married:—

Held, that A, having a child who had attained a vested interest in the fund, was not entitled to any portion as next-of-kin of the settlor, and that so much of the fund as did not pass under the limitations other than to the next-of-kin, resulted to the settlor and passed under his will to his residuary legatees. *Westwood v. Slater*, 1 De Gex & S. 1.

By an indenture of settlement certain estates were settled upon A B for life, with remainder to his son for life, with remainders over. A power was also given to the trustees to sell the estate during the lives of A B and his son. By a subsequent deed A B conveyed his life estate to his son, and after his death to remain and continue to the several uses and estates, and upon the powers, provisoes, declarations, and agreements, expressed and declared of and concerning the said hereditaments by the previous indenture *anterior* to the limitations therein for the respective lives of A B and his son:—Held, that it was not intended, under this clause, to limit a new life estate to the son, without the subsequent powers, during his life, but that the estate was still subject to those powers which, in the first deed, were to be found subsequent and in addition to the limitations to the son for life; and that the trustees consequently retained the immediate power of sale. *Morgan v. Rutson*, 17 Law J. Rep. (N.S.) Chanc. 419; 16 Sim. 234.

By a marriage settlement, trustees were directed to pay the income of certain trust funds to the husband and wife for their lives, and, after the death of the survivor, to divide such funds between the children and issue of the marriage, to be transferred and paid to sons at twenty-one, and to daughters at twenty-one or marriage. There were three children of the marriage. One of them attained twenty-one and died in the lifetime of the tenants for life, leaving children and grandchildren; another attained twenty-one and died in the lifetime of the tenants for life without children, and the other attained twenty-one, survived the parents, and had children:—Held, that the trust funds vested in the children of the marriage as they attained twenty-one, and that the surviving child and the representatives of those deceased were entitled to them. *Gordon v. Hope*, 18 Law J. Rep. (N.S.) Chanc. 228; 3 De Gex & S. 351.

The wife's property (1,000*l.*) was, in 1787, by a marriage settlement, vested in trustees for the husband and wife for their lives, and after the death of the survivor for all the children then living, equally, and if there should be only one child then living for such only child, to be paid at twenty-one, with interest to be applied as maintenance, and in case there should be no child living at the death of the survivor of the husband and wife, or there being such they should all die under twenty-one, the 1,000*l.* to be in trust for the wife's father. In 1793 the wife's father made a voluntary settlement of leaseholds and 500*l.* stock in trust for the wife for life, remainder in trust for all children living at her decease equally, their shares to be paid at twenty-one, and the income to be applied in the mean time for maintenance; and if any of them should die before their shares became payable, their shares to go to the survivors; and if all the children should die under twenty-one, in trust for the settlor. There were three children, two of

whom died in the life of the wife, and the third survived her and attained twenty-one. The wife survived the husband:—Held, that that child took the whole of the property comprised in the deeds. *Jeffery v. Jeffery*, 17 Sim. 26.

Upon a marriage, a sum of 5,000*l.* consols was vested in trustees, to pay the dividends to the husband for life, and, after his decease, upon trust to transfer the principal to the wife, her executors and administrators, or as she or they should appoint; but in case the wife should depart this life in the lifetime of the husband, leaving issue one or more child or children then living, then, after the decease of the husband, upon trust for all and every the child and children of the marriage as the wife should by deed or will appoint; and if there should be no issue of the said marriage living at her death, then upon trust for such person as the wife should by deed or will appoint, with remainder, in default of appointment, to the husband absolutely. There were seven children of the marriage, two of whom died under the age of twenty-one years, in the lifetime of the wife, who never executed the power of appointment; another of the children attained twenty-one, and died in the lifetime of the husband; and upon a bill filed to determine the interest of the children under the settlement, it was held, in reference to the power, that the five children living at the death of the wife were entitled to the 5,000*l.* consols, by implication, and that there was no implied gift for the benefit of all the children of the marriage. *Winn v. Fenwick*, 18 Law J. Rep. (N.S.) Chanc. 337; 11 Beav. 438.

In a marriage settlement, a sum of stock was given to trustees, after the death of the husband and wife, upon trust, in case the wife died first, "for such person or persons as at the time of the death of the husband should be the next-of-kin of the wife, and would be entitled to her personal estate and effects, his, her, and their executors, administrators and assigns, as if she had died sole and unmarried." The wife died first, leaving five brothers and sisters. On the death of the husband only one brother was living, but there were children of the other brothers:—Held, that the brother surviving at the death of the husband took the whole fund, as the next-of-kin designated in the settlement. *In re Webber's Settlement*, 19 Law J. Rep. (N.S.) Chanc. 445.

(C) COVENANT TO SETTLE.

Upon the marriage of an infant ward of court, who was entitled jointly with her sister to real and personal estate held by trustees, in undivided moieties, the intended husband, by the sanction of the Court, covenanted that upon the wife coming of age her real property should be settled upon himself and herself and the children of the marriage, with an ultimate limitation in default of issue of the marriage to the heirs of the wife. He also settled the personal property in the same manner, except that the ultimate limitation was to the wife's next-of-kin. The marriage took effect, the wife attained twenty-one, and about a month after the marriage died without issue, and without executing a settlement of the real estate, leaving her sister, who was also an infant ward of court, her sole heiress and next-of-kin:—Held, that the surviving sister could not com-

pel a conveyance to herself of her deceased sister's moiety of the real estate, without making compensation to the husband for his loss of that interest in the real estate which he would have taken under the settlement if it had been executed by the wife. *Savill v. Savill*, 2 Coll. C.C. 721.

An intended husband settled his wife's fortune, and covenanted to settle any property to which the wife or he in her right at any time during the marriage should become entitled. A reversionary interest which had been accidentally omitted to be settled was held to be included in the covenant. *Bute (Marquis) v. Harman*, 9 Beav. 320.

A person, on his marriage, covenanted to lay out 1,000*l.* at least in the purchase of real estate, and to settle it on certain trusts declared by the marriage settlement. The marriage took effect in 1813. In 1818, a house was purchased by him for 1,650*l.*, and conveyed to him in fee. In 1847, he mortgaged this house in fee:—Held, that the purchase was made with a view to the performance of the covenant, and that the persons claiming under the settlement were, subject to the mortgage, entitled to the house. *Ex parte Poole, in re Symes*, 17 Law J. Rep. (N.S.) Bankr. 12.

A, on the marriage of his daughter Elizabeth, agreed, by the indenture of settlement made on her marriage, to which he was a party, that his executors or administrators should, within twelve months after the decease of the survivor of himself and his wife, in case of his giving to his other daughter Sarah more than the sum or value of 1,500*l.* for her portion, pay or deliver unto J, the husband of Elizabeth, such portion, or other sums or property, as should make the portion or fortune of Elizabeth equal to that of Sarah; and by the same indenture A covenanted with J, his executors and administrators, to pay J 1,500*l.* in manner therein mentioned, and that in case A should give to his other daughter Sarah, on her marriage or otherwise, a greater portion or fortune than 1,500*l.* in money or value, his executors or administrators should and would, within the space of twelve calendar months next after the decease of the survivor of himself and his wife, pay and deliver over to J, his executors or administrators, in money or value, such further or other sum or property as would be equal to the portion or fortune given to or intended for Sarah. A paid the 1,500*l.* covenanted by him to be paid to J, and, on the marriage of his daughter Sarah to O, A paid to O the sum of 1,500*l.* as a marriage portion with his daughter Sarah. A's wife died during his lifetime, and A, by his will, gave to trustees, for his daughter Sarah's separate use, a life interest in certain real estates, and also an absolute interest in his household goods and furniture, and he charged his real and personal estate with the payment of his debts:—Held, on bill filed after A's death, by the executors of J, that they were entitled under the agreement and covenant to be paid, as a specialty debt, a sum of money equal to the amount or value of the life interest of Sarah in the real estates devised in her favour by A's will. *Eardley v. Owen*, 17 Law J. Rep. (N.S.) Chanc. 67; 10 Beav. 572.

In contemplation of a marriage between an alien and an English lady, certain real estates were conveyed to trustees in trust for sale, and to stand

possessed of the sale monies upon the trusts expressed in the deed of settlement executed before the marriage, by which the dividends of certain stocks were declared to be held by the trustees in trust for the husband and wife and the survivor for life, and then in trust for the children of the marriage absolutely; and by the deed of settlement the husband covenanted that, in case any real or personal property should during the intended coverture vest in the wife, he would do all acts necessary for settling the same upon the trusts of the marriage settlement. The marriage took effect, and there were issue six children, of whom the eldest had attained twenty-one years. The two eldest were born in France and were aliens; the others were born in England and were English subjects. After the marriage, the lady became entitled to certain real estates:—Held, that they were bound by the covenant, and ought to be sold, and the proceeds invested upon the trusts contained in the settlement and declared of the stocks. *Master v. De Croismare*, 17 Law J. Rep. (N.S.) Chanc. 466; 11 Beav. 184.

A marriage settlement contained a covenant by the intended husband and wife, that all the personal estate to which the intended wife should, at any time during the coverture, become entitled, should be called in, and converted into money, and invested in the names of the trustees on the trusts therein mentioned. At the date of the settlement the father of the intended wife had in his hands a sum of money belonging to her. After the death of the father this circumstance became for the first time known to the husband:—Held, that this sum of money was not bound by the trusts of the settlement. *Otter v. Melville*, 17 Law J. Rep. (N.S.) Chanc. 345; 2 De Gex & S. 257.

(D) FAILURE AND REVOCATION OF.

By an indenture, made in contemplation of marriage, certain leasehold property, belonging to the intended wife, was conveyed to trustees on certain trusts; and the trusts of a sum of stock, also belonging to the intended wife, which had been transferred into the names of the trustees, were declared. The marriage did not take effect, and, soon after the date of the indenture, the lady married another person. In a suit instituted by the husband and wife against the trustees, it was ordered that the leasehold property should be conveyed to the husband, and the stock transferred into his name. *Thomas v. Brennan*, 15 Law J. Rep. (N.S.) Chanc. 420.

By a settlement executed in contemplation of a marriage, a bond payable to the trustees, twelve months after its date, was (*inter alia*) settled upon trusts, with a proviso that until the marriage should be solemnized the trustees should be possessed of the trust monies, &c. in trust for the lady. The marriage never took place. After the obligee's death the bond was found among his papers, with the words "Cancelled, the marriage never having taken place," written across it. The Court held that the lady was not entitled as *cestui que trust* of the bond, though it was not invalidated. *Mitford v. Reynolds*, 16 Sim. 130.

A mortgage in fee was conveyed to trustees on certain trusts of a contemplated marriage. Afterwards and before the marriage the intended husband and

wife revoked the trusts of the settlement. Upon a bill by the husband claiming the mortgage *jure mariti*, the Court referred it to the Master to inquire under what circumstances the revocation had been executed.

Quære—Whether a revocation is valid in such a case. *Page v. Horne*, 9 Beav. 570.

(E) SETTLEMENT BY THE COURT OF CHANCERY.

[See INFANT.]

Where the Master has approved of a settlement of the property of a female ward of court, and of her intended husband (the settlement being for the benefit of the husband and wife and their issue,) and the approval has been confirmed by the Court, it was held not to be competent to the husband and wife, by delaying the marriage until after she attained her majority, and entering into a fresh settlement, to defeat that approved by the Court.

Principles on which the Court acts in relation to the marriage of infants and the settlement of their property. *Hobson v. Ferraby*, 2 Coll. C.C. 412.

SEWERS.

[See RATE, Sewers Rate.]

The Metropolitan Commission of Sewers consolidated and continued by the 11 & 12 Vict. c. 112; 26 Law J. Stat. 269.

The laws relating to sewers further amended by the 12 & 13 Vict. c. 50; 27 Law J. Stat. 72.

The Metropolitan Sewers Act (11 & 12 Vict. c. 112.) amended by the 12 & 13 Vict. c. 93; 27 Law J. Stat. 187.

SHARES.

[See COMPANY.]

Certain shares in two public companies were assigned, by a voluntary settlement, to a trustee, for the life of the settlor, and then to his great-nephew; no formalities were used for completing the transfer of the shares. It appeared that both the companies had rules relating to the transfer of shares for valuable consideration, and to the disposal of shares belonging to deceased persons, but no forms were prescribed for the assignment of shares by a voluntary deed:—Held, that these shares had not been effectually passed, according to the intention of the deceased settlor, to his great-nephew, but must be handed over by the trustee to his personal representatives. *Searle v. Law*, 15 Law J. Rep. (n.s.) Chanc. 187; 15 Sim. 95.

SHERIFF.

[See PRACTICE, AT LAW, Execution.]

(A) RIGHTS AND PRIVILEGES.

(a) *In general.*

(b) *Fees and Possession Money.*

(B) DUTIES AND LIABILITIES.

(a) *Arrest.*

(b) *Escape.*

(c) *Executions.*

(d) *Return.*

(e) *Extortion.*

(f) *Attachment.*

(A) RIGHTS AND PRIVILEGES.

(a) *In general.*

A sheriff who has levied under a *fi. fa.*, issued by the Court of Chancery, under the 1 & 2 Vict. c. 110, is not entitled to an injunction to restrain proceedings against him by a stranger to the suit, by analogy to the case of receivers or sequestrators appointed by the Court, or to the practice at law under the Interpleader Act, or otherwise. *Rocke v. Cooke*, 2 De Gex & S. 493.

(b) *Fees and Possession Money.*

Where the execution creditor paid the expenses of a sale by appraisement of the goods sold under the *fi. fa.*,—Held, that in the absence of all proof of the circumstances under which such appraisement took place, he could not set off the amount so paid against the sheriff's demand for poundage. *Marshall v. Hicks*, 16 Law J. Rep. (n.s.) Q.B. 134; 10 Q.B. Rep. 15.

The attorney who engages the bailiff to execute process, and not the client, held liable to the officer for his fees. *Walbank v. Quarterman*, 3 Com. B. Rep. 94.

Where a sheriff, having seized certain horses which were claimed by a third party, applied for relief, under the Interpleader Act, and obtained a Judge's order that, on payment of a sum of money into court, and on payment to the sheriff of *possession money* from the date of the order, the sheriff should withdraw from possession,—Held, that the sheriff was not entitled to detain the horses for the expense of their keep. *Gaskell v. Sefton*, 15 Law J. Rep. (n.s.) Exch. 107; 14 Mee. & W. 802; 3 Dowl. & L. P.C. 267.

(B) DUTIES AND LIABILITIES.

(a) *Arrest.*

[*Clifton v. Hooper*, 5 Law J. Dig. 715; 6 Q.B. Rep. 468.]

The sheriff is liable to the 50*l.* penalty imposed by the 32 Geo. 2. c. 28, if he takes a person arrested to prison within the twenty-four hours, without expressly informing him of his right to name a convenient dwelling-house to which he may be carried. *Gordon v. Laurie*, 16 Law J. Rep. (n.s.) Q.B. 98; 9 Q.B. Rep. 60.

In an action on the case against a sheriff for negligence in not arresting A B, while he was in the bailiwick, on a *ca. sa.* issued by the plaintiff, and also alleging as a breach of duty that the defendant illegally arrested A B under a false writ, and detained him until discharged by a Judge's order, whereby, while A B was so imprisoned, and for a reasonable time after his discharge, the defendant was unable to arrest him under the plaintiff's writ, but was obliged to let him depart out of custody, whereby the plaintiff's writ became useless; the defendant pleaded not guilty, and traversed that he could have arrested A B *modo et formâ*. It ap-

peared that after the delivery to the sheriff of the plaintiff's writ, another writ (which was void) was delivered at the suit of J S, and that the sheriff granted a warrant on this last-mentioned writ to the officer who arrested A B under it, having at the time no other warrant in his possession, and detained him in custody under that writ until he was discharged by a Judge's order. After that order the sheriff still detained A B in custody under the plaintiff's writ, until a second order for his discharge from that writ was made. A B immediately afterwards left the country. The Judge directed the jury that there had been no arrest at the plaintiff's suit, and that the Judge's order was no justification to the sheriff; and that if the jury believed the evidence, the sheriff was liable for negligence in point of law, and that the plaintiff was entitled to a verdict:—Held, that the ruling was correct; that there had been no arrest at the plaintiff's suit; and that the Judge's order was no justification; but that it was a question of fact which ought to have been submitted to the jury, whether the sheriff had been guilty of negligence in arresting A B on the supposed writ at the suit of J S instead of the plaintiff. *Hooper v. Lane*, 17 Law J. Rep. (N.S.) Q.B. 189; 10 Q.B. Rep. 546.

The sheriff, in the execution of mesne process (a *capias* under the 1 & 2 Vict. c. 110), is bound to provide such a force as will enable him to effect his caption in spite of any resistance he has reason to anticipate.

If, after a caption, the party taken be rescued by force, the sheriff may return the rescue.

The declaration alleged that a writ of *capias* under the 1 & 2 Vict. c. 110, against K was delivered to the defendant (the sheriff), that K was within his bailiwick, and that the defendant could and might have taken him, but did not take him, though often requested so to do, and falsely returned *non est inventus*. Pleas, not guilty; and that the defendant could not nor might have taken K:—Held, that directions given by the plaintiff to the sheriff not to arrest K at a time when he might have done so, being affirmative matter in excuse, were not admissible in evidence on those issues; and that the allegation, "though often requested so to do," was immaterial. *Hovenden v. Standish*, 18 Law J. Rep. (N.S.) C.P. 33; 6 Com. B. Rep. 504.

In case against the sheriff for not arresting, the declaration stated that L being indebted to the plaintiff, the plaintiff according to the statute, &c., and under and by virtue of a special order duly made in that behalf by a Judge, caused a *capias* to be issued in due form of law against L, duly indorsed, &c., directed to the sheriff, &c.:—After verdict for the plaintiff judgment was arrested, on the ground that the declaration did not shew that the plaintiff was a plaintiff against L, or that he was entitled to sue out the writ of *capias*. *Williams v. Griffith*, 18 Law J. Rep. (N.S.) Exch. 195; 3 Exch. Rep. 584.

(b) Escape.

The attorney for the plaintiff, where the defendant has been taken in execution upon a *ca. sa.*, although as such attorney he has authority to receive the fruits of the judgment, has no authority to enter into any other arrangement with the de-

fendant for his discharge from custody under such writ.

Where, therefore, such attorney acting fairly and *bond fide* had, upon receiving a portion of the debt in money from the execution debtor, and for the residue his warrant of attorney for the amount, ordered the sheriff to discharge him from custody, and who, accordingly, discharged him,—Held, an escape on the part of the sheriff, and that the execution creditor was entitled to recover the amount of such residue in an action against the sheriff for an escape. *Connop v. Challis*, 17 Law J. Rep. (N.S.) Exch. 319; 2 Exch. Rep. 484.

In case against the sheriff of R for an escape of a party, whose family were residing in London, and whither he intended to return, and who petitioned the Court of Bankruptcy for protection, under the 5 & 6 Vict. c. 116. and the 7 & 8 Vict. c. 96, upon which a warrant was directed to the sheriff to bring him up for examination, and under which the party was taken on Saturday, the 19th of September, and his petition dismissed for informality:—Held, that the petitioner had been a sufficient resident within the London district to entitle him to present his petition there, and that the sheriff was bound to yield obedience to the warrant.

It appeared that the prisoner's state of health was such as not to permit his return to R on the Saturday evening; and before five o'clock of that day a *habeas corpus* issued, and a copy was served on the officer who had him in custody, and, on the return of the writ on the following Monday, he was taken before a Judge and committed to the Queen's Bench Prison, having in the interval been allowed, in company of the officer, to visit various places in London, &c.:—Held, that the officer being only obliged to return with the prisoner to R in convenient time, and to guard him with a reasonable degree of strictness whilst out of his bailiwick, no escape had been permitted. *Nias v. Davis*, 4 Com. B. Rep. 444; 2 Car. & K. 280.

(c) Executions.

Plea, in trover against the sheriff for certain specified goods, that he seized and sold them under an execution at the suit of T; replication, that the conversion was not in respect of the goods taken and sold under that writ, but for other and different goods, &c. It appearing that the defendant had seized under the writ at the suit of T goods of the debtor, including the specified goods, and on the first day's sale sold enough to satisfy the debt of T; and that having received a second writ at the suit of C, which afterwards turned out to be invalid, he proceeded to sell on a second day to satisfy C's execution,—Held, that the sheriff was liable in trover for the goods sold beyond the amount of T's debt, and that the plaintiff properly newly assigned, and not merely traversed the allegation of the plea, that the goods were sold under C's writ. The sheriff, after sale of sufficient goods to satisfy the writ, is not justified in a further sale, although by accident, not through his default, the amount levied should become insufficient. *Aldred v. Constable*, 6 Q.B. Rep. 370.

Goods having been seized under a writ against the plaintiff, at the suit of G, a claim was made

under a bill of sale, with a schedule annexed. The clerk of G's attorney, in consequence, called on the officer, and was told by him, that the goods were being compared with the schedule; and subsequently, in the course of the day, G, being indisposed to contest the claim, the clerk gave the following notice to the officer:—"G. v. Walker—Withdraw under the *fi. fa.* herein, the goods having been claimed." The officer afterwards discovered that part of the goods were not included in the schedule, and these he retained and sold, and he also for some time retained possession of part of the goods claimed, which, when seized, were in the plaintiff's possession. Three days afterwards, in consequence of the plaintiff's application, the clerk called on the officer, to inquire why he did not withdraw, and being told that there were goods which did not belong to the claimant, expressed his approbation of their detention. The plaintiff having brought trespass to his house and goods, the sheriff and his officers pleaded a justification under the *fi. fa.* To this, the plaintiff replied, that G ordered the defendants to withdraw from the house and possession of the goods, and that he brought his action for their staying after such discharge. Some of the defendants pleaded not guilty, and others traversed the order as alleged. The jury found a verdict for the defendants upon these facts, under the direction of the Judge, and, upon motion,—Held, that the terms of the order, though *prima facie* giving a direction to the sheriff to withdraw generally, were to be interpreted with reference to the circumstances under which it was given, and that they sufficiently negatived an intention on the part of G that it should be treated as a general order. Held also, that the act of detention having been done for G's use and benefit, a ratification by him had a retrospective operation, and would have rendered him liable to an action of trespass, had it not been justifiable; and lastly, that the issue was, whether the order was a general order, and was not divisible, and therefore, the plaintiff could not recover for the subsequent detention of part of the goods to which the order extended, though his possession of them was not disputed. *Walker v. Hunter*, 15 Law J. Rep. (N.S.) C.P. 12; 2 Com. B. Rep. 324.

Trespass against the sheriff for breaking and entering the plaintiff's dwelling-house; plea, that the defendant entered under a *fi. fa.* and seized a lease under which the plaintiff possessed the house, and, before the return of the writ, sold the term, and continued in possession of the house for the further execution of the writ. The plaintiff new assigned, that defendant continued in possession an unreasonable time after he had seized and sold the lease: pleas, not guilty, and that the house was not the house of the plaintiff. The term was sold by auction, but there was no assignment executed. The jury found for the plaintiff on not guilty:—Held, that trespass was maintainable; that the seizure did not vest the term in the sheriff until he executed an assignment to the purchaser; that whether the word "sold" meant an actual assignment or not, the sheriff could not remain in the house after he had sold the term, and that the plaintiff was entitled to recover on the second plea to the new assignment. *Playfair v. Musgrove*, 15

Law J. Rep. (N.S.) Exch. 26; 14 Mee. & W. 239; 3 Dowl. & L. P.C. 72.

At the trial of an action by an execution creditor against the sheriff, for not levying a debt of 60*l.* under a *fi. fa.* the landlord of the debtor was called as a witness, and stated, that 46*l.* was due from the debtor for rent, and it appeared that the sheriff had withdrawn the execution upon notice thereof from the landlord, who had subsequently distrained and realized less than the rent due. The landlord having admitted that the debtor held under a lease, but which was not produced,—Held, that the plaintiff was entitled to recover from the sheriff the amount realized under the distress. *Augustin or Augustien v. Challis*, 17 Law J. Rep. (N.S.) Exch. 73; 1 Exch. Rep. 279.

In an action against the sheriff the declaration stated that certain writs of *fi. fa.* against the plaintiff's goods having been directed to the sheriff, he seized goods of much greater value than were sufficient to pay the sums of money, interest, poundage, and expenses indorsed on the writs, although he knew that the money arising from the sale of part of the goods would be sufficient to satisfy the said sums of money, interest, and expenses so indorsed and directed to be levied. That he sold more goods than were necessary to pay the said sums of money, interest, &c., and levied thereout a greater sum than was sufficient to pay all the said sums of money, &c. And that he sold the said goods for a less sum than the same were really worth, and for which he could and might and ought to have sold them:—Held, on motion in arrest of judgment, that the declaration was good, although the last two breaches might be open to special demurrer.

The duty of the sheriff, in the first instance, is to seize so much goods as will be reasonably sufficient, if sold, to satisfy the sum indorsed on the writ; and his duty to seize in respect of rent does not arise until the landlord has made a claim, when on the refusal of the tenant to pay the rent the sheriff is bound to levy it under the writ, and, consequently, to seize to a larger amount. *Gawler v. Chaplin*, 18 Law J. Rep. (N.S.) Exch. 42; 2 Exch. Rep. 503.

Where goods seized under a former writ, founded on a judgment fraudulent against creditors, are capable of being seized by the sheriff, he is compellable under the 13 Eliz. c. 5. to seize and sell such goods under a writ received by him subsequently, and founded on a *bond fide* debt; and if after notice of such fraud he neglects to sell, and returns *nulla bona* to the latter writ, he is liable to an action for a false return. Nor does the fact that the sheriff has assigned the goods upon the prior execution to a supposed *bond fide* purchaser (but who is in truth a party to the fraud), innocently and in ignorance of the fraud, excuse the sheriff from such liability. *Christopherson v. Burton*, 18 Law J. Rep. (N.S.) Exch. 60; 3 Exch. Rep. 160.

Where the defendant had wrongfully seized the plaintiff's goods, but had not removed them from the house in which the plaintiff resided, and another wrong-doer, against the will of the defendant, seized the goods while thus in the defendant's possession, the plaintiff was held entitled in an action of trespass to recover as damages from the defendant the amount she has been forced to pay to the second

wrong-doer to redeem the goods from him. *Keene v. Dilke*, 18 Law J. Rep. (N.S.) Exch. 440; 4 Exch. Rep. 388.

Trespass may be maintained against the sheriff for seizing under a *fi. fa.* goods of A mortgaged to B, though in A's possession. *Watson v. Macquire*, 5 Com. B. Rep. 836.

(d) *Return.*

The sheriff is not bound to levy under a *fi. fa.*, whatever the value of the goods may be, unless the execution creditor (having notice) first satisfies the landlord's rent. And therefore where, in an action for a false return, the declaration alleged that there were within the bailiwick goods not only sufficient to satisfy five other writs and also the rent, but also goods whereof the sheriff might have levied the monies indorsed on the plaintiff's writ, and that the sheriff had returned that he had received five other writs before the plaintiff's, and had seized under them; and also had notice of a year's rent due to the landlord of the premises where the goods were seized; and that the other execution creditors, as well as the plaintiff, had notice that it was due, but had not paid it, and that there were no other goods, &c.; and the sheriff pleaded that there were no other goods of the debtor besides the goods sufficient to satisfy the said five other writs of *fi. fa.* whereof the sheriff had notice, or could have levied the monies indorsed on the plaintiff's writ:—Held, that on proof by the sheriff of the facts stated in the return, he was entitled to a verdict on this plea. *Cocker v. Musgrove*, 15 Law J. Rep. (N.S.) Q.B. 365; 9 Q.B. Rep. 223.

(e) *Extortion.*

The statute 1 Vict. c. 55. does not repeal the statute 29 Eliz. c. 4. s. 1, so far as regards the penalty thereby imposed upon sheriffs for exceeding the specified rate of poundage upon writs.

Where, therefore, a declaration in debt against the sheriff for treble damages alleged that after the passing of the 1 Vict. c. 55. the Judges sanctioned the taking of certain fees by sheriffs upon the execution of a *fi. fa.*; that a writ of *fi. fa.* issued against the goods of the plaintiff, indorsed to levy 296*l.* and interest, and 1*l.* 1*s.* for execution; that the defendant, as bailiff to the sheriff, levied of the plaintiff's goods 296*l.* and interest, and also 1*l.* 1*s.* as directed; that the defendant was also entitled to take certain specified fees as allowed by the Judges under the 1 Vict. c. 55, but that the defendant over and above those fees took more than allowed by the Statute of Elizabeth, and injured the plaintiff to the amount of the excess:—Held, on special demurrer, that the declaration was good. *Wrightup v. Greenacre*, 16 Law J. Rep. (N.S.) Q.B. 246; 10 Q.B. Rep. 1.

The statute 1 Vict. c. 55. does not repeal the 29 Eliz. c. 4; its only effect is to exempt from the penalties of the statute of Elizabeth those cases in which the sheriff takes no larger fees than shall be allowed by the Judges. It is therefore unnecessary, in a declaration on the case for extortion on the statute of Elizabeth, to negative the defendant's having had authority under the statute of Victoria to take the fees complained of; that is matter of defence which should be pleaded.

The Court will not judicially notice an order of

the Judges, allowing a scale of fees under the 1 Vict. c. 55, so far as to recognize its having been made before the time of the alleged extortion, stated in the declaration.

A declaration on the case against the sheriff for extortion, on the statute of Elizabeth, stated, that the defendant levied under a *fi. fa.* upon the goods of the plaintiff's debtor a certain sum, to wit, 28*l.* 10*s.*; and that he wrongfully took of the plaintiff, for the serving and executing the execution, a large sum of money, to wit, 16*l.*, the same being a larger recompence than in the same statute is limited of and for the sum so levied, that is to say, a large sum, to wit, the sum of 15*l.* more than in the said act is limited in that behalf:—*Semble*, that this allegation was bad in point of form, inasmuch as the poundage upon the levy allowed by the statute being 1*l.* 8*s.*, the allegation that the defendant took 16*l.*, which was excessive by 15*l.*, was repugnant; and if the words, "to wit, the sum of 15*l.*" were rejected as surplusage, there would be no sufficient allegation of the damage. *Pilkington v. Cooke*, 17 Law J. Rep. (N.S.) Exch. 141; 4 Dowl. & L. P.C. 347; 16 Mee. & W. 615.

(f) *Attachment.*

An attachment against the sheriff, for not bringing in the body of the defendant, was set aside, on perfecting special bail and payment of costs. Those terms, not having been complied with, and a *habeas corpus* having issued to the coroner to bring up the body of the sheriff, it was arranged that the *habeas* should not be executed, the sheriff paying to the plaintiff the penalty in the bail-bond, being double the amount of the debt indorsed on the writ, without prejudice to any application to be made by him to the Court:—Held, that the plaintiff was only entitled to retain the sum indorsed on the writ, and costs, and was bound to refund the residue to the sheriff. *Regina v. Sheriff of Middlesex*, 15 Law J. Rep. (N.S.) Exch. 93; 15 Mee. & W. 146; 3 Dowl. & L. P.C. 472.

Where a sheriff's officer has been guilty of extortion, the injured party may, by one and the same rule, call upon the sheriff to shew cause why he should not pay over the excess, and upon the officer to shew cause why an attachment should not issue against him. *Blake v. Newburn*, 17 Law J. Rep. (N.S.) Q.B. 216; 5 Dowl. & L. P.C. 601.

On an application to set aside an attachment issued against a sheriff for not returning a *fi. fa.*, it appeared that the writ was issued on the 21st of July; the goods were seized on the 22nd; the sheriff was ordered on the 24th to return the writ; the goods were claimed on the 27th; the sheriff applied under the Interpleader Act, on the 30th; the plaintiff attended the summons and various adjournments thereof, and declined to contest the claim, which was allowed on the 12th of August; on the 14th of September the sheriff returned *nulla bona*:—Held, that the delay on the part of the sheriff having caused no damage to the plaintiff, the attachment might be set aside on payment of all costs by the sheriff. *Regina v. Sheriff of Devon, in re Nathan v. Elworthy*, 17 Law J. Rep. (N.S.) C.P. 116.

The Court, in considering the terms of setting aside an attachment against the sheriff for the

escape of an execution debtor will be guided by the principle adopted by the legislature in the act 5 & 6 Vict. c. 98, s. 31. in the case of actions against the sheriff.

Where the Court had not sufficient materials for deciding upon affidavit what was the damage sustained by the plaintiff, an action was directed, in which the only question was to be the amount of damage sustained by the plaintiff in the former action, by reason of the escape. *Regina v. Sheriff of Leicestershire, (In re Arden v. Bingham)*, 19 Law J. Rep. (N.S.) C.P. 320; 1 L. M. & P. 414.

The sheriff having taken a defendant under an attachment for non-payment of a large sum of money, in obedience to an order of the Court, received a part of the amount, and a deposit of title-deeds, as security for payment of the balance on the return of the writ. At the return of the writ, the defendant did not pay the balance. Upon the motion of the sheriff, the Court permitted him to pay the sum he had received into court, and to issue an attachment in the names of the plaintiffs, without prejudice to the question of his liability to them; he also indemnifying them against consequent costs, and undertaking to allow the defendant inspection of the title-deeds, deposited as security. *Thomas v. Hall*, 2 De Gex & S. 264.

SHIP AND SHIPPING.

- (A) CHARTER-PARTY.
- (B) INSURANCE.
- (C) BILL OF LADING.
- (D) BOTTOMRY.
- (E) OWNERS.
- (F) MASTER.
- (G) PILOT AND PILOT ACT.
- (H) SEAMEN'S WAGES.
- (I) BROKER.
- (K) SUPERCARGO.
- (L) CARRIERS BY SEA.
- (M) REGISTRY.
- (N) SALE AND TRANSFER.
- (O) FREIGHT.
- (P) AVERAGE.
- (Q) DEMURRAGE.
- (R) DEVIATION. [See (B) INSURANCE.]
- (S) DERELICT.
- (T) NECESSARIES.
- (U) LIEN AND MORTGAGE.
- (V) COSTS.
- (X) ATTACHMENT.
- (Y) COLLISION AND DAMAGES.

Regulation of steam navigation and sea-going vessels, by 9 & 10 Vict. c. 100; 24 Law J. Stat. 262.

The Passengers' Act, 5 & 6 Vict. c. 107, amended by the 10 & 11 Vict. c. 103; 25 Law J. Stat. 278.

Steam navigation further regulated and the number of passengers conveyed in steam vessels limited by the 11 & 12 Vict. c. 81; 26 Law J. Stat. App. iii.

The laws for the encouragement of British ship-ping and navigation amended by the 12 & 13 Vict. c. 29; 27 Law J. Stat. 33.

The carriage of passengers in merchant vessels

regulated by the 12 & 13 Vict. c. 33; 27 Law J. Stat. 41.

The laws relating to pilotage amended by the 12 & 13 Vict. c. 88; 27 Law J. Stat. 172.

An act for improving the condition of masters, mates, and seamen, and maintaining discipline in the merchant service. 13 & 14 Vict. c. 93; 28 Law J. Stat. 243.

(A) CHARTER-PARTY.

A declaration by the owner of a vessel against the charterers upon a charter-party, by which the defendants agreed to load the vessel with a cargo at Liverpool, without detention, and to receive the same at Stettin, setting out the usual clause of exception as to restraints of princes, &c., *during the said voyage*: breach, that the defendants did not load a cargo at Liverpool without detention,—Held, sufficient, without any averment that the detention did not arise from any of the excepted causes. *Crow v. Falk*, 15 Law J. Rep. (N.S.) Q.B. 183; 8 Q.B. Rep. 467.

A ship being chartered to take coals to Algiers, it was stipulated in the charter-party that the ship should be unloaded, weather permitting, at a certain rate per diem, to reckon from the time of the vessel being ready to unload, and "*in turn to deliver*." In an action by the owner against the charterers for an alleged detention, the defendants proved at the trial that the coals in question were for the use of the French Marine, who made special regulations with all their contractors with respect to "the turn to deliver;" that according to these regulations the delivery was "*in turn*," and that these regulations formed part of the general regulations of the port:—Held, that the defendants had a right to prove that the contract was entered into with reference to a known recognized use of the words "*in turn to deliver*" among persons conversant in the trade; and that a question put by the defendants, whether there was any general understood meaning of those words among ship-owners and merchants entering into charter-parties with respect to the commerce then under investigation, was unobjectionable. *Robertson v. Jackson*, 15 Law J. Rep. (N.S.) C.P. 28; 2 Com. B. Rep. 412.

A vessel was chartered by the defendant from London to Bombay, addressed to G & Co., the defendant's agents at the latter place; and it was stipulated by another charter-party of the same date, that the vessel should discharge her cargo at Bombay, and then take in a homeward cargo, the defendant agreeing to pay freight as to one-half the cargo at 3*l.* per ton; and as to the rest at the current rate of freight when the ship should be loading. It was also agreed, that the master of the vessel and the agents at Bombay should be at liberty to make such alterations in the charter-party as they might mutually think proper, without prejudice to the agreement. Shortly after the arrival of the vessel at Bombay, G & Co. agreed, by a memorandum indorsed on the charter-party, that, before loading her homeward cargo, the vessel might proceed to Aden with government coals and stores and return to Bombay with all possible despatch. The plaintiffs accordingly entered into a charter-party with the East India Company; and the vessel proceeded to Aden in February and returned thence in May,

having earned freight, which was paid to the plaintiffs:—Held, that G & Co. had authority to permit the voyage to Aden, and that the defendant was bound by the alteration in the charter-party; and, therefore, that he was bound to pay the charter rate of 3*l.* per ton for half the cargo, although that exceeded the current rate of freight at the time of loading, and although the alteration might be prejudicial to him; and that he was not entitled to bring into the account the freight earned by the owners on the Aden voyage. *Wiggins v. Johnston*, 15 Law J. Rep. (N.S.) Exch. 202; 14 Mee. & W. 609.

Declaration in assumpsit upon a charter-party, by which the plaintiff let a ship to the defendants to proceed to T, and there load from the defendants a cargo of coals, the ship to be loaded in turn. First breach, that the defendants did not within a reasonable time after the arrival of the ship at T load a cargo. Second, that they did not load the ship in turn. Pleas, first, that the defendants did load a cargo within a reasonable time after the arrival of the ship at T. Second, that they did load the ship in turn. Third, that after the arrival of the ship at T, and before the defendants could load any cargo, and while the plaintiff was the master of the ship, and had the care, direction, and management thereof, the ship was damaged by the carelessness, misdirection, and mismanagement of the master and crew, and rendered unfit to receive any cargo. The jury found that the ship was damaged by the carelessness of the master and crew, and their disobedience to the orders of the harbour-master of T, while the latter, who by law had authority to direct and controul all ships there, was superintending her entrance into the port. The ship was loaded by the defendants as soon as she was in a fit state to receive a cargo, having been delayed two months by the damage:—Held, that these facts entitled the defendants to the verdict upon all the issues; for that the "reasonable time" and "the turn" were to be calculated from the time the ship was ready to receive a cargo, and not from the time of her arrival at T, and that the plaintiff had the care and management of the ship within the meaning of the third plea.

Held, also, that the jury were properly directed to find for the defendants on the last issue, if the plaintiff's misconduct contributed to the damage done to the vessel, though it did not entirely cause it. *Taylor v. Clay*, 16 Law J. Rep. (N.S.) Q.B. 44; 9 Q.B. Rep. 713.

In an action on a charter-party made between the plaintiffs and the defendant, the declaration alleged, as breach, that the defendant did not ship a full cargo of linseed according to the terms of the charter-party. The defendant pleaded, setting forth the charter-party, which stated that it was mutually agreed between the plaintiffs, as original charterers of the vessel called the *Dove*, A, 1, "now at sea, having sailed three weeks ago," and the defendant, that the said ship should sail to Marseilles, and there load a full cargo of linseed, and should then proceed to one safe port in the United Kingdom, and deliver the same on being paid freight. Averment, that upon the making of the said charter-party time was an essential part of the contract, and that the probable situation of the

vessel, with reference to the date of her sailing, was also a material and necessary part of the contract; that at the making of the charter-party, the vessel *had not sailed three weeks before*, but, on the contrary, had sailed at a materially and unreasonably later time, to wit, one week later, which plaintiffs, at the time of the making of the charter-party *knew*, wherefore the defendant declined to load any cargo. Replication *de injuriâ*. A verdict having been found for the defendant on this issue,—Held, on motion for judgment *non obstante veredicto*, that the fact of the vessel having sailed three weeks was a condition precedent to the defendants' liability to load, and that the defendant was entitled to judgment.

Semble, per Parke, B., that the averment of the plaintiff's knowledge was an immaterial averment. *Ollive v. Booker*, 17 Law J. Rep. (N.S.) Exch. 21; 1 Exch. Rep. 416.

Assumpsit on a charter-party in these terms:—It is this day agreed between E O (the plaintiff), agent for the owner of the *Lydia*, new ship now on the stocks, of 1,100 tons, or thereabouts, now at Quebec, to be launched and ready to receive cargo in all May, guaranteed to sail in all June, and Messrs. F & Co., merchants (the defendants), that the ship shall proceed to, &c. and there load a full cargo of timber:—Held, that the readiness to receive a cargo in all May was a condition precedent to the plaintiff's right to recover against the defendants for not loading a full cargo, and that a plea stating the ship was not ready to receive cargo in all May was good. *Oliver v. Fielden*, 18 Law J. Rep. (N.S.) Exch. 353; 4 Exch. Rep. 135.

The plaintiff insured eighty-one bales of waste silk free of particular average in a ship from Leghorn to Liverpool. The ship met with bad weather, and she made so much water and was so damaged by perils of the seas as to be obliged to put into Gibraltar, where she was surveyed and detained for repairs. The cargo was (necessarily) unloaded, and twenty-three of the bales of silk found to be so much damaged by, and in such stinking condition from the effects of sea-water, that the master, under the advice of the surveyors, sold them at Gibraltar as damaged silk. The plaintiff claimed as for a total loss of the twenty-three bales. The jury found that a portion of each bale, if cleaned, &c. at a moderate expense, could have been brought home in specie by some other vessel, and that the master had acted in the matter as a prudent uninsured owner would have acted:—Held, that the above facts shewed a partial loss, not a total loss, and that the plaintiff was not entitled to recover. *Navone v. Haddon*, 19 Law J. Rep. (N.S.) C.P. 161.

A ship-owner is entitled to take merchandise on board as ballast, provided it occupies no more space than the ballast would have done, and leaves to the charterer the full space of the vessel for his cargo.

There is no undertaking on the part of the ship-owner that the vessel which he charters shall be free from suspicion of unseaworthiness or any other matter. *Touse v. Henderson*, 19 Law J. Rep. (N.S.) Exch. 163; 4 Exch. Rep. 890.

The stipulation in a charter-party that a vessel shall proceed to a certain place, or as near thereto as she can safely get, and there load a full cargo,

means a place to which she can safely get, and from which, when loaded, she can safely get away. *Shield v. Wilkins*, 19 Law J. Rep. (N.S.) Exch. 238; 5 Exch. Rep. 304.

By a charter-party, the owner of the ship agreed that she should proceed direct to Ichaboe, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew; and being so loaded, should proceed therewith to Cork or Falmouth, &c., and deliver the same, on being paid freight, at 4*l.* 15*s.* per ton, restraint of princes and rulers, the acts of God, and the Queen's enemies, fire, and perils of navigation always excepted. Twenty-one working-days to be allowed to the charterers, if the ship were not sooner discharged, at the port of unloading. The charterers to ship bags and other materials requisite for loading the ship, and to supply the stores for the vessel, at cash prices, for the voyage, and to deduct the amount from the balance of freight; but, in the event of the vessel being lost, or any other unforeseen causes preventing the completion of the charter-party, the owner agreed to pay the charterers the amount of their disbursements for such stores. To a declaration on this charter-party, alleging as a breach of it that the defendant, the ship-owner, did not load a full and complete cargo of guano on board the ship at Ichaboe, he pleaded a plea, which stated in substance that he was prevented from doing so by an unforeseen cause, namely, that on the arrival of the ship at Ichaboe, and within a reasonable time afterwards, no guano was to be found there; and that he had paid to the plaintiffs the amount of their disbursements for stores for the vessel.—Held, that this plea was bad in substance, for that the fact of no guano being to be found was not such an "unforeseen cause preventing the completion of the charter-party," as entitled the defendant to pay the amount of the disbursements, and treat the charter-party as at an end, but that he was nevertheless bound by his positive contract to load a full cargo. *Hills v. Sughrue*, 15 Mee. & W. 253.

Where a charter-party stipulates for seventy-five running days, and twenty days on demurrage, if the ship is detained for extra days, the remedy is not by an indebitatus count for demurrage, but by action on the charter-party itself. *Cropton v. Pickernell*, 16 Mee. & W. 829.

(B) INSURANCE.

A vessel insured under a time policy from August 1841 to August 1842, encountered very severe weather in the Indian seas, and was compelled, in May 1842, to put into the Mauritius. The master wrote to the owners, telling them of the injuries which the vessel had received, of the necessity to make extensive repairs, of his intention to borrow money on bottomry for that purpose, of the sum required, and of the impossibility of getting the money except on the undertaking to return direct to England, instead of proceeding to Bombay, as originally intended. He further stated, that on account of the very low state of freights in India, this would be better for their interests, which he said he consulted in everything he did. The agents for Lloyd's, at the Mauritius, who were employed by the captain to act for him, wrote letters to the

same effect. These letters were received at intervals between September and December 1842, and in the latter month the owners wrote to the agents expressing their surprise at the amount required, but saying, at the same time, that they supposed what was done was the best that could be done under the unfortunate circumstances in which the ship was placed. The owners wrote to agents in London, apprising them of the expected arrival of the vessel, and directing them to do what was needful. The vessel did arrive on the 27th of March, and was at first taken possession of by the agents for the owners. On the 30th of March the owners abandoned to the underwriters:—Held, that under these circumstances they were not entitled to recover as for a total loss; for, first, assuming notice of abandonment to be necessary in a case of constructive total loss, the notice here had not been given in time; and secondly, the conduct of the owners on the receipt of the letters amounted to an election to treat this as a partial loss, and they could not afterwards, on the arrival of the vessel, when they found that the cost of repairs much exceeded the market value of the vessel itself, convert this partial into a total loss.

Though the master may, by an ordinary rule of law, be considered, whenever the vessel is, by capture or other detentions and casualties, prevented from continuing the voyage, as the agent for all parties concerned, yet the owners, even under such circumstances, may by their conduct make him their sole agent, so as to be bound by his acts.

Per Lord Campbell.—Notice of abandonment is necessary in order to convert a constructive into an absolute total loss.

The cases of *Cambridge v. Anderton* and *Roux v. Salvador* shew that where a ship, in consequence of the inability of the master to get it off the rocks where it has struck, has been actually sold, or where a cargo of a perishable nature has been so damaged by the sea that its substance is gone, and it can never reach the destined port in specie, the loss, in each instance, is actual, and not constructive total loss.

Where a prudent owner uninsured would have sold, the case amounts to one of actual total loss. *Fleming v. Smith*, 1 H.L. Cas. 513.

A policy of insurance was effected on goods on board the ship *Penang*, on a voyage from L to various ports in China; amongst others, to Macao, Hong Kong, and Canton, with liberty to trans-ship the goods on board any other vessel; and for the *Penang*, or the vessel on board of which the interest might have been trans-shipped, to touch at any port in China, and discharge there, or remain at the same until it should be deemed expedient to proceed to the port of discharge, and continuing the risk until the goods should arrive at their final port of destination. The policy contained a provision for the return of a portion of the premium if the *Penang* discharged at a port in China in the usual course, the port being open. The *Penang* and the cargo sustained damage on the voyage; in consequence of which, on her arrival at Macao, the consignees chartered the *James Laing*, in order to trans-ship the cargo, and ascertain the extent of the damage. The *Penang* and *James Laing* proceeded to Hong Kong; the intention of the consignees

being, after the trans-shipment at Hong Kong, to keep the goods on board the *James Laing* there until they could be safely sent to Canton. It was unsafe and inexpedient to send them at that time to Canton, in consequence of the hostile feeling exhibited by the Chinese against the English. There had been no proclamation of war by England against China. While the trans-shipment was proceeding, the *James Laing* was driven ashore by a storm, and the goods lost:—Held, that, these facts did not shew any agreement to make Hong Kong the final port of destination; that the risk was not determined, and that the insurers were entitled to recover the amount of the damage.

A second policy of insurance upon other goods in the same ship contained no clause authorizing their trans-shipment. The facts being the same as above stated, and it being admitted that the goods were transhipped without any intention of returning them to the *Penang*,—Held, that this was a deviation not warranted by the terms of the policy. *Oliverson v. Brightman, Bold v. Rotherham*, 15 Law J. Rep. (n.s.) Q.B. 274; 8 Q.B. Rep. 781.

A policy of insurance upon a ship contained the clause, "The ship is allowed to be seaworthy for the present voyage." The ship met with a storm, and was obliged to put into a port, where, on being examined, it was found that from the damage caused by the storm, and the age and decayed state of the ship, she was not worth repairing. It appeared that, but for the storm, the decayed parts would have been strong enough for the voyage:—Held, that the underwriters were liable for a total loss, and that it was not necessary for the jury to be directed to exclude from their estimate, in considering the repairs that were necessary, all such repairs as the decayed state of the ship made necessary. *Phillips v. Nairne*, 16 Law J. Rep. (n.s.) C.P. 194; 4 Com. B. Rep. 343.

A policy of insurance was effected on a vessel at and from Liverpool to ports and places in China and Manilla, all or any, during the ship's stay there for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places on either side of, and at the Cape of Good Hope. The vessel sailed direct from Liverpool to a port in China, having on board a cargo for that port, and also for Manilla. She afterwards discharged a portion of her cargo at a port in China, and thence proceeded to Manilla, where she discharged the remainder of her outward cargo. At Manilla the captain took on board on freight 230 chests of opium for Tongkoo, and sailed from Manilla (the vessel not being a tenth part laden), intending to seek there a freight back to England, and whilst he was sailing towards Tongkoo the vessel was by the perils of the sea totally lost. Tongkoo is altogether out of the regular course of a voyage from Manilla to England:—Held, by the Court of Exchequer, and also on error in the Exchequer Chamber, that the sailing from Manilla to Tongkoo was not a deviation; the words in the policy meaning not "from Manilla" only, but "from ports or places in China and Manilla, all or any." *Ashley v. Pratt, Pratt v. Ashley*, 17 Law J. Rep. (n.s.) Exch. 135; 16 Mee. & W. 471; 1 Exch. Rep. 257.

Where the jury found that the necessary outlay in repairing would exceed her value, when repaired, held to amount to a total loss, and that the value stated in the policy was immaterial to the question. *Manning v. Irving*, 1 Com. B. Rep. 168; affirmed, *Irving v. Manning*, 2 Ibid. 784.

In an action by a ship-owner against underwriters, on a policy of insurance, where the plaintiff's claim rested on the abandonment of the vessel by the captain, and a consequent right to recover as for a total loss, evidence that previous to the voyage insured against the captain was habitually a drunkard is admissible, as being material to the inquiry, and tending to shew that he could not have exercised a sound judgment in reference to the abandonment. *Alcock v. Royal Exchange Insurance Co.*, 18 Law J. Rep. (n.s.) Q.B. 121; 13 Q.B. Rep. 292.

Where there is a legal certainty that profit will be made on goods expected to arrive by a specified time, and they are ready to be shipped under a valid contract, the party entitled to such profit has an insurable interest in respect of which he may recover.

The plaintiff purchased, by bought and sold notes in the usual way, rice which was supposed to have been then shipped on board a vessel at M, and which was expected to arrive in May 1847, and he subsequently re-sold it at an advance by a valid contract. The ship, which had been chartered for the purpose, was at M, ready to receive the rice, the whole of which was lying there ready for shipment, and had taken a portion on board, when she was blown out to sea, and so much damaged that the rice on board was obliged to be re-landed, and no portion of the cargo was brought to England by May, and the expected profit was consequently lost by the plaintiff. Subsequently to the re-sale of the rice by him, the plaintiff had effected an insurance at and from M "on profit on rice loaded or to be loaded, beginning the adventure at and from the loading at M":—Held, that he had such an interest in the rice as was insurable, and that he was entitled to recover against the underwriters in respect of the expected profits on the rice which was not actually on board as well as on that which had been in fact shipped at M. *M'Swiny v. Royal Exchange Assurance*, 18 Law J. Rep. (n.s.) Q.B. 193.

A declaration on a policy of assurance stated, that the plaintiff insured the goods, body, tackle, &c. of the ship *Cumberland*, valued at 5,000*l.*, that the ship and freight were warranted free from average under 3*l.* per cent., unless general or the ship were stranded, that the G M Assurance Company became insurers for the sum of 1,500*l.* upon a policy which provided that the capital stock of the said company should alone be liable to make good all claims under that policy, and that no proprietor should be charged beyond the amount of his share in the stock of the company; that the defendants were directors who executed the policy, and in consideration of the payment of the premium at their request undertook that the company should perform the policy. The declaration then alleged, that the bower anchor and kedge anchor were left in the sea, and lost to the plaintiff, whereby he sustained a general average loss; and as a second breach, that the ship being strained and damaged the plaintiff

sustained an average loss on the said ship, her masts, ropes and cables, to a larger amount than 3½ per cent. on all the monies insured thereon, to wit, to the amount of 50½ by the hundred, for all and every hundred insured thereon, whereby the said company became liable to pay to the plaintiff a certain sum of money, to wit, 200½, being their proportion of the said average loss in respect of the said sum of 1,500½, and that the company's funds were sufficient. Third plea, that the said anchors and cables were not left in the sea and lost. Fourth plea, that the plaintiff had not suffered an average loss on the said ship or vessel, her masts, ropes and cables, to the amount of 3½ per cent. on all the monies insured thereon:—Held, first, that the pleas were bad, the traverses being too large. Secondly, that the declaration shewed a personal responsibility of the defendants, the funds of the company being sufficient. Thirdly, that the second breach was bad, as it did not sufficiently aver that the loss exceeded 3½ per cent. on the value of the articles insured. And fourthly, that upon demurrer to the plea to the second breach, although the plea was bad, the defendant on that demurrer was entitled to judgment. *Dawson v. Wrench*, 18 Law J. Rep. (N.S.) Exch. 229; 3 Exch. Rep. 359.

Policy of assurance on a vessel "at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." The vessel was chartered to take on board a cargo at Quebec and proceed therewith to Wallasey Pool in the River Mersey, or as near thereto as she could safely get, and there discharge her cargo. She arrived from Quebec in the Mersey on the 4th of September, and was towed up the next morning and came abreast of Wallasey Pool, where, being unable to enter the pool by reason of her great draft of water, the captain anchored and reported the vessel at Liverpool. He engaged lumpers to discharge the cargo at a fixed rate of payment and discharged the crew. The deck cargo and also a considerable portion of the other cargo having been discharged, on the 14th of September the vessel fell over and sustained injury. The captain had always intended to take the vessel into Wallasey Pool with as much of the cargo as she could safely carry:—Held, that the vessel had arrived at her port of discharge, was in the course of discharging her cargo, and had moored twenty-four hours in safety; and that the underwriters were not liable. *Whitwell v. Harrison*, 18 Law J. Rep. (N.S.) Exch. 465; 2 Exch. Rep. 127.

The defendant and four others were jointly sued upon a policy of insurance upon a ship and cargo, for a total loss. The declaration was in the usual form, and amongst the other stipulations in the policy alleged an agreement between the plaintiff and the insurers, "that the capital stock and funds of the company should alone be liable to answer and make good all claims and demands whatsoever under or by virtue of the said policy," and, further, that no proprietor of the company should in anywise be liable or charged, by reason of the said policy, beyond the amount of his shares in the capital stock of the company. There was an express averment

that sufficient capital stock and funds of the company existed to pay the amount of the policy:—Held, upon demurrer, that notwithstanding the above stipulation, the declaration shewed that the policy had been properly declared upon as a joint contract. *Dowdall v. Hallett*, 19 Law J. Rep. (N.S.) Q.B. 37.

To a declaration on a policy of insurance upon a ship and cargo, alleged to have been duly made and subscribed by the defendants and three others jointly, as proprietors and shareholders in an insurance company, it was pleaded by one of the defendants, that he did not subscribe the policy *modo et forma*, and by both respectively that his name was not expressed or specified in or upon the said policy, by reason whereof the same became void under the statute 25 Geo. 3. c. 63:—Held, upon demurrer to the pleas, that it was not necessary that the defendants' names should be subscribed to the policy or expressed therein, and, therefore, that the plea was no answer. And *per Wightman, J.*, that the plea was bad, as amounting to the plea of non assumption. *Dowdall v. Allan, Dowdall v. Clark*, 19 Law J. Rep. (N.S.) Q.B. 41.

There is no difference between a time policy and one for a particular voyage, with reference to the implied warranty of seaworthiness; and the period to which such a warranty applies is that at which the risk of the underwriters first attaches. *Small v. Gibson*, 19 Law J. Rep. (N.S.) Q.B. 147.

M, the plaintiff below, agreed to buy 6,000 bags of rice, supposed to have been shipped at Madras on board a certain ship to arrive in England on or before the end of May. In a few days after making this contract he agreed to sell the same 6,000 bags on terms exactly similar, except at an advanced price. He thereupon, with a view of insuring the expected profit which would accrue to him on the arrival of the rice by virtue of these contracts, caused a policy of assurance in the usual form to be effected with the defendants "at and from Madras to London," &c., "on profit on rice," &c., "beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board the said ship at Madras." He did not communicate to the defendants the terms of the contracts. The 6,000 bags of rice were ready to be shipped at Madras, and 1,200 bags were put on board the vessel, when the vessel was driven out to sea by a gale of wind, which spoiled the 1,200 bags of rice, and so injured her that she was disabled from taking on board the remaining 4,800 bags, which were consequently sent to London in another vessel, and arrived there in June. The injured ship, after having been repaired, arrived in London in the November following without any of the rice. The assurance company paid M for the loss of profit on the 1,200 bags of rice, but refused to pay anything for the loss of profit on the remaining 4,800 bags:—Held, that M had, under the contracts, an insurable interest in the expected profit on the rice, and might, by a policy adapted to the case, have insured that special interest against the several contingencies by which it was defeasible, viz., loss of all the rice, loss of part of the rice, loss of the ship, and delay in the arrival of the ship. That the policy actually effected by M insured

his special interest as a profit on rice, but only against losses by perils of the sea, or other perils specified in the policy directly affecting the goods; and that as the risk on goods insured by a similar form of policy would not commence until the goods were put on board, the insurance on the profit on goods (which ordinarily is only the excess of their value at the port of discharge over their value at the port of loading) would in like manner not commence until the goods were shipped; consequently, that under this policy the risk had not commenced with respect to the profit on that portion of the rice which had not been shipped on board the vessel. That even if the risk were assumed to have commenced with respect to the profit on the rice on shore, the company were not liable as for a total loss, or bound to indemnify M further than in respect of the profit on the portion of the rice which had been shipped and injured by the sea; as the loss of the whole profit under the contracts by reason of the damage occasioned by the sea to the part shipped, was not a loss by peril of the sea, or any peril insured against directly affecting the rice on shore; and the loss of profit arising from the retardation of the voyage was not a loss by any peril covered by the policy. *Royal Exchange Assurance Co. v. M'Swinye*, 19 Law J. Rep. (n.s.) Q.B. 222.

To entitle the assured to recover under a policy of insurance upon a ship, as for a constructive total loss, where no such urgent necessity is shewn as rendered a sale of the ship by the master valid as against the insurers, there must have been due notice of abandonment to the insurers.

Whether a notice of abandonment may be dispensed with, where there has been a sale by the master, under such urgent necessity as to make the sale valid as against the insurers, *quære*.

Under a time policy upon a ship, a claim for partial loss, occasioned by a peril insured against during the continuance of the risk, may be recovered, although the extent of the damage done to the ship be not ascertained until after the expiration of the time insured against.

A total loss, for which the insurers are not liable, following a partial loss occasioned by the perils insured against, has not the effect of exempting the insurers from liability for such partial loss, where it continues prejudicial to the assured.

A ship insured for 1,000*l.* by a time policy ending on the 23rd of September 1846, whilst endeavouring to make the harbour of Santa Cruz, on the 16th of September 1846 got aground, and so remained for some time until the flowing of the tide, when she was got off and taken into the harbour. There she continued discharging her cargo, and without any injury, until the middle of October, when she was beached and surveyed, and then for the first time it was discovered that she had received considerable damage from the accident of the 16th of September. It was found impracticable either to repair her at Santa Cruz, or to take her to any place where she could have been prudently repaired, and ultimately she was sold by the master for 72*l.* No notice of abandonment was given to the underwriters:—Held, in an action of covenant upon the policy, that there had been no actual total loss, and that the underwriters were not liable as for a constructive total loss; but that they were bound to indemnify

the assured to the amount of the partial loss, which the ship had sustained from the accident of the 16th of September. *Knight v. Faith*, 19 Law J. Rep. (n.s.) Q.B. 509; 15 Q.B. Rep. 649.

A ship was insured by two policies: the first on the ship itself, the second on her freight. She received damage by perils of the sea, but might have been repaired at an expense such as a prudent owner would have incurred with reference to the value of the ship:—Held, that although the expense of such repairs might have exceeded the amount of freight contracted for, the insured could not recover as for a total loss of freight. *Moss v. Smith*, 19 Law J. Rep. (n.s.) C.P. 225.

In an action by an assured against the defendant the declaration stated that the defendant with others, to wit, 500, were united in co-partnership under the style of the General Maritime Assurance Company; that the company had a capital stock of 1,000,000*l.* divided into 10,000 shares of 100*l.* each; that the defendant was the proprietor of 100 shares of which 5*l.* only on each share had been paid; that it was declared and agreed between the company and the assured that the capital stock of the company should alone be liable to answer all claims, and that no proprietor should be liable or be charged by reason of the policy beyond the amount of his share in the capital stock of the company; it being one of the fundamental principles of the company that the responsibility of the individual proprietors should be limited to their respective shares; that in consideration of the payment of premiums by the plaintiffs the defendant promised the plaintiffs that he would become an insurer to them of 1,500*l.* and perform all things in the policy on his part as such insurer, and that he became an insurer for 1,500*l.*; that the ship was lost, and that the funds of the company were sufficient to pay all the claims under the policy of insurance. Breach, non-payment by the defendant. Plea, that the policy was made after the passing of the 35 Geo. 3. c. 63, and that the defendant did not subscribe the policy, nor was the name of him, the defendant, expressed or specified in or upon the policy according to the true intent, &c. of that act, by reason whereof the policy was wholly void:—Held, on demurrer, that the plea was bad, inasmuch as the 35 Geo. 3. c. 63. s. 11. does not require that in insurance partnerships and companies the name of every individual subscriber should be expressed in the policy, but only the name of the firm.

Semble—also, that the plea was double in raising the defence under the statute, and also in putting in issue the execution of the policy.

Held, also, that the declaration was good, the action being rightly brought against the defendant, and not against the directors who subscribed the policy. *Reid v. Allan*, *Cross v. Allan*, 19 Law J. Rep. (n.s.) Exch. 39; 4 Exch. Rep. 326.

A declaration on a policy of assurance stated, that J S, before his bankruptcy, made a policy of assurance on the ship *Defiance*, that the ship, &c. should be valued at 2,500*l.*, averring a loss and non-payment by the defendant of the sum insured. Plea, that G M, official assignee of J S, made a certain other policy upon the said ship and goods valued at 2,500*l.*, in case of loss on average the adjustment to be made irrespective of any other

assurance, averring the identity of the ship, the interest, the risk, the amount of the interest and loss, and that the insurers had paid the plaintiffs, who had accepted 2,590*l.* as the agreed indemnity for the loss, and which was a full indemnity. Replication, *de injuriâ*.—Held, on special demurrer, that the replication was bad, as the plea amounted to a discharge, and not to an excuse. Secondly, that the plea was good on general demurrer. *Morgan v. Price*, 19 Law J. Rep. (N.S.) Exch. 201; 4 Exch. Rep. 616.

A declaration on a policy of insurance stated, that the policy was duly entered into by the defendants for twelve months, subject to the limitations thereto annexed, and certain warranties were specified. It then averred that at the time of making this policy the defendants were accustomed to allow all persons insuring ships with them for twelve months to take the ships off the risks insured against for any one or more months, upon notice thereof; in which case a proportionate return of the premium was to be made. That the plaintiff, on the faith of such custom, took the ship off risks for a month, and gave the defendants notice thereof, and that afterwards the amount of premium to be returned was agreed upon and returned; and it was agreed that the ship should be considered again upon the risks insured against for the residue of the time, and that the policy and the limitations should continue in force for the said residue. Mutual promises as to the residue of the said twelve months. That during the continuance of the said risk the ship sailed and was lost by the perils of the sea; and that from and after the continuance of the said policy and the said risks insured against, and during the remaining currency of the policy, the warranties were complied with; and stated as breach the non-payment of the sum insured.—Held, that the declaration was bad, for not shewing compliance with the warranties during the whole period insured against, or, if the usage was to be relied on, for not shewing any consideration for the new contract as to the residue of the twelve months. *Hutchinson v. Read*, 19 Law J. Rep. (N.S.) Exch. 222; 4 Exch. Rep. 761.

(C) BILL OF LADING.

A vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle, on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew were discharged, except the mate, and lumpers were being employed in unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged.—Held, that this was a loss within the exception in the bill of lading, of "all and every the dangers and accidents of the seas and navigation."

Held, also (in an action by the freighters against the ship-owners to recover damages for this loss), that the jury were properly directed, "that the owners were only bound to take the same care of the goods as a person would of his own goods,"

that is, an ordinary and reasonable care. *Laurie v. Douglas*, 15 Mee. & W. 746.

The indorsee of a bill of lading cannot maintain an action on the case for non-delivery of the goods.

The master of a ship, after waiting a reasonable time at a foreign port, and no person having produced the bill of lading, may deliver the goods to some person to keep till the bill of lading is produced.

A declaration in case stated, that the defendant, a ship-owner, received on board thirty casks of cochineal, shipped by R to Bombay; that the master delivered bills of lading to R, and that the defendant undertook to deliver to the order of R or assigns; that by the custom of merchants the goods were deliverable to a *bond fide* assign of the bill, on production; that R assigned the bills to the plaintiff as security for monies due; that the plaintiff was *bond fide* assign, and that it was the defendant's duty to deliver to the plaintiff. Breach, that the defendant delivered to other persons, not *bond fide* holders. Plea, that R was agent for M D & Co. at Bombay, and the plaintiff was a broker; that R had an order from M D & Co.; that the plaintiff was agent for R to purchase, and did purchase the goods, and sent the invoice to R, and that R sent a notice and copy of the invoice to M D & Co.; that the bill of lading was delivered to the plaintiff as agent of R; that the plaintiff did not deliver or send the bill to R or to M D & Co.; that the plaintiff fraudulently procured R to indorse the bill to the plaintiff to secure a debt; that the ship remained at Bombay four months, and no holder producing the bill, the master delivered to M D & Co., who produced the invoice and letter of advice:—Held, on demurrer to the plea, that the declaration was bad as a declaration in case; also that it was substantially bad as a declaration in trover for not averring property in the plaintiff, or a conversion. *Howard v. Shepherd*, 19 Law J. Rep. (N.S.) C.P. 249.

(D) BOTTOMRY.

A bill was filed to set aside a bottomry bond, which had been given at Trieste, without any communication from the captain to the owners in England, and, as was alleged, by a fraudulent conspiracy between the captain and the obligee. The Court supported the bottomry bond, but, instead of dismissing the bill, at the request of the defendant (the obligee) directed inquiries as to the amount due to him upon the bond.

Practice of the Court as to dismissing a bill and refusing secondary relief, where allegations are made of fraud which is not proved. *Glascott v. Lang*, 16 Law J. Rep. (N.S.) Chanc. 429; 2 Ph. 310.

Bottomry bond given at Pernambuco upon the ship, freight and cargo, resisted by the consignees of the cargo, upon the ground, first, that the advances were made by persons acting in the capacity of ship-agents at the time the bond was given; secondly, that the disbursements were made with the understanding that they should be covered by bills of exchange upon the owners of the ship; thirdly, that the repairs upon the ship were improvidently undertaken, and the vessel should have been sold, and the cargo transhipped. Objection

overruled, and the bond sustained. *The Lord Cochran*, 2 Rob. 320.

Where a bond-holder advances his money upon the security of the ship alone, it is not competent for him to extend that security beyond the express terms of the bottomry bond.

Three bonds of bottomry were granted upon the same vessel; two of the bonds upon the ship alone, the third bond upon the cargo only. In marshalling the assets, the Court directed the two bonds upon the ship to be paid out of the proceeds of the ship exclusively; the bond upon the cargo to be paid out of the proceeds of the freight in the first instance, and the cargo only held liable if the proceeds of the freight should be insufficient. *La Constancia*, 2 Rob. 404.

Advances made for the service of a ship, to pay debts *bond fide* incurred previous to the advances, may be legally included in a bond of bottomry.

The general validity of a bond will not be vitiated by the fact that the lender of the money was himself partially indebted to the ship at the time he lent the money, the bond will be invalidated *pro tanto* only; and the amount of the deductions must be ascertained by reference to the registrar and merchants. *The Hebe*, 2 Rob. 412.

A bottomry bond was granted in the port of London upon an American vessel, stipulating that the payment of the bond should be made within twenty-four hours after the ship's arrival in any port of the United States. The vessel sailed from London, took in a cargo at Shields, and was in the actual progress of her voyage, when she was compelled to put into Plymouth, and was condemned as unseaworthy. Payment of the bond decreed by the Court; and the maritime interest allowed, upon the ground that the maritime risk had been partially incurred and was interrupted by the damaged condition of the vessel.

Semble—if the vessel had not left the port of London, the maritime interest would not have been allowed. *The Dante*, 2 Rob. 427.

Validity of a bottomry bond was contested upon the grounds, first, that there was no necessity for a bond of bottomry; secondly, that the bond was vitiated *personali exceptione* of the lender; thirdly, that some of the items in the bond consisted of simple contract debts bought up from the ship's creditors, at a discount of about 50% per cent. Bond generally referred to the registrar and merchants to report thereon. *The Ocean*, 2 Rob. 429.

Where a bond of bottomry is given upon the ship alone, and another bond is likewise given upon the cargo only, demands for pilotage, towage and seamen's wages must be satisfied *pro rata* out of the proceeds of the ship and freight.

An application of the bond-holder upon the ship only, to have these demands satisfied out of the proceeds of the freight in the first instance, rejected. *La Constancia*, 2 Rob. 460.

Objection to the report of the registrar and merchants in a cause of bottomry in part sustained.

Where the bond-holder had bought up the debts of certain creditors upon the ship, at a discount of 50% per cent., the bondholder was not at liberty to convert them into a lien upon the ship, by repaying himself out of monies advanced by him upon bottomry.

Allowance of the registrar and merchants, that such debts should be included in the bond and the amount of the sums actually paid for them, overruled, and the claim directed to be struck out. *The Ocean*, 2 Rob. 466.

A vessel being carried into a foreign port by a mutinous crew, with the master dispossessed and in irons, the expenses incurred by a party employed by the British vice-consul to investigate into the mutiny, and re-invest the master in his command, allowed by the Court to be a good foundation for a bottomry transaction, although no mention was made of a bottomry bond in the outset of the inquiry, and the bond was taken from the master on the eve of the vessel's sailing from the port. *The Gauntlet*, 3 Rob. 82.

A bond of bottomry given by the master to release his vessel from an arrest on account of debts owing by the owner to his agent at Malta, upon the balance of accounts current between them, such accounts being incurred anterior to the voyage in which the vessel was engaged at the time, not sustained. The general principle, that bonds of bottomry can alone be given for the furtherance of the voyage in which the vessel is actually engaged, not affected by the circumstance that by the law of the country where she is seized the vessel may be arrested and sold for any debt owing by the owner to a creditor residing in that country. *The Osmanli*, 3 Rob. 198.

A bottomry bond granted in New York by the master of a vessel whose owners were residing at St. John's, New Brunswick, (a communication by electric telegraph existing between the two cities) held to be valid, although the bondholder had previously acted as agent in the concerns of the ship, and no intimation had been made to the owners of the bottomry transaction until after the bond was executed. *The Oriental*, 3 Rob. 243.

A bond of bottomry upon the ship and cargo, granted by the master in the country where the owners of the ship resided, and with their consent, but without any previous communication with the owners of the cargo, upheld by the Court. The opposition of the owners of part of the cargo, who were resident at Hull, the bond being given in a port of Sweden, overruled. *The Bonaparte*, 3 Rob. 298.

(E) OWNERS.

A part-owner is entitled as against the other part-owners to have his disbursements for the outfit and repairs of the ship, so far as the same were necessary and proper for the joint adventure, repaid to him out of the freight earned by the ship before any division of profits is made.

A mortgagee of seven-eighths of the ship and freight can only claim his share of the freight, subject to the like deductions. *Green v. Briggs*, 17 Law J. Rep. (N.S.) Chanc. 323; 6 Hare, 395.

(F) MASTER.

Where a ship is so damaged during a voyage that she cannot prosecute it, the master has authority to sell her for all parties interested, and the person whom he may have employed to sell her and receive the money may pay over the proceeds to him or his agent; and such payment, in the absence of

any notice not to do so from the parties interested, will be good. *Ireland v. Thompson*, 17 Law J. Rep. (N.S.) C.P. 241; 4 Corn. B. Rep. 149.

The master of a ship, in ordering repairs of such ship, or borrowing money on bottomry bond for such repairs, is exclusively the agent of the ship-owner.

Where, therefore, the master of a ship damaged by perils of the sea, hypothecated at a foreign port, by one bottomry bond, for necessary repairs, the ship, freight and cargo, amongst which were the plaintiff's goods; and in consequence of the ship and freight realizing less than the sum borrowed, the plaintiff was obliged to contribute towards the difference, and also to pay his proportion of the costs of a suit instituted in the Court of Admiralty by the obligee of the bond,—Held, (affirming the judgment of the Court of Exchequer, 17 Law J. Rep. (N.S.) Exch. 238; 1 Exch. Rep. 537), that the plaintiff might maintain an action against the owner of the ship on an implied promise to indemnify.

Held, also, (affirming the judgment of the Court of Exchequer) that a plea stating that the bond was executed by the master without express authority from the defendant, and that when the same was executed, the costs of the repairs exceeded the value of the ship and freight, and that as soon as the defendant had notice he abandoned the ship and freight, and never did ratify the act of the master, was bad on general demurrer.

Held, also, that the non-delivery by reason of the proceedings on the bottomry bond was not caused by the "perils of the seas," within the exception of the bill of lading.

Held, also, that to a count upon the bill of lading, a plea alleging acts shewing the money to have been borrowed for the repairs, but that a prudent owner would not have repaired, that the master acted without authority from the defendant, and that the defendant never had the controul of the goods after the arrival of the ship at its port of destination, was bad after verdict.

If upon a replication to a plea which is substantially bad, an immaterial issue is found for the plaintiff, but the declaration is good, the defendant cannot have judgment. *Benson v. Duncan*, 18 Law J. Rep. (N.S.) Exch. 169; 3 Exch. Rep. 644.

Construction of the Irish Bankrupt Act, 6 Will. 4. c. 14.

Plea of the master, that the owners of the vessel were bankrupt, not brought within the provisions of the 22nd section of the statute. *The Great Northern*, 2 Rob. 509.

(G) PILOT AND PILOT ACT.

The 2nd section of the Pilot Act, 6 Geo. 4. c. 125, enacts, "That all vessels sailing as well up and down, or upon the rivers Thames and Medway, &c., between Orfordness and London Bridge, as also from London Bridge to the Downs, &c. (except as thereinafter provided), shall be piloted by pilots licensed by the Trinity House." And the 58th section imposes penalties on masters acting as pilots after a licensed pilot has offered to take charge of the vessel. Section 62. provides, "That nothing in that act contained shall extend, or be construed to extend, to subject to any penalty the master or mate

of any ship or vessel, being the owner or part-owner of such ship or vessel, and residing at Dover, Deal or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports":—Held, that this section exempts from penalties such masters only as navigate their vessels from Dover, Deal, or the Isle of Thanet; therefore, that the penalties imposed by section 58. were recoverable from a master piloting his own vessel on a foreign voyage commencing in the port of London. *Williams v. Newton*, 15 Law J. Rep. (N.S.) Exch. 11; 14 Mee. & W. 747.

A master of a ship acting himself as pilot after a licensed pilot has duly offered to take charge of the ship, is liable, under the 58th section of the 6 Geo. 4. c. 125, to double the amount of the pilotage of the ship, but not to the penalty contained in the 70th section. *Beilby v. Shepherd*, 18 Law J. Rep. (N.S.) Exch. 73; 3 Exch. Rep. 40.

The time and place in which a vessel should be brought up is entirely within the province of the pilot, and the master must be governed upon these points by the pilot's direction.

Owners of a vessel running down another vessel at anchor in the British Channel dismissed, but without costs. *The George*, 2 Rob. 386.

Manner of cating the anchor, preparatory to bringing up a vessel at her anchorage ground, exclusively within the province of a licensed pilot in charge.

Averment of the owners of the damaged vessel, that the collision was occasioned by the anchor of the damaging vessel being improperly catted, and that the blame lay partly, if not entirely, with the crew, overruled; and the owners of the vessel charged with the damage dismissed. No costs given. *The Gipsy King*, 2 Rob. 537.

Steam-tugs employed in an ordinary service of towing merchant vessels are bound to be subservient to the orders of the pilot on board the vessel in tow. The master of the tug must implicitly obey the orders of such pilot, excepting in the case of wilful misconduct or gross mismanagement on the part of the pilot. The master of a steam-tug employed in towing a vessel from Gravesend to the Surrey Docks, having brought the vessel in tow into a collision by disobedience of the pilot's orders, the Court pronounced against the owner's claim for towage remuneration. *The Christina*, 3 Rob. 27.

(H) SEAMEN'S WAGES.

The 7 & 8 Vict. c. 112. s. 15. does not give any jurisdiction to a Justice of the Peace to adjudicate upon a claim for wages, by the administrator of a deceased seaman; and such administrator is not deprived of his right of action by section 16. *Hollingworth v. Palmer*, 18 Law J. Rep. (N.S.) Exch. 409; 4 Exch. Rep. 267.

An agreement in writing between the defendants, who resided in England, and who contracted expressly on behalf of and as representing a named foreign principal resident abroad, and the plaintiff, stipulated that the plaintiff would faithfully and properly discharge the duty of fireman and stoker on board the steam vessel *Tridente*, about to leave

London for Havannah, to be placed in the service of the foreign principal, subject to the orders and directions of the engineer; in consideration of which he was to receive certain wages and provisions, and on the outward voyage to be served with rations on account of the said principal. It was further stipulated that the agreement was to be in force for one year from its date, and in case of the previous discharge of the plaintiff he was to be paid three months' wages in advance, besides a passage home, the said principal being at liberty to confirm and continue the engagement, or to discharge the plaintiff and find him a passage home, &c.:—Held, that the defendants had made themselves personally liable to the plaintiff for a breach of this agreement.

Held, also that the plaintiff was a labourer or artificer within the meaning of the exemption contained in the schedule to the 55 Geo. 3. c. 184, and, therefore, that the agreement did not require a stamp. *Wilson v. Zulueta*, 19 Law J. Rep. (N.S.) Q.B. 49.

Construction of the statute 7 & 8 Vict. c. 112. s. 16.

Masters of vessels are only entitled to sue in the Court of Admiralty for their wages under the statute when the owner has become insolvent in the strict legal sense of the term, viz., by taking or applying for the benefit of the Insolvent Debtors Act. *The Princess Royal*, 2 Rob. 373.

The privilege of masters to sue for their wages, under the 7 & 8 Vict., is confined to two cases.—

First, where the wages are claimed to be due from a party who was owner of the ship at the time of the original contract.

Second, where such owner is bankrupt or insolvent at the time when the claim is preferred.

Master of a vessel not debarred from suing under the act, upon the ground that he was a joint mortgagee of the ship, and that he was cognizant of the sale of the vessel by the other mortgagee and did not dissent from such sale. *The Repulse*, 2 Rob. 398.

Construction of the statute 7 & 8 Vict. c. 112. The right of the master to sue for his wages in the Court of Admiralty is not taken away by the circumstance that the owner, subsequent to the declaration of his insolvency, had compounded with his creditors and been released from his debts by the Lord Ordinary of Scotland. *The Tecumseh*, 3 Rob. 109.

Where an agreement has been made with a steam-tug belonging to a steam-tug towing company to tow a vessel from Dover to Gravesend for 40l., and the steam-tug breaking down in the progress of the service, the towage was completed by other steam tugs belonging to the same company, the defence of the owners of the vessel in tow, that the contract was annulled by the non-fulfilment of the original agreement, not sustained.

Semble—the acceptance of the services of the other steam-tugs by the master of the vessel in tow, a continuance of the original contract. *The Lady Flora Hastings*, 3 Rob. 118.

Mere error of judgment on the part of the master in the management of the concerns of a vessel in a foreign port, unaccompanied by corrupt intention or wilful disobedience of orders, will not, *per se*, entail a forfeiture of his wages. Defence of the owners, that the wages were forfeited by reason of

alleged losses sustained by them in consequence thereof, overruled. *The Thomas Worthington*, 3 Rob. 128.

In a suit for wages, brought by the master under the statute 7 & 8 Vict., an item of 6l. per month for supplying cabin stores in the agreement for wages, directed to be struck out of the alleged agreement, as being in the nature of a special contract. *The Tecumseh*, 3 Rob. 144.

(I) BROKER.

The plaintiff, a ship-broker, procured for the defendant, a ship-owner, a charter-party, by which the defendant was to receive 4l. 15s. per ton, for every ton of guano delivered by him at a certain port, if delivered before a certain day, and if not, 4l. 12s. 6d. only. In an action by the plaintiff, for work and labour, in procuring the charter-party, and for commission,—Held, that, to maintain this action, it was not necessary for the plaintiff to shew what amount of freight had been earned by the ship; that some commission was, at all events, due to the broker, and that the amount of it was a question for the jury.

C, who had introduced the plaintiff to the defendant, was called by the plaintiff as a witness, and stated, on the *voir dire*, that, by the custom of the trade, he was entitled to half of the plaintiff's commission for having introduced the plaintiff to the defendant, but that his demand was against the plaintiff, and not against the defendant:—Held, that it was right not to join C as a co-plaintiff, and that C was an admissible witness under the 6 & 7 Vict. c. 85. *Hill v. Kitching*, 15 Law J. Rep. (N.S.) C.P. 251; 3 Com. B. Rep. 299.

(K) SUPERCARGO.

The following letter was addressed to a captain and supercargo by his employers:—"Your commissions are 6l. per cent. on the *net proceeds* of your homeward cargo, after deducting the usual charges as arranged by the African Association, viz., 4l. per ton from the gross sales of the oil when taken from the quay, and 4l. 15s. when warehoused:—"Held, upon the construction of this letter, (*Parke, B.* and *Rolfe, B. dubitantibus*,) that the commissions were payable only upon the proceeds which came to hand, after deducting bad debts upon the sales. *Caine v. Horsfall*, 17 Law J. Rep. (N.S.) Exch. 25; 1 Exch. Rep. 519.

A, a supercargo, sailed to Calabar in charge of a ship, called the *Magistrate*, his commission being 5l. per cent. Some time after his departure, his principals despatched another ship called the *Windermere*, to Calabar, with instructions to A to find a cargo for her, and to consider her "in one turn" with the *Magistrate*, and offering him, in respect of this second ship, a commission of 2½ per cent. A wrote to his principals, rejecting the 2½ per cent. commission; but, notwithstanding this, he proceeded to load the *Windermere*, that course being, in his view, the best for his principals:—Held, that, as he had acted on the instructions of his principals in loading the *Windermere*, he was bound by their offer as to commission, and could not recover more than 2½ per cent. in respect of the cargo of that ship. *Moore v. Maxwell*, 2 Car. & K. 564.

(L) CARRIERS BY SEA.

To an action against the defendant for breach of a contract to carry goods of the plaintiff safely by ship from Gibraltar to London, calling at Cadiz, the act of God, the Queen's enemies, fire, and dangers of the seas, rivers, and navigation (save risk of boats) excepted, the defendant pleaded that the ship, in the course of the voyage, called at Cadiz, according to the terms under which the goods were shipped, and that while there, and within the jurisdiction of a court of the revenues in Spain, the said goods were, by the proper authorities having jurisdiction in that behalf, lawfully taken out of the ship against the will, and without the consent, neglect, or default of the defendant, on a charge of suspicion that they were contraband according to the laws of Spain; and were afterwards, by a decree of the said Court, duly made according to the law of Spain, declared to be and were confiscated, whereby the defendant was prevented from delivering the goods:—Held, that the defendant was liable, as he had failed to bring himself within any of the exceptions in his contract, and nothing was stated from which it appeared that either party knew or was bound to take notice of the revenue laws of Spain. *Spence v. Chadwick*, 16 Law J. Rep. (N.S.) Q.B. 313; 10 Q.B. Rep. 517.

The defendants, being ship-owners and emigration agents, advertised ships to sail on certain days, with emigrants to Adelaide, in South Australia, and upon application by the plaintiff for further particulars, sent a printed circular stating (*inter alia*) that the ships despatched by them would be despatched on the appointed days (wind and weather permitting), for which written guaranties would be given. The *Asiatic* was named as to sail from London the 15th of August, and from Plymouth the 25th of August. Half the passage-money was to be paid upon the berths being secured, and half upon the granting of the embarkation order. The plaintiff paid half the passage-money agreed upon for himself and family by the *Asiatic*, but no other contract was signed, or any guarantie asked for or given:—Held, that the defendants had undertaken that the *Asiatic* should sail on the appointed days, wind and weather permitting, and that vessel not having arrived at Plymouth on the 31st of August, and not having been prevented by wind or weather, that the plaintiff was justified in taking a passage for himself and family on board another ship, and entitled to recover from the defendants the deposit money and the expenses at Plymouth. *Cranston v. Marshall*, 19 Law J. Rep. (N.S.) Exch. 340; 5 Exch. Rep. 395.

(M) REGISTRY.

A ship built in a foreign port in India, in 1817, within the limits of the company's charter, by foreigners, and which sailed under foreign flags, until 1838, when it was then and thereafter owned by, and belonged to, British subjects, resident at Bombay, is entitled, under the proclamation of the Governor-General in Council, and the act of the Legislative Council of India, No. X. of 1841, (passed in pursuance of the powers granted by the statute 3 & 4 Vict. c. 56), to be registered at

Bombay, as a British ship, for the purposes of trade, within the limits of the company's charter. *Crawford v. Spooner*, 6 Moore, P.C. 1.

A company incorporated by charter for the purpose of building, purchasing, and employing vessels, is entitled to have them registered as British vessels, upon compliance with the provisions of the 8 & 9 Vict. c. 89, applicable to the registry of vessels the property of corporations, although the individual members of the company may be foreigners. *Regina v. Arnaud*, 16 Law J. Rep. (N.S.) Q.B. 50; 9 Q.B. Rep. 806.

L A & Co. made an arrangement with D to sell him a ship on payment of 1,800*l*. A bill of sale of the ship was made out and executed by the vendors; but no part of the money was paid, and the bill was not delivered to D. D took away the bill of sale without the knowledge or consent of the vendors, but returned it to them in a few days after, with a statement that the above arrangement was not to be carried out. It was subsequently discovered that D had, when the bill of sale was in his possession, procured the ship to be registered in his own name. A bill was filed against D, stating the above facts, and praying that the ship might be restored to the vendors. D put in a demurrer to the bill for want of equity.—Demurrer allowed. *Follett v. Delany*, 17 Law J. Rep. (N.S.) Chanc. 254; 2 De Gex & S. 235.

Plaintiffs, a firm in Liverpool, agreed with the English branch and agents there of a colonial firm to accept the agency of, and make certain advances to, the latter, upon consideration of all consignments being made to the plaintiffs. The latter accordingly made large advances, and were advised by the colonial firm of its intention to launch a ship and consign it and the cargo to them, to the credit of the consignors' account with the plaintiffs. Power of attorney to sell the ship on its arrival at Liverpool, executed by the sole registered owner (one of the partners of the colonial firm), specifications and invoice of the cargo and freight signed by the firm, and bills of lading of the cargo to be delivered to the plaintiffs or their assigns, and signed by the then master of the ship, were duly forwarded to the plaintiffs. The latter, upon the credit of the promised consignment, then made a further large advance to the English agents. The colonial firm subsequently became embarrassed, and previously to the sailing of the ship, assigned it, with the cargo and freight, to a second colonial firm, and the latter duly registered the ship in their own names. The second colonial firm very shortly afterwards (having changed the former master) assigned the ship and cargo to a third colonial firm to secure a certain sum, and the ship was duly registered in the name of one of its partners. The third colonial firm retained the new master and consigned the ship and cargo to their own agents at Liverpool (who constituted a firm there consisting of all the members of the third colonial firm, except the then registered owner of the ship), accompanied by power of attorney to sell the ship, and by the usual invoices, specifications, and bills of lading of the cargo to be delivered by the new master to the order of their Liverpool agents. Possession of the ship and cargo on arrival at Liverpool being refused to the plaintiffs, they filed a

bill for sale of the ship, declaration of their lien, and for an account against all the members of the three colonial firms (except one member, a partner both in the first colonial firm and the English branch), and the assignees in bankruptcy of the English agents of the first colonial firm, and the master of the ship. None of the defendants, except one, a member both of the third colonial firm and that of its Liverpool agents, had been served with subpoena. The consignees of the third colonial firm sold the ship after the bill had been filed. The Court, at the hearing, refused to make a decree in respect of the plaintiff's claim to the ship in the absence of the registered owner and others claiming an interest in it; but, subsequently, upon the plaintiffs waiving all interest in the ship if unsold, gave them a decree (without prejudice) for an inquiry as to the proceeds of the sale of it; and, on further directions, sent the questions as to the property in the cargo under the bills of lading to the plaintiffs and in the freight, to be tried at law. *M'Calmont v. Rankin*, 19 Law J. Rep. (N.S.) Chanc. 215; 8 Hare, 1.

During the rebellion in Sicily two foreigners were sent to England by the usurping government to purchase a vessel from the defendants. The vessel was registered in the name of the company, and a bill of sale was then executed to two persons alleged to be trustees for the foreigners. The plaintiff, upon being restored to his government, filed a bill to restrain the company from parting with the vessel upon the ground that the purchase-money was taken from his royal treasury. The bill alleged that the company had entered into a scheme with the two foreigners for the purpose of evading the provisions of the Ship Registry Act. The company demurred, on the ground that by answering the bill they would expose themselves to pains and penalties under the Ship Registry Act, and to an indictment under the Foreign Enlistment Act. Demurrer overruled.

Held, that a corporation cannot be indicted under the Foreign Enlistment Act. *The King of the Two Sicilies v. Peninsular and Oriental Steam-packet Co.*, 19 Law J. Rep. (N.S.) Chanc. 488.

(N) SALE AND TRANSFER.

By the 3 & 4 Will. 4. c. 55. s. 31, it is enacted, that the sale of a registered ship shall be by an instrument in writing containing a recital of the certificate of registry, "otherwise such transfer shall not be valid or effectual for any purpose whatsoever, either in law or equity;" by section 34, that no instrument shall be valid to pass the property in a ship or for any other purpose, until it shall have been registered by the proper officers; and by section 35, as soon as it shall have been registered it shall be valid and effectual to pass the property against all persons whatsoever. Plaintiffs were the mortgagees of a ship under a bill of sale in writing executed before, but not registered until after the bankruptcy of the mortgagor, and had not taken possession of the ship; the defendants were the bankrupt's assignees, and claimed to hold the ship, on the ground, either that it had not passed from the bankrupt at the time of the bankruptcy, or that it was in the bankrupt's order and disposition:—Held, that under the above

sections of the statute the operation of a bill of sale commences not from the time of execution, but from the time of registration only, and that all rights which have accrued by the act of the law or of the vendor before registration are as valid against the mortgagee or vendee as if the unregistered bill of sale had not existed; that the ship in question therefore passed to the assignees as part of the property of the bankrupts, and not as property of the plaintiffs in the bankrupt's order and disposition. *Boyson v. Gibson*, 16 Law J. Rep. (N.S.) C.P. 147; 4 Com. B. Rep. 122.

A boat under fifteen tons' burthen may be transferred without bill of sale under the 8 & 9 Vict. c. 89. s. 34, even though it has been registered under the 8 & 9 Vict. c. 88. s. 13; and no subsequent registration is necessary. *Benyon v. Cresswell*, 18 Law J. Rep. (N.S.) Q.B. 1; 12 Q.B. Rep. 899.

(O) FREIGHT.

It is the duty of a master, in case of damage to the ship, to do all that can be reasonably done to repair it, bring home the cargo, and earn the freight.

Where, in case of damage to a ship, the master elects to repair it, the mere fact that the expenses of repair ultimately prove to be greater than the value of the ship, will not be sufficient to shew that he acted beyond the scope of his authority, or to entitle the owner in an action on a policy on freight, to recover as for a total loss.

The receipt of freight by the obligee of a bottomry bond is, in law, a receipt of it by the ship-owner, whose master has given that bond in discharge of expenses incurred in the necessary repairs of the ship.

The owner of a ship insured ship and freight. On leaving Pernambuco in June 1839, the ship struck on a rock, and put back. After a survey, repairs were begun. They were continued for a long period, and the expense of them much exceeded the value of the ship and freight. The master, not being able to procure money in any other manner, was compelled to borrow on a bottomry bond, charging ship, freight, and cargo. On the 30th of December 1839, the owner, in London, on being shewn a letter addressed to the agents of the lenders on bottomry, in which the great expenses of the repairs were stated, gave notice of abandonment to the underwriters on ship and on freight. The ship arrived, and the freight was duly paid to the holders of the bottomry bond, under an order of the Court of Admiralty. The ship-owner sued the underwriters on freight as for a total loss. The jury found, on a special verdict, that the plaintiff had acted *bonâ fide* without laches, and as a prudent owner of the ship and freight, if uninsured, would act:—Held, that in this case, which was one of constructive total loss, the master might have abandoned at Pernambuco, but that having there elected to repair, he must be treated for that purpose as the agent of the owner, whose acts bound the owner.

Held, also, that as the special verdict did not find that the owner, if on the spot, would not have repaired the ship, the Court could not infer that he would not have done so.

A partial loss of freight may be recovered on a

declaration claiming a total loss. *Benson v. Chapman*, 1 H.L. Cas. 696; 8 Com. B. Rep. 950; and 5 Com. B. Rep. 330.

In all cases of insurance on a ship, in which the subject is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefit or advantage incident to it, or rather, such property vests in the underwriters.

Freight, while the ship is in the course of earning it, is a benefit or advantage incident to the ship, and, therefore, becomes the property of the underwriters, paying for a total loss.

A vessel, in the course of a voyage, struck upon an iceberg on the 27th of July, and was considerably injured, but reached Liverpool, and while in the river there, grounded outside the docks on the 11th of August, was afterwards taken into dock, the cargo discharged, and was then surveyed, and, after the survey, namely, on the 1st of September, the owner abandoned to the underwriter on ship, and claimed as for a total loss:—Held, that the underwriter on ship was entitled, on settling as for a total loss, to have the benefit, in account, of the freight which had been received by the owner on the discharge of the cargo. *Stewart v. Greenock Marine Insurance Co.*, 2 H.L. Cas. 159.

A charter-party stipulated that the vessel should proceed from London to Bombay, and being there loaded should proceed to London, and discharge in any dock the freighters might appoint, and deliver the cargo, "on being paid freight at and after the rate of 4*l.* per ton," &c. A subsequent clause stipulated that "the freight should be paid on unloading and right delivery of the cargo, in cash, two months after the vessel's inward report at the Custom House."—Held, that by the terms of the charter-party freight was not payable until two months after the inward report; and the ship-owner had no lien on the cargo for the freight after it was discharged pursuant to the charter-party.

Quære—Whether in a charter-party, partly printed and partly written, the written words are to receive a different construction from those printed. *Alsager v. St. Katherine's Dock Co.*, 15 Law J. Rep. (N.S.) Exch. 34; 14 Mee. & W. 794.

A charter-party provided, that the ship should sail to any safe island or islands on the south-west coast of Africa, agreeably to instructions which were to be given to the captain in due time by the charterers or their agents, and there load, from the factors of the charterers, a full cargo of guano or other lawful produce, which the charterers bound themselves to provide; and being so loaded should proceed therewith to a safe port in the United Kingdom and deliver the same on being paid freight at 8*l.* 18*s.* per ton, the freight to be paid on unloading and right delivery of the cargo, one-third in cash on arrival at port of destination, and the remainder by approved acceptances at three months, or cash equal thereto, &c. And it was further agreed, that, in case the charterers' agents should be unable to furnish a cargo of guano at the ports or places therein provided, they should have power to send the vessel to any other safe port or ports, place or places, for the purpose of obtaining a cargo of guano in the manner aforesaid, or of other goods,

&c., in which case they were to pay for such service, as hire for the said vessel, after the rate of 15*s.* 6*d.* per ton per month, such pay or hire to commence from the day of the vessel's clearing outwards at the Custom House, London, and to terminate upon the vessel's return to her port of delivery as thereinbefore provided for, and the discharge of the cargo. If the freighters' agents intended so to employ the vessel, they were to give the master written notice of such their intention, on production whereof the freighters engaged to pay the owner, in each on account, three months' pay for the hire of the vessel, and the balance to be paid on the vessel's return as aforesaid. The charterers instructed their agent on the south-west coast of Africa that the ship should proceed according to his instructions, and that, in case she could not find a cargo, she should proceed where he deemed it likely to procure one. The vessel sailed pursuant to the charterers' directions, to an island on the south-west coast of Africa, where the agent met her, and informed the captain that there was no guano to be had there, and that she must procure a cargo in Saldanha Bay (another place on the same coast), and must proceed to the Cape for a licence to load a cargo there. The vessel accordingly sailed for the Cape, but, being there required to enter into an engagement to sign and hand over bills of lading for the cargo, as a security for the charges of the licence, the captain refused to do so unless the agent would make the freight payable according to the time employed, instead of according to the weight of the cargo; and the latter accordingly gave the captain notice that he engaged him upon time, according to the latter clause of the charter-party:—Held, that, under such circumstances, this clause had come into operation, and that the time freight was recoverable.

The vessel, having loaded a cargo of guano at Saldanha Bay, proceeded therewith to England, and, under the charterers' instructions, went to Southampton to discharge her cargo. The charterers wrote to the captain there, stating that, without prejudice to the charter-party, or any dispute connected with the vessel, their wishes were that it should be landed and warehoused in the Southampton docks in bulk, which was accordingly done:—Held, that upon such landing of the cargo the balance of the freight became payable. *Fenwick v. Boyd*, 15 Mee. & W. 632.

The liability of a consignee or indorsee of a bill of lading to pay freight is a new contract, the consideration for which is the delivery of the goods to him at his request.

A declaration in an inferior court containing the common *indebitatus* count for freight, and which alleges the delivery of the goods at the request of the defendant, to have been within the jurisdiction of such court, sufficiently shews that the cause of action arose within the jurisdiction; as the words "at the request of the defendant" are to be taken to apply to the delivery of the goods only, and not to the carriage of them, which may have been out of the jurisdiction. *Kemp v. Clark*, 17 Law J. Rep. (N.S.) Q.B. 305; 12 Q.B. Rep. 647.

By the terms of a charter-party, "the ship P was to proceed to Port Phillip, and there load a full and complete cargo of wool, tallow, bark, or other legal

merchandise, the bark not to exceed 180 tons, the tallow and hides not to exceed 80 tons, and being so loaded to proceed therewith to London and deliver the same on being paid freight as follows:—for wool pressed, twelve-eighths of a penny per pound, unpressed, thirteen-eighths of a penny per pound, tallow 3*l.* per ton, bark 4*l.* per ton, hides 2*l.* per ton, one-third to be paid in cash on unloading, the remainder by bills at two months.' The ship took on board a few goods at Port Phillip, and obtained leave without prejudice to the charter to go to Sydney, where she was loaded full, and returned to London with 61 tons of wool only, and a large quantity of dead weight.

In assumpsit for not loading at Port Phillip according to the tenour of the charter,—Held, that the terms of the charter-party meant that the ship-owners should be paid freight for a full homeward cargo, consisting of 180 tons of bark, tallow, and hides, and the residue of wool; and that damages were to be calculated on that basis.

Held, also, that under the words "other legal merchandise," the charterer was at liberty to ship any lawful articles he pleased (due regard being paid to the safety of the vessel), but was bound to pay the same amount of freight as the vessel would have earned if loaded within the terms of the charter.

Held, also, that there was no ambiguity in the terms of the charter-party, and parol evidence was inadmissible to shew which party (by the custom at the port of lading) should pay for the cost of pressing the wool. *Cockburn v. Alexander*, 18 Law J. Rep. (N.S.) C.P. 74; 6 Com. B. Rep. 791.

Assumpsit for freight due under a charter-party. Pleas, first, non assumpsit; second, the bankruptcy of the plaintiffs and the appointment of assignees. Replication, that the plaintiffs before their bankruptcy were indebted to Messrs. D & Co. in more than the amount sued for, and by an order indorsed on the charter-party requested the defendants to pay to Messrs. D & Co. all sums which should become due under the charter-party, and that the charter-party, with the order indorsed, was delivered to Messrs. D & Co., and that the defendants had notice thereof. The issue raised was whether the defendants had notice of the order. The facts were, that the plaintiffs, who were ship-owners, having offered their vessel for hire to the defendants, the latter objected to take it on the ground of its being too large, whereupon the plaintiffs offered to take half the ship as adventurers in partnership with the defendants. It was then arranged that a charter-party in the usual form should be executed by the plaintiffs and the defendants, and that an agreement as to the adventure should be signed by A, the plaintiffs' clerk, as their agent, and a memorandum of guarantee should be signed by the plaintiffs, the same to be one transaction. The agreement stated that the trading, cargo, &c. should be upon the joint account and risk of the defendants and A, and that after payment or deduction of the freight, the profit or loss should be borne and received or paid by the parties in equal moieties. The plaintiffs by the memorandum of guarantee guaranteed A from all losses and expenses happening in the course of such trading. The plaintiffs being indebted to Messrs.

D & Co. in a large sum of money subsequently deposited the charter-party with them as a security, with an indorsement upon it, directed to the defendants, and requiring them to pay the amount of what was due to Messrs. D & Co. Notice of this was afterwards given to the defendants. The plaintiffs subsequently became bankrupts, and assignees were appointed. The present action was brought by Messrs. D & Co. in the name of the plaintiffs, the bankrupts, to recover the freight due under the charter-party:—Held, first, that according to the true construction of this contract the defendants were bound to pay freight to the ship-owners, and that the parties were then to bear and receive equally the loss and profit of the adventure. Secondly, that the transaction amounted to an absolute assignment to Messrs. D & Co. of the right to the freight, and that the plaintiffs were entitled to succeed on both issues. *Boyd v. Mangles*, 18 Law J. Rep. (N.S.) Exch. 273; 3 Exch. Rep. 387.

By a charter-party, the defendants undertook to ship a full cargo of produce at N. or B. It was stipulated that the freight should be paid "at and after the rate of 5*s.* 6*d.* per barrel of flour, meal and naval stores, and 1*l.*s. per quarter of 480*lb.* of Indian corn or other grain." It was proved that a quarter of wheat weighing 480*lb.* occupied ten cubic feet; and that oats weighed 272*lb.* and occupied sixteen cubic feet. The vessel came home with a short cargo. In an action on the charter-party for freight in respect of the unoccupied space, the defendant paid into court the amount that would have been payable if that space had been filled with oats, and the freight payable in respect of them was 1*l.*s. per quarter:—Held, that the words "other grain" must be taken to mean such grain as would weigh about 480*lb.* per quarter, and could not, therefore, include oats; and that oats, like other produce not enumerated, should be paid for, not at 1*l.*s. per quarter, but after the rate of 5*s.* 6*d.* per barrel of flour and of 1*l.*s. per quarter of grain weighing 480*lb.* *Warren v. Peabody*, 19 Law J. Rep. (N.S.) C.P. 43; 8 Com. B. Rep. 800.

The captain of a ship was instructed to apply for a cargo to A; and, in the event of A not being on the spot, then to apply to B (both being agents of the charterers) for the same purpose. He applied to both accordingly, and was refused a cargo by both. An action was brought by the owners to recover the freight; and, in order to do away with the effect of the proof as to B's refusal, a letter from B to the defendants was tendered in evidence, to shew that, prior to such refusal, B had renounced their agency:—Held, to be inadmissible.

Held, further, that A having been on the spot, what passed between B and the captain was important only in so far as it was confirmed and adopted by A. *Hassell v. Watson*, 2 Car. & K. 141.

A monition extracted by a bond-holder calls upon I D P, the secretary of the East and West India Dock Company, to bring in certain deposits lodged in his hands by the consignees of the cargo on account of freight. I D P having prayed to be heard on his petition as to the construction of the statute 3 & 4 Will. 4. c. 57. s. 47, upon the petition being subsequently abandoned, and the freight

brought in, I D P dismissed, but without costs, the question being *prima impressionis*. *The Lord Auckland*, 2 Rob. 301.

Claim of a ship-broker to the remnant of freight remaining in the registry in a cause of bottomry dismissed, with costs. *The Douthorpe*, 2 Rob. 365.

(P) AVERAGE.

No claim for general average arises when the master of a ship has been obliged to sell part of the cargo for the purpose of executing repairs made necessary by ordinary perils of the sea. The claim for general average arises when part of the cargo is sacrificed in order to preserve the rest from impending peril.

The declaration in an action brought by the shippers of goods against the ship-owners, stated that the ship, proceeding on her voyage, was damaged by tempestuous weather, and put back to the port of lading to repair; that the master, not being able to obtain money for the repairs, sold part of the cargo, and that the defendants, in consideration of the premises, promised the plaintiffs to pay them the value at the port of discharge of the part of the cargo so sold. The defendants pleaded pleas to the effect, that the vessel was compelled by weather to put back to repair; that expenses were incurred in unloading and repairing; that they exceeded the value of the vessel; that they were necessary for the preservation of the ship and the cargo and for the completion of the voyage, and were done for the common benefit of all concerned; that the master having no funds, nor the means of raising any by bottomry or hypothecation, and no power of conveying the cargo to the port of discharge unless the repairs were completed, sold part of the cargo to defray such expenses; and that by the custom of merchants, such loss was the subject of a general average contribution among all parties interested in the ship and cargo. On demurrer,—held, that the pleas were bad, and the declaration good. *Hallett v. Wigram*, 19 Law J. Rep. (N.S.) C.P. 281.

(Q) DEMURRAGE.

The assignee of a bill of lading, who claims and receives goods under it, is liable to pay not only the freight of the goods, but also for demurrage, according to the terms of the bill of lading. *Stindt v. Roberts*, 17 Law J. Rep. (N.S.) Q.B. 166; 5 Dowl. & L.P.C. 460.

Objections to registrar's report. A deduction by the registrar and merchants of one-third for the full amount of the repairs and of the cost of new articles, in consideration of new articles being substituted for old, not sustained by the Court. In fixing the amount of demurrage to be paid for the detention of the vessel during the repairs, a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight. Report sent back to be reconsidered. *The Gazelle*, Rob. 279.

(R) DEVIATION.

[See (B) Insurance.]

(S) DERELICT.

A simple contract creditor not permitted to have his asserted debt paid out of the proceeds of a ship which had been found derelict, and had been sold under the decree of the Court, the application being resisted by the mortgagees of the vessel, who claimed the proceeds in question in satisfaction of their mortgage.

Proceeds directed to be paid out to the mortgagees. *The New Eagle*, 2 Rob. 441.

(T) NECESSARIES.

In an action against a ship-owner for goods supplied and money lent to the captain of the ship at a foreign port, no witnesses were called for the defendant, but it appeared from the cross-examination of the plaintiffs' witness, that the expenses of such a vessel and voyage might be expected to be less than the sum paid into court. The Judge directed the jury that it was for the plaintiff to establish that the goods and money supplied were necessary:—Held, not to be a misdirection. *Mackintosh v. Mitcheson*, 18 Law J. Rep. (N.S.) Exch. 385; 4 Exch. Rep. 175.

In order to establish that the necessities supplied to a foreign ship or vessel are necessities within the meaning of the act, the vessel must be in a state of exigency at the time; and the articles supplied must consist of articles needful for the relief of such exigency.

Articles supplied for the equipment of a vessel building in a foreign dock-yard not necessities within the meaning of the statute. *The Ocean*, 2 Rob. 368.

(U) LIEN AND MORTGAGE.

A mortgagee of ships and cargoes sold some of the cargoes under a power of sale in the mortgage-deed, and others under an order of the Court, with the concurrence of the receiver appointed in another suit for the administration of the debtor's estate:—Held, that upon the latter sales he was not entitled to the rate of brokerage and commission which he had been in the habit of receiving from the ship-owner who was dead, but only to a reasonable allowance, to be ascertained by the Master, if the parties could not agree.

Held, also, that he was not entitled to any brokerage on the sale of the cargoes which he had sold as mortgagee, without any order of the Court. *Arnold v. Garner*, 16 Law J. Rep. (N.S.) Chanc. 329; 2 Ph. 231.

The master of a ship has no claim on the accruing freight, nor any lien on the certificate of registry either for his wages or for money disbursed by him for the ship's use; nor have ship-brokers any lien on the certificate of registry for advances made by them to the owner for the ship's use.

Ship-brokers advancing money to the owner of a ship for the ship's use, having at the same time notice, by indorsement on the certificate of registry, of a prior mortgage on the ship, are not entitled to be repaid their advances out of the freight in priority to the mortgagee, although the latter does not take possession of the ship until after she has entered the docks from her homeward voyage.

The vendor of a ship with covenant for title retains such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party who unlawfully detains it; and there is nothing in the nature of such a certificate which excludes it from the jurisdiction of the Court to decree its delivery. *Gibson v. Ingo*, 6 Hare, 112.

(V) COSTS.

Application to the Court to supersede an attachment which had been directed to issue for non-payment of costs in a cause of possession, upon the ground that during a part of the proceedings in the original cause, the party applying had sued *in forma pauperis*; secondly, that the writ of attachment was wrongly directed, being addressed to the *marshal* of the Queen's Bench prison. Application rejected.

Semble—when an attachment is issued by the Court for non-payment of costs, the Court has no power to supersede that attachment, saving upon grounds only relating to the manner in which the writ is executed. *The Plym*, 2 Rob. 345.

(X) ATTACHMENT.

Where an attachment from the Court of Admiralty, backed by the Lord Ordinary's concurrence, had been executed upon a person resident in Scotland, and the person so attached had been brought to England and committed to the Queen's Bench prison, the Court directed a supersedeas and the party to be released, upon the ground that the Lord Ordinary of Scotland had subsequently revoked his concurrence as illegal, and as granted *periculo petentis et per incuriam*. *The Mathesis*, 2 Rob. 286.

Monition for an attachment refused, against a receiver of droits of Admiralty under the act 9 & 10 Vict. c. 99, for refusing to give up the possession of a vessel which he had seized as derelict and retained until his claim for expenses had been settled. *The Tritonia*, 2 Rob. 522.

(Y) COLLISION AND DAMAGES.

A steam-tug entered into a verbal agreement with the master of a vessel, having a licensed pilot on board to tow her to London; in coming up the river they came across a brig near a tier of vessels; the pilot hailed the tug to go to the westward of the brig, but the master of the tug disobeyed the order and went to the eastward, and thereby caused a collision between the vessels. The tug afterwards completed the towage, and brought the vessel to her destination:—Held, in such circumstances that the disobedience of the orders of the pilot was not justifiable, and that the towage was forfeited.

Quære—whether, notwithstanding such misconduct, the tug could recover from the owners of the vessel under the contract, and leave the vessel towed to a cross-action for the damage.

This question not having been properly raised or discussed in the Admiralty Court, the Judicial Committee sitting as a Court of appeal, refused to entertain it. *Pelley v. Catto*, 6 Moore, P.C. 371.

In an action against the registered owners of a brig, for negligence in the navigation of the vessel, whereby the plaintiffs' vessel was injured, the defendants having suffered judgment by default, on the inquisition it appeared that by the same stroke

which injured the plaintiffs' vessel, the defendants' (which was not insured) was immediately sunk, and was entirely lost:—Held, upon the construction of the 53 Geo. 3. c. 159, that the defendants were not exempted from all liability by the total loss of the vessel.

The act only restricts the liability of the ship-owner to the value of the ship and freight, at some time.

And, *quære*, whether the decision in *Wilson v. Dickson*, that the value is to be calculated at the time of the collision, is correct.

Held, also, that if the defendants had, by reason of the total loss of their vessel, been wholly exempt from liability, they should have pleaded that fact. *Brown v. Wilkinson*, 16 Law J. Rep. (N.S.) Exch. 34; 15 Mee. & W. 391.

The declaration stated that before the happening of the damage complained of, to wit, on &c., a certain barge of the defendant, and of which he was then in possession and then had the management, sunk in a navigable river in England, the same being a public highway; that it lay concealed under water in such a manner that vessels passing over the place would be in danger of striking against it, of which the defendant had notice; that it thereupon became and was the duty of the defendant while the barge continued so sunk to use due care to prevent the danger to vessels navigating that part, by giving notice by a buoy or otherwise to persons navigating; that the defendant omitted to give such notice, and that a vessel of the plaintiffs was damaged:—Held, first, that the declaration was insufficient for not shewing with sufficient directness any obligation on the defendant to do that which the plaintiffs complained the defendant omitted to do.

Secondly, that the word "thereupon" in the allegation "it thereupon became and was the duty," was not to be understood as shewing that the proposition following the word was a consequence deducible from what preceded it, but only as shewing the time or occasion upon which the proposition was averred to have taken place.

Thirdly, that the allegation in question was an averment of matter of law only, and that there were no sufficient allegations of facts from which such law could be inferred.

Fourthly, that as the declaration did not shew either a continuing possession and controul of the defendant at the time of the collision, nor other special circumstances shewing that he was bound to prevent other vessels being injured, the declaration was insufficient in substance.

Fifthly, that the mere fact of the defendant having the possession and controul of the barge at the time it sank, was not in itself sufficient to render him liable. *Brown v. Mallett*, 17 Law J. Rep. (N.S.) C.P. 227; 5 Com. B. Rep. 599.

A Trinity House pilot navigating a vessel near the Nore, on the Essex side of the Thames, ran foul of and damaged another vessel, for which the owner brought an action against the pilot, and laid the venue in the city of London. Plea, not guilty, by statute:—Held, that the act complained of was not done in pursuance of the statute 6 Geo. 4. c. 125, and that the action need not be brought in the county in which the collision occurred. *Lawson v. Dumlin*, 19 Law J. Rep. (N.S.) C.P. 139.

In doubtful circumstances, where there is a probability of collision, a vessel on the larboard tack, although close hauled, is bound to give way to a starboard tack, notwithstanding the latter may be sailing at the time with the *wind free*. *The Ann and Mary*, 2 Rob. 189.

It is the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack at once, without considering whether the other vessel be one or more points to leeward. Damage pronounced for. *The Traveller*, 2 Rob. 197.

Masters of vessels navigating at night are bound to use all proper precautions for avoiding the chances of collision.

A vessel sailing upon a dark and foggy night with her topmast studding sails set, condemned in the damage sued for. *The Virgil*, 2 Rob. 201.

A vessel running free with a fair wind, and carrying her square sail, topmast studding sail, fore and aft mainsail, and gaff topsail set, the weather being dark and thick and the night foggy, dismissed from further observance of justice in the suit upon the ground of inevitable accident. *The Ebenezer*, 2 Rob. 206.

The application of the Trinity House regulation with respect to two vessels meeting each other, the one upon the larboard and the other upon the starboard tack, depends upon the presumption that the two vessels are directly opposing each other, and is not intended to apply when the heads of the respective vessels are lying in different directions. *The London Packet*, 2 Rob. 213.

A vessel with the wind free not giving way to a vessel sailing by the wind, condemned in the damage. Practice of the Court in taking the opinion of the Trinity Masters in cases of damage by collision. *The Speed*, 2 Rob. 225.

In cases of collision, where the evidence on both sides is conflicting and nicely balanced, the Court will be guided by the probabilities of the respective cases which are set up; *à priori*, the presumption is, that the master of a vessel would do what was right and follow the regular and correct course of navigation. *The Mary Stewart*, 2 Rob. 244.

Where a steamer coming down the river upon a dark night meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken his speed, until he ascertains the course of the sailing vessel.

A defence—that the master of the steamer, under the circumstances, immediately put her helm to port, in compliance with the Trinity House regulations—not sustained. *The James Watt*, 2 Rob. 271.

Commander of a queen's ship condemned in a cause of damage, the collision having been occasioned by his anchoring too near the damaged vessel; and having anchored with only one anchor down, the weather being squally and tempestuous at the time. *The Volcano*, 2 Rob. 337.

A steam vessel proceeding at the rate of between eleven and twelve knots an hour, in a track where many vessels were passing up and down, condemned in the damage. Masters of merchant vessels not compelled to carry lights. *The Iron Duke*, 2 Rob. 377.

Declaration of the pilot in charge of a vessel proceeded against in a cause of damage, that the collision was not his fault, but was occasioned by the neglect of the crew of the damaging vessel, not pleadable in a cause by plea and proof.

Declaration of a mariner belonging to the damaging vessel, confirming the pilot's assertion, also inadmissible.

Investigation into the alleged misconduct of the pilot before a Pilot Committee of the port of Liverpool; decision of such committee, that the pilot was not to blame, not receivable as evidence in the cause. *The Lord Seaton*, 2 Rob. 391.

Where a vessel at anchor is run down by another vessel under weigh, the *onus probandi* lies with the vessel doing the damage, and she is bound to shew that the accident was not occasioned by any fault or negligence on her part.

The exemption from liability under the Pilot Act not taken away from the owners of the damaging vessel by the constant employment of the same pilot to pilot their vessel up and down the river for a period of fifteen years. *The Batavier*, 2 Rob. 407.

When a launch is about to take place in a river, reasonable notice of the intended launch should be given; and such notice must be sufficiently specific, with respect to the time when the launch is to take place, as to prevent vessels navigating in the river from unknowingly incurring risk or loss.

It is further necessary that a good look out should be kept, and great care should be taken to prevent the launch from coming into collision with any other vessel.

A vessel launched from a shipbuilder's yard in the river Tyne, proceeded against for running into a steamer proceeding down the river at the time. Defence set up that the steamer might have avoided the collision by keeping more to the northward. Defence sustained by Trinity Masters, and suit dismissed, with costs. *The Blenheim*, 2 Rob. 421.

Owners of a damaged vessel and part of the cargo, who had obtained a decree of the Court in a cause of damage, entitled to have the proceeds of the damaging vessel paid out of the registry to satisfy the amount of their damage, in preference to the owners of the remaining portion of the cargo, who had not brought their action until after the decree of the first suit had been pronounced.

Prayer of the owners of the remaining portion of the cargo, that the proceeds might be applied *pro ratâ* to satisfy the two actions, rejected. *The Saracen*, 2 Rob. 451.

A vessel sailing upon a dark night with her studding sails set, and not porting her helm in time, condemned in the damages. *The Switzerland*, 2 Rob. 482.

Damage pronounced for against a vessel with a licensed pilot in charge, compulsorily taken on board.

Blame of the collision solely imputed to the crew by the pilot in charge, and distinctly denied by the crew. Court pronounced that the pilot was in some degree in fault, and that the evidence, under the circumstances, was not sufficient to bring the charge home to the crew. Owners of the damaging vessel dismissed from the responsibility of the damage. *The Atlas*, 2 Rob. 502.

A vessel close hauled on the larboard tack, meeting another vessel with the wind free, at night, not justified in starboarding her helm where there is a probability of the two vessels coming into collision. Both vessels pronounced in default, the other vessel not having kept a good look out, and not having ported her helm in time. *The Seringapatam*, 2 Rob. 506.

Steam vessel proceeding at an improper speed upon a dark night condemned in the damage. *The Gazette*, 2 Rob. 515.

Where a vessel having been run down, subsequently becomes unmanageable, and gets upon a sand bank and is lost, the presumption of law is that her eventual loss is attributable to the effects of the collision, and not to the mismanagement of the persons on board. *The Mellona*, 3 Rob. 7.

Where in a cause of collision bail is given and accepted between the party charged with the damage and the party promoting the suit, the promoter of the suit, if he succeeds in his action, is not precluded from subsequently disputing before the registrar and merchants the real value of the ship and freight. *The Mellona*, 3 Rob. 16.

The owners of a foreign vessel which was run down by a British ship brought an action for damages in the Admiralty Court, and a cross-action was also entered against the foreigners by the British owners. The foreign owners being resident abroad, and declining to give an appearance in the cross-action, the cross-action was discontinued, and the cause was heard upon the original action alone. The Trinity Masters being of opinion that both vessels were in fault, the Court decreed the damage to be equally divided between them.

This sentence was appealed and affirmed by the Privy Council, and the cause was remitted. A motion was now made on behalf of the British owners that the registrar and merchants should be directed to ascertain the amount of the damage sustained by the British ship, and deduct a moiety of that damage from the compensation awarded to the foreign owners. The Court rejected the motion, but withheld the payment of the sum claimed by the foreign owner until he consented to a deduction of a moiety of the damage sustained by the British ship. *The Seringapatam*, 3 Rob. 88.

A vessel lying at anchor in a track frequented by other ships, is bound at night to exhibit an efficient light. The owners of a vessel so lying at anchor, and run into by a vessel under sail, held to have been in fault in omitting to exhibit such light. *The Victoria*, 3 Rob. 49.

In a collision in the river Mersey between a steam-tug and a ferry boat, held by the Trinity Masters that the proper station for the master or look-out man in such steamer is the bridge between the paddle boxes. *The Wirral*, 3 Rob. 56.

The commander of a steam vessel of war condemned in a cause of damage. The excuse that the vessel which was run down was mistaken for a fishing vessel at anchor, and that the helm was starboarded to avoid the fishing nets, not sustained. The steamer should have eased or reversed her engines, and have ascertained the fact, instead of proceeding on her course. *The Birkenhead*, 3 Rob. 75.

The value of a vessel condemned in a cause of

damage by collision is the existing value of the vessel at the time or immediately prior to the collision. Claim of the owners of a damaging vessel to have their liability reduced to the value of their ship after the collision, overruled. *The Mary Caroline*, 3 Rob. 101.

Defence of a vessel in a cause of damage, that from the proximity of the two vessels, and the fact of the damaging vessel missing stays in consequence of a sudden squall of wind, the collision was inevitable, not sustained.

Semle—If a vessel in close proximity to another vessel is put in stays and misses, it is the duty of the persons on board to square the mainyard and so let the vessel pay off. *The Kingston-by-sea*, 3 Rob. 162.

Where a vessel is sunk in a collision, and compensation is awarded by the Court of Admiralty to the full value of the vessel as for a total loss, the plaintiff will not be entitled to recover anything in the nature of demurrage for loss of the employment of his vessel or his own earnings in consequence of the collision. *The Columbus*, 3 Rob. 158.

Where steam vessels are navigating under the rules of the Admiralty with respect to the number and colour of the lights to be carried, it is essential that the master of each vessel should see that his lights are properly trimmed and burning. The green light of the plaintiff's vessel having gone out previous to the collision, the plea of the defendant, that the master of his vessel, upon the supposition that the vessel approaching was a sailing vessel, acted in conformity to the general rules of navigation by porting her helm, sustained. *The Rob Roy*, 3 Rob. 190.

Where a party who has received a damage by collision, claims to be indemnified for a consequential loss, arising from the non-employment of his vessel, whilst under repair, he is bound to prove that he has sustained a direct and positive loss; it will not be sufficient to aver that the vessel, if she had not been detained in dock, might have earned certain probable freight.

Claim of a steam company for demurrage, at the rate of 20*l.* per diem during the repairs, as being the amount at which the vessel might have been hired, not allowed by the registrar and merchants, and the objection to their report upon this ground overruled. *The Clarence*, 3 Rob. 283.

Where there is a probability of a collision, a vessel on the larboard tack, and close hauled, is not justified in pertinaciously keeping her course, although the vessel she meets is on the starboard tack, and with the wind free. Where practicable, she is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in time.

A close hauled vessel on the larboard tack and a starboard tacked vessel with the wind free meeting each other, and neither vessel giving way in time, both vessels held to be equally at fault. *The Commerce*, 3 Rob. 287.

A vessel with a duly licensed pilot on board condemned in a cause of collision, the fault being equally imputable to the crew on board. *The Lochlibo*, 3 Rob. 310.

SLANDER.

- (A) WHAT WORDS ARE ACTIONABLE.
- (B) PLEADING.
- (C) SLANDER OF TITLE.

(A) WHAT WORDS ARE ACTIONABLE.

A party in a matter before the Court had kept a sum of money which, by his contract, he ought not to have kept: counsel in reference to this matter, used the language, "This gentleman has defrauded us," and was interrupted by the Court before he had finished his sentence:—Held, first, that the words were not actionable; secondly, that they were not irrelevant to the matter before the Court. *Needham v. Dowling*, 15 Law J. Rep. (N.S.) C.P. 9.

Semble—that the words "he is a bad character; none of the medical men here will meet him," are actionable. *Southey v. Denny*, 17 Law J. Rep. (N.S.) Exch. 151; 1 Exch. Rep. 196.

Where a defendant volunteered a statement to a third party, injurious to the credit of the plaintiff in his trade and untrue:—Held, *per Tindal, C.J.* and *Erle, J.*, that it was a question for the jury, whether the communication was malicious. *Per Colman, J.* and *Cresswell, J. contra. Bennett v. Deacon*, 15 Law J. Rep. (N.S.) C.P. 289; 2 Com. B. Rep. 628.

Words spoken of a superintendent of police: "I saw a letter respecting an officer of the Leeds Police Force, who was superior in rank to A B, and who had been guilty of conduct unfit for publication:"—Held, not actionable without special damage; the conduct imputed to the plaintiff not being connected on the face of the declaration with his official character. *James v. Brook*, 16 Law J. Rep. (N.S.) Q.B. 17; 9 Q.B. Rep. 7.

In an action for slander the first count stated that the plaintiff was a clergyman of the United Church of England and Ireland as by law established, and vicar of W; that the defendant was also a clergyman of the said united church; that the defendant, intending to injure the plaintiff in his said character of a clergyman, falsely, &c. spoke the following words of and concerning the plaintiff in his said profession of a clergyman: "The very day I (the defendant) came into residence, Dr. P (the plaintiff) sent for me: I went out and dined with him, and the wine must have been drugged, for I took but two glasses and was quite stupefied. While in this condition Dr. P (the plaintiff) put a bill into my hands and requested me to sign it, saying, C, just put your name to this: I wish to have it as a security for the payment of 130*l.* per annum for reading for you at the new church. I (the defendant) answered, Will you give me a pen and I will sign it, but I thought I had sufficiently satisfied you. Immediately I had signed it, Dr. P (the plaintiff) snatched it up and walked to the fire in order to dry the signature, and, laughing, said, This will be quite safe; I (the plaintiff) will take care of this. The bill, I (the defendant) think, was drawn for 2,500*l.*; but having been stupefied with the wine, I do not rightly remember;" and also the following words: "You cannot suppose that I (the defendant) can meet a man who so cheated me at my first coming:"—Held good, as charging imputations on the plaintiff in his professional character.

The second count charged that the defendant spoke of and concerning the plaintiff in his said profession of a clergyman the following words: "Dr. P (the plaintiff) placed before me a bill; I (the defendant) signed. I do not know for what amount it was, whether for 2,000*l.* or 3,000*l.*, for I was completely pigeoned by Dr. P (the plaintiff):"—Held, insufficient to sustain an action.

A general verdict having been given on both counts, a *venue de novo* was awarded. *Pemberton v. Colls*, 16 Law J. Rep. (N.S.) Q.B. 403; 10 Q.B. Rep. 461.

An action of slander cannot be maintained by a lessee or renter of tolls, for words spoken of him in his character of contractor for tolls, after he has ceased to contract for renting the tolls, respecting which the words are spoken.

Semble—the renting of tolls is not a profession or trade. *Bellamy v. Burch*, 16 Mee. & W. 590.

Under the statute 5 & 6 Vict. c. 109, the vestry, upon precept from the Justices, are to make out and return a competent number of persons qualified and liable to serve the office of constable; the list is to be published, and notice given of when and where objections will be heard by the Justices, who, at a special session, have power to strike out of the list the names of persons disqualified, and to choose and swear in constables from the list; and the vestry may return a resolution to have paid constables, in which case the Justices are to appoint paid constables.

A vestry made out a list and returned it with a resolution to have a paid constable, and the plaintiff being named in the list was about to be sworn in as a paid constable by the Justices, when the defendant, a parishioner, made a statement to the Justices, in the presence of a number of persons, affecting the plaintiff's character. In an action for slander, it being objected that the statement ought to have been made to the vestry, and not to the Justices, who could only hear objections as to qualification and liability to serve,—Held, that the plaintiff was not entitled to recover if the statement was made *bond fide* in furtherance of the ends of justice. *Kershaw v. Bailey*, 17 Law J. Rep. (N.S.) Exch. 129; 1 Exch. Rep. 743.

In an action for words which are *prima facie* privileged, evidence tending to make out an admission by the defendant, subsequently to the speaking of the words of a dispute existing between him and the plaintiff, before the speaking of the words, about a sum of money claimed to be due from the defendant to the plaintiff, is admissible to shew express malice. And the evidence of the examination of the plaintiff himself before a commissioner in insolvency on occasion of an application by the defendant to the Court to have the debt so claimed by the plaintiff and inserted in his schedule struck out therefrom, and on which occasion the defendant declined to be examined, though called upon, is proper to be left to the jury as evidence of such admission of a previous dispute.

Where a justification of the truth of the words had been pleaded, and the plaintiff, during the trial, offered to accept an apology and a verdict for nominal damages, if the defendant would withdraw the plea of justification, which the defendant refused to do, though he did not attempt to prove it,—Held,

that this conduct on the part of the defendant was also proper to be left to the jury, with reference to the question of malice as well as that of damages. *Simpson v. Robinson*, 18 Law J. Rep. (N.S.) Q.B. 73; 12 Q.B. Rep. 511.

The plaintiff, a domestic servant, was engaged by A, on a character given by the defendant; a short time afterwards the defendant having reason to believe that the character was undeserved, wrote to A a letter containing an allusion to the plaintiff and to her having been deceived. A accordingly called on the defendant, and made more inquiries about the plaintiff's character, in answer to which the defendant imputed dishonesty to the plaintiff:—Held, that the whole of the communications were privileged, and that no action could be maintained; and that the defendant was bound, on discovering that the character was undeserved, to state that fact to A: and that he stood in the same position as if the statement had been made by him in answer to questions asked by A in the first instance. *Gardener v. Slade*, 18 Law J. Rep. (N.S.) Q.B. 334.

A declaration stated as inducement that the plaintiff was a dissenting minister, and that before the grievances therein mentioned he had been in trade in partnership with P; that the partnership had been dissolved, and that certain reports had been circulated of and concerning the plaintiff and the partnership accounts and money transactions; that the defendant, well knowing the premises, &c. said of and concerning the plaintiff and of and concerning him in his said ministry, and of and concerning the said partnership, &c., "Mr. H is a rogue, and I can prove him to be so by the books at S. Mr. H pretends to say he has been as good as a father to him, but you see he has been robbing him; he has cheated P of 2,000*l*. I will so expose Mr. H that he will not be able to hold up his head in T pulpit or any other." The second count was for saying "Mr. H has cheated P his brother-in-law of upwards of 2,000*l*. I wonder how any respectable person can countenance such a man by their presence. I have been advising some other persons to go to the W chapel, as they would there hear plain honest men." There were also counts for libel, and special damage was alleged, that divers persons discontinued their attendance at the plaintiff's chapel. It was proved that the plaintiff received 30*l*. per annum and house rent, but not how that sum was to be raised, or the parties by whom it was to be paid. It was also proved that the attendance of the chapel was diminished, but why, or whether the seceders were contributors to the funds of the chapel, did not appear. The libels complained of were written by the defendant to one A, acting for the plaintiff in the course of a correspondence arising out of an invitation to the defendant by A, with the plaintiff's concurrence, to investigate certain charges brought against the plaintiff.

Held, first, that the words in the first and second counts were not actionable *per se*, and could not be deemed to have been spoken of the plaintiff *quâ* minister in any sense that would subject the defendant to an action. Secondly, that there was no evidence of special damage resulting from these words so as to support an action on them. Thirdly, that the libels declared on were privileged communications. *Hopwood v. Thorn*, 19 Law J. Rep. (N.S.) C.P. 94; 8 Com. B. Rep. 293.

In an action for slander, the words were: "You are a thief; you robbed Mr. L of 30*l*." The words were spoken in the hearing of B and of several strangers. B knew that the words did not mean to impute a felony, but meant to impute that the plaintiff had improperly obtained 30*l*. from Mr. L to compromise an action for a distress:—Held that, under these circumstances, the question to be left to the jury was not what the defendant meant by the words he spoke, but what reasonable men, hearing the words, would understand by them.

Semble, also, that if *all* the persons present when the words were spoken had known that the words did not impute felony, that would have been an answer to the action. *Hankinson v. Bilby*, 2 Car. & K. 440.

The use of words imputing an indictable offence is actionable or not according to the sense in which they may fairly be understood by bystanders not acquainted with the matter to which they relate, or which may render them a privileged communication, and the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial. *Ibid.* 16 Mee. & W. 442.

In an action of slander, if the words used have been spoken in a sense different from their ordinary meaning, facts should be given in evidence to shew that they may have been used in a particular sense. After that has been done, a bystander may be asked "What did you understand by the expression used?" But without such a foundation being laid, the question is not allowable. *Daines v. Hartley*, 18 Law J. Rep. (N.S.) Exch. 81; 3 Exch. Rep. 200.

(B) PLEADING.

The first count in a declaration for slander alleged, that the plaintiff was a butcher, and carried on that trade, and that the defendant, with intent to impute to the plaintiff the use of fraudulent weights, and of cheating in her said trade, spoke of the plaintiff in her said trade, and of M G, being her son and servant, and of the plaintiff having by M G used fraudulent weights in her said trade, these words:—"M G uses two balls to his mother's steelyard," (innuendo) "thereby meaning that the plaintiff, by M G as her agent and servant, used fraudulent weights in her said trade, and cheated and defrauded in her said trade."—Held, that the innuendo was warranted, and did not improperly extend the meaning of the words.

The second count alleged, that in a certain other discourse by the defendant then had in the presence of other persons, of and concerning the plaintiff in her trade (stating the colloquium as in the first count, but not alleging any facts by independent averment,) the defendant spoke of the plaintiff in her trade (as in the first count) these words; "you have used them for years," (innuendo) "meaning that the plaintiff had used improper weights, and defrauded and cheated in her said trade." The second count went on to allege, that in the last-mentioned discourse, in answer to a question put by the plaintiff to the defendant, whether the defendant had told J G that the plaintiff's son had used two balls to the plaintiff's steelyard, the defendant spoke these words: "To be sure I did: I will swear to it in any court," with an innuendo similar to that in the first count. After verdict for the plaintiff with general damages,

—Held, that the latter words of the second count, as explained by the innuendo, were actionable; and as all the words laid in the second count were alleged to have been spoken in the same discourse, there was no ground for arresting the judgment. *Griffiths v. Lewis*, 15 Law J. Rep. (N.S.) Q.B. 249; 8 Q.B. Rep. 841.

The declaration in an action for slander, after averring that the plaintiff was a dealer in "winches," proceeded (with the ordinary innuendoes) to allege that the defendant said to the plaintiff, "I have been robbed of three dozen of winches—you have bought three of them at 2s.; you well knew when you bought them that they could not have been honestly come by." Whereupon the plaintiff said to the defendant, "I have bought half a dozen winches from a new maker," and then produced certain winches to the defendant, "who further contriving and intending as aforesaid," falsely and maliciously replied, "Oh, no; these are not my winches; you know that well enough; these (the said defendant pointing to some others) are mine. I am sorry to say anything against any tradesman, but I will bring the man who stole my winches, and let you see him, for he is in my custody," (innuendo that the plaintiff had been and was guilty of buying winches, well knowing the same to have been dishonestly come by, and to have been feloniously stolen):—Held, that the words "further contriving and intending" did not make the latter part of the declaration a fresh count, and that sufficient appeared on the face of the declaration to sustain the verdict which had been found for the plaintiff. *Alfred v. Farlow*, 15 Law J. Rep. (N.S.) Q.B. 259; 8 Q.B. Rep. 854.

Declaration for that whereas the defendant, contriving and wickedly intending to injure the plaintiff, to wit, on &c. in a certain discourse, in the presence of, &c. spoke and published of and concerning the plaintiff the false, malicious, and defamatory words following [stating them], by means of which the plaintiff is greatly injured, &c.:—Held, bad, on special demurrer, for charging the plaintiff with having committed the grievances by way of recital only and not positively. *Brown v. Thurlow*, 16 Law J. Rep. (N.S.) Exch. 46; 16 Mee. & W. 36; 4 Dowl. & L. P.C. 301.

In actions on the case for words not actionable by themselves, but actionable in consequence of the special damage alleged to have been occasioned thereby, the plea of "not guilty" puts in issue the special damage stated in the declaration.

The words "she is living by imposture," are not actionable unless special damage be proved to have resulted from the use of them. *Wilby v. Elston*, 18 Law J. Rep. (N.S.) C.P. 320; 8 Com. B. Rep. 142.

(C) SLANDER OF TITLE.

In an action against the surveyor of highways, appointed under the 7 & 8 Vict. c. 84, for slander of title, the slander alleged was, "I shall not allow purchasers (meaning persons who then might be disposed to purchase at the said sale the said houses of the plaintiff so exposed for sale as aforesaid) to be finished until the roads are made good. I have no power to compel any one to make the roads, but I have power to stop the buildings until the roads are made." The Judge, at the trial, amended the de-

claration by substituting "*the houses*" for the words in italic letters:—Held, that under the 3 & 4 Will. 4. c. 42. the Judge had power to make the amendment.

In an action of this kind, where it is necessary for the plaintiff to prove malice, the Court will not infer malice from the defendant having put a wrong construction on a complicated act of parliament. *Pater v. Baker*, 16 Law J. Rep. (N.S.) C.P. 124; 3 Com. B. Rep. 831.

The defendant who was the ground landlord and remainder-man of a lease of premises, of which the plaintiff was assignee, stated at an auction where the lease and assignment were put up for sale, that all the covenants of the lease had been broken, that he had served a notice in ejectment, and that the premises would cost 70l. to repair. Some of the covenants had been broken and others not. The effect of the defendant's statement was that the lease and assignment were sold for a lower price than they otherwise would have produced. In an action for slander of title, the Judge directed the jury that the only question was, whether the defendant had said anything untrue about the lease, and that if he had made misrepresentations the plaintiff was entitled to recover:—Held, that this was a misdirection, the proper question being whether that part of the defendant's statement which was false was also malicious, and productive of damage to the plaintiff. *Brook v. Rawl*, 19 Law J. Rep. (N.S.) Exch. 114; 4 Exch. Rep. 521.

SLAVE.

In debt on a contract for the purchase of apprenticed labourers, under the 3 & 4 Will. 4. c. 73. formerly slaves, for instalments payable at certain periods, the defendant guaranteeing the undisturbed possession of the labourers during the period of their respective service, provided that, in default of the payment of any instalment, the plaintiff should be entitled to reclaim their services during the remainder of their apprenticeships, the defendant remaining liable for the value of their services at a certain rate; averment of performance on the part of the plaintiff, &c.; breach, of non-payment of two instalments. To a plea alleging that, during the term of service, the plaintiff removed, and retained the labourers, and that defendant had never since had the benefit, &c.:—Held, bad on demurrer, in not showing that the plaintiff exercised his right to retain on default made by the defendant: held, also, that the Court would not, in the absence of any express statement, intend that the contract was illegal at law generally, or for non-compliance with the regulations of the act.

To pleas also averring the contract to have been rescinded by the parties, and that by an order of the colonial government made after the entering into the contract, all such apprentices were thereby discharged from service,—Held, that such act of the colonial government did not operate as a consent of British subjects to determine the contract, which being absolute as an immediate sale and transfer, and the price due *in presenti*, although payable by instalments, the plaintiff was entitled

to the instalments, notwithstanding the determination of the apprenticeships before they fell due.

Held, also, that an omission to register the transfer, as required by the colonial regulation, (the omission so to do rendering the transfer void, and the purchaser not entitled to claim the services,) did not disentitle the plaintiff to enforce the purchase-money; and that, if the duty of registering lay on the vendor, it ought to have been shewn by the plea. *Mittelholzer v. Fullarton*, 6 Q.B. Rep. 989.

The principles of law which are applied to prize captures in time of war are applicable to questions of bounty for the capture of vessels engaged in the slave trade. The claim of one of H.M. slave cruisers to share in the bounties for the capture of a slave vessel overruled. *The Felicidade*, 3 Rob. 45.

Trespass was maintained for the seizure of slaves from a Spanish island, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law for the abolition of the slave trade.—Held, also, that the ratification of the defendants' act by the Ministers of State was equivalent to a prior command, and rendered it an act of State, and for which the Crown was alone responsible. *Buron v. Denman*, 2 Exch. Rep. 167.

SMALL DEBTS ACT.

[See DEBTOR AND CREDITOR—INFERIOR COURT.]

SODOMY.

Prisoner was indicted under the statute 7 & 8 Geo. 4. c. 29. s. 8. (in first count) for feloniously accusing A B of a certain infamous crime, that is to say, of having made to the prisoner a certain solicitation whereby to move and induce the prisoner to commit with him (A B) the crime of sodomy, with a view to gain and extort money from him. Second count charging the same offence somewhat differently:—Held, by seven of the Judges to five, that the evidence was not sufficient to prove the intent laid. *Regina v. Middleditch*, 1 Den. C.C. 92.

The patient may be convicted of sodomy, although the agent is under fourteen years of age. *Regina v. Allen*, 18 Law J. Rep. (N.S.) M.C. 72; 1 Den. C.C. 364; 2 Car. & K. 869.

SOLDIER AND SAILOR.

Period of service of boys in the navy extended by the 10 Vict. c. 30; 25 Law J. Stat. 95.

Time of service in the army limited by the 10 & 11 Vict. c. 37; 25 Law J. Stat. 145.

Naval prisons established, and provisions for apprehending deserters made by the 10 & 11 Vict. c. 62; 25 Law J. Stat. 202.

Time of service in the marine forces limited by the 10 & 11 Vict. c. 63; 25 Law J. Stat. 205.

SOMERSET HERALD.

[See ARREST.]

SOUTH SEA COMPANY.

Provisions as to unclaimed stock and dividends made by the 9 Vict. c. 8; 24 Law J. Stat. 50.

SOVEREIGN.

[See OFFENDERS.]

SPECIAL CASE.

[See COSTS.]

SPECIFIC PERFORMANCE.

[See COMPANY—PARTNERS—PRACTICE, IN EQUITY, DEMURTER—VENDOR AND PURCHASER.]

- (A) WHEN DECREED.
- (B) WHEN REFUSED.
- (C) PRACTICE ON BILL FOR.

(A) WHEN DECREED.

By an agreement between A and B, A agreed to lease to B a piece of land for ninety-nine years, at the rent of 10*l.*, and to convey the inheritance to B for the price of 180*l.*, at any time within a certain period from the date of the agreement, on notice being given by B of his intention to purchase; B agreed that, in case of such purchase, he would accept A's title without dispute. B gave notice of his intention to purchase:—Held, that B, on such notice being given, became bound to accept A's title, even though it should be bad; and that A was entitled to a specific performance of the agreement so far as related to the purchase. *Duke v. Barnett*, 15 Law J. Rep. (N.S.) Chanc. 173; 2 Coll. C.C. 337.

The defendants agent, by letter addressed and sent to the plaintiff's agent, stated that he was directed to offer a sum of 3,000*l.* for certain property belonging to the plaintiff. The plaintiff's agent, by his letter in answer thereto, stated that he accepted the offer for the property; at the same time adding, "If you approve of the inclosed, sign the same, and on receipt of the deposit we will sign you a copy." That letter contained a memorandum in writing, which was not produced, and no evidence was adduced on either side to shew the nature or particulars of it:—Held, on bill filed by the vendor against the purchasers for specific performance, that there was a binding contract, and a reference was directed to inquire into the title to the property. *Gibbins v. North-Eastern Metropolitan Asylum District*, 17 Law J. Rep. (N.S.) Chanc. 5; 11 Beav. 1.

An agreement was entered into with two vendors for the sale of two-sixths of certain leasehold pro-

perty, together with other the estates and interest of the vendors therein. It turned out that the vendors were only entitled to two twenty-one parts each of the estate:—Held, that the purchaser was entitled to specific performance of the contract, to the extent of the vendor's interest, with a proportionate abatement. *Jones v. Evans*, 17 Law J. Rep. (N.S.) Chanc. 469.

A plot of land was put up in several lots for sale by public auction, and previously to the sale the vendors printed and circulated particulars and conditions, accompanied by a plan of the land, from which it appeared that to each lot wide and hand-some roads would be secured. The plaintiff, at the sale, became the purchaser of one of the lots. After the sale it was discovered that one of the projected new roads would pass across a leasehold piece of land, whereby the risk of forfeiture thereof would be incurred. The plaintiff having filed a bill seeking specific performance of the contract in all respects,—Held, that he was entitled to a specific performance of the contract in accordance with the plan delineating the road in question and intended to be made if it could be carried out, but as the making of the road would incur the risk of forfeiture, the defendant could not be required by the plaintiff to make the road;—that a person not being a party to the contract entered into with the plaintiff, but only having joined with the vendor in the sale of their respective lands, was improperly made a party to the suit, and must be dismissed, with costs;—that the plaintiff was entitled to a specific performance of the contract, save as to the road, and as to that the plaintiff was entitled to a reference to the Master to ascertain the damages arising to the plaintiff thereout; that the plaintiff was not entitled to any costs up to the hearing, but that if, in lieu of taking a decree to the extent already stated, the plaintiff preferred bringing his action at law for damages, the bill must be dismissed, without costs. As against a party, who had subsequently to the filing of the original bill by the plaintiff, purchased of the vendor the lot contracted to be purchased by the plaintiff, and also the leasehold piece of land across which the new road was projected, and who was made a defendant by supplemental bill, the bill was dismissed, with costs. *Peacock v. Penson*, 18 Law J. Rep. (N.S.) Chanc. 57; 11 Beav. 355.

A, the owner of lands in the line of a railway, agreed in writing to sell a portion of such lands to the company, subject to the company making such roads, &c. as might be necessary to connect the portions of A's lands which would be severed by the line. A conveyed the land comprised in the agreement to the company, who entered and made their line. Disputes afterwards arose as to the sufficiency of the communications made by the company. On bill by A against the company for specific performance,—Held, that the contract was one which would be enforced in equity, and that the jurisdiction of the Court was not ousted by the Lands Clauses Consolidation Act, none of the provisions of which respecting the mode of ascertaining compensation were applicable to the case of a purchase by agreement, but only to a compulsory taking of lands by the company; and the Court referred it to the Master to inquire and state what roads were necessary and proper. *Sanderson v. Cockermouth*

and Workington Rail. Co., 19 Law J. Rep. (N.S.) Chanc. 503; 2 Hall & Tw. 327.

(B) WHEN REFUSED.

Agreement for a lease for five years, from the 1st of April 1840, the landlord undertaking to erect by that time a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount of the landlord's expenditure on the buildings. The new building was not erected, nor the old warehouse repaired on the 1st of April, but no objection was made by the intended lessees, who then occupied part of the premises under a former agreement, and shortly afterwards the whole premises were destroyed by fire. In such circumstances,—Held, upon a bill filed by the landlord, for specific performance of the agreement, and for the defendants to re-build the premises, and to accept a lease, that it was a condition precedent that the premises should be put in repair before the lease was granted, and that, as the landlord had not performed his engagement within the time limited, the contract could not be enforced in equity, and the bill was dismissed. *Counter v. Macpherson*; 5 Moore, P.C. 83.

The appellant having claimed to be a partner with one Paynter in gas-works, which the latter had erected and was about to sell to a company then about to be formed, it was agreed between them, for the purpose of ending their disputes respecting the ownership of the gas-works, that Paynter should be at liberty to sell the works at such price as he pleased, upon accounting to the appellant for the value of the works at a certain rate, and that Paynter should hold shares for the appellant in the company to the value of 2,000*l.* for two years. The company having been formed, and having purchased the gas-works from Paynter, the appellant filed a bill against him, and obtained a decree for specific performance of their agreement. Before that decree was made, the company was dissolved, and the gas-works were sold to the Ratcliff Gas-light and Coke Company. The appellant then filed a new bill against Paynter, the Ratcliff company, the directors of the dissolved company, and the assignees of Paynter, who had become bankrupt, to establish a lien upon the gas-works for what should be found due to him under the former decree, as well as to carry out the former decree against all these parties:—Held, by the House of Lords, affirming a decree of the Vice Chancellor, that the sale of the gas-works by Paynter to the Ratcliff company was authorized by the appellant's agreements; that he had no just claim against the company, or lien on the property, and that the supplemental bill was properly dismissed, with costs, as against all the defendants, except Paynter and his assignees. *Pinkus v. Ratcliff Gas Co.*, 1 H.L. Cas. 309.

This bill was filed for the purpose of enforcing a contract for a lease of mines, at a rent of one-fifteenth of the minerals obtained. The defendant had subsequently granted a lease to another party at the same rent. The bill charged, that, under an act of parliament, it was directed that the best rent should be obtained by the owner of the mines, and although one-fifteenth was a fair rent when the

plaintiff's contract was entered into, that afterwards the mines having become more valuable, that amount was not then a fair rent, and the lease granted by the defendant was therefore contrary to the act:—Held, upon a demurrer for want of equity, that a party coming for performance of a contract could only have it as it actually existed, and that as the rent reserved in the plaintiff's contract was not the best that could be obtained, it was contrary to the act, and in effect fraudulent. The plaintiff, therefore, could not have his contract enforced, and the demurrer was allowed.

Held, also, that it was an undeniable proposition, that when a party entered into a contract without having the power of performing it, and afterwards acquired the right to do so, he was then bound to perform it. *Carne v. Mitchell*, 15 Law J. Rep. (n.s.) Chanc. 287.

The particulars of sale of a timber estate, which took place on the 4th of July, described the property as "a wood containing upwards of sixty-five acres of oak timber trees, the average size of which approached to fifty feet;" but the number of timber trees was not stated in the particulars. After various fruitless applications by the defendant (the purchaser) to obtain time for payment, on the 30th of September following, he, for the first time, refused to complete, on the ground of misrepresentation as to the average size of the trees. The vendor then filed his bill for specific performance, and, if necessary, with compensation. By the defendant's witnesses the average size of the trees was estimated at twenty-two feet, and by the plaintiff's admission it did not exceed thirty-five feet:—Held, that as at the time of the sale the foliage rendered it impossible for the defendant to view the wood, the statement in the particulars must be held to be a definite representation of the average size of the trees; and as the compensation for the difference could not be measured by reason of the number of trees not being specified in the particulars, the bill was dismissed, but without costs. *Lord Brooke v. Rounthwaite*, 15 Law J. Rep. (n.s.) Chanc. 332; 5 Hare, 298.

A contract for the purchase of an estate was to be completed on the 29th of September. Notice was given on the 24th of November following, by the purchaser, of his abandonment of the contract. No effectual step to complete was taken by the vendor till some months after that time; and the purchase-money, being trust property, was, in the mean time, invested in the purchase of another estate. A bill, filed by the vendor against the purchaser, for specific performance, was dismissed, with costs, but without prejudice to the plaintiff's right to bring his action if he should be so advised.

A mortgagee with power to sell the mortgaged estate, and to give an effectual receipt for the purchase-money, held, under existing circumstances, bound to procure the execution of the bankrupt mortgagor's assignees to the deed of conveyance. *Benson v. Lamb*, 15 Law J. Rep. (n.s.) Chanc. 218; 9 Beav. 502.

A father (tenant for life) and a son (tenant in tail) in 1831 joined in mortgaging the estate to secure payment of a debt of the son, under an agreement to suffer a recovery to enure as to the remainder after the life estate, in case the father

should be obliged to pay any interest on the mortgage debt, or the son should not pay off the debt by a certain day, and the father should then pay it off and release the son therefrom, to the use of the father in fee, the father covenanting to convey or devise a seventh part of the estate to the son; and in case the son should pay off the mortgage by the time mentioned, then to the son and the heirs of his body, charged with 500*l.* to such persons as the father should appoint. The son did not pay off the mortgage, nor did the father pay it off or release the son, but the father paid the interest until his death in 1841, and after his death his devisees paid off the mortgage:—Held, that neither party having performed the agreement, nor apparently acted on it in the father's lifetime, the Court would not after his death enforce its specific performance, especially as it was an agreement for a sale of the son's reversionary interest at an undervalue. *Playford v. Playford*, 4 Hare, 546.

In a suit by a vendor for specific performance, against a purchaser, if the contract stipulates that possession should be given at a specified day, it is competent for the purchaser to insist that both time and a vacant possession are of the essence of the contract; and the Court will receive as evidence that such was the purchaser's object, statements made by his agent at the time of signing the contract.

Where a purchaser has consented to enlarge the time for completion, and where a vacant possession is of the essence of a contract, it is competent for him to object to complete at the end of such enlarged time if the possession is not then vacant, and if he has done no act towards completion of the contract after he had notice that vacant possession could not be given at the day.

But where a purchaser had by his acts waived completion in the first instance, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly upon the discovery that vacant possession could not be given according to stipulation, declined to complete, the Court, although it dismissed a bill against such purchaser for a specific performance, dismissed it, with costs. *Nokes v. Kilmorey (Lord)*, 1 De Gex & S. 444.

In October 1840 a written contract for the sale of the plaintiff's interest in a manor under a lease for lives was entered into with the defendant. A deposit was paid on the signing of the contract, and on the 30th of October following an abstract was delivered; objections were taken to the title, and a correspondence between the parties took place, and continued until the 20th of August 1841, when the defendant gave a formal notice of rescinding the contract. Various communications on the subject of the title afterwards took place between the parties, but always expressed to be without prejudice to the notice of rescinding. In November 1841, the defendant required further evidence, and intimated that if it were not perfected within two months, he would fall back upon his original position under the rescinded contract. On the 17th of January 1842, immediately upon the expiration of the two months, the defendant gave notice that he insisted upon the notice of rescinding of the 20th of August 1841, and he declined any further communication. Nothing more passed between

the parties until the 30th of August 1843, when the vendors filed their bill for specific performance:—Held, that the unexplained delay of the vendors from the 17th of January 1842 to the 30th of August 1843 had precluded them from the assistance of a court of equity in enforcing performance of the contract, and especially in a case where time was so material; and the Court refused to direct a reference as to whether a good title had been shewn on the 17th of January 1842, and dismissed the bill with costs.

Where, after notice of rescinding the contract, a correspondence on the title is continued under protest, this gives to the correspondence the character of a treaty for the renewal of the rescinded contract, and of the continuation of a subsisting contract.

The circumstance, that the purchaser, after notice of rescinding, has allowed the deposit to remain in the hands of the vendor without taking any steps to enforce repayment, is no excuse for the vendor's laches in not enforcing the contract.

Quære—Whether the Court could, by decree in the cause, order repayment by the plaintiff of the deposit. *Southcomb v. the Bishop of Exeter*, 16 Law J. Rep. (N.S.) Chanc. 378; 6 Hare, 213.

C having taken the benefit of the Insolvent Debtors Act, his assignees, with the consent of C's creditors, entered into an agreement with M, that he should pay 35,000*l.* for the purchase of the estate of C, and that the assignees should cause the sale to take place by public auction, without any reserved bidding, except the proposed bidding of 35,000*l.*, and that if M should, at such sale, bid the sum of 35,000*l.* or any higher sum, and there should be no bidding higher than his, the estate should be knocked down to him at such bidding of 35,000*l.*; but M was not bound to make any higher bidding. Particulars and conditions of the sale of the estate were duly printed and circulated, stating that the same was to be sold without reserve. M's agent attended the sale, and also W, the agent of F, and many other persons. The estate was knocked down to F at 50,000*l.*, who, through his agent, paid a deposit of 5,000*l.*, and signed the usual undertaking to complete his contract; the immediately preceding bidding of 49,800*l.* being made by M. F, at the time of the sale, knew that M would bid 35,000*l.* for C's estate; but it did not appear that F was acquainted with the agreement between M and C's assignees:—Held, under the circumstances, that a bill by the assignees of C, seeking specific performance of the contract, could not be sustained; and the same was dismissed, with costs; but F, by his answer, having repudiated the agency of W, who attended the sale, and bid on F's behalf, was ordered to pay the costs incident to the making of W a party to the suit.

Where property is advertised to be sold "without reserve," it excludes all interference, direct or indirect, by the vendor which can, by any possibility, affect the right of the highest bidder to be declared the purchaser, and if there is any evasion of that engagement by the vendor, a court of equity will not assist him to enforce the sale. *Robinson v. Wall*, 16 Law J. Rep. (N.S.) Chanc. 17; 10 Beav. 61; affirmed, 16 Law J. Rep. (N.S.) Chanc. 401; 2 Ph. 372.

On the treaty for the under-lease of a house, the

agent for the plaintiff tendered an unconditional agreement for the signature of the defendant. The latter signed his name and initials in pencil, and added also in pencil his approval of the agreement, subject to the condition that there was nothing unusual in the covenants in the original lease. Pending the settling of the draft of the under-lease, the defendant discovered the existence of a nuisance, which would prevent his occupation of the house, and he thereupon abandoned the treaty. The existence of the nuisance was unknown to the plaintiff:—Held, in a suit for the specific performance of the defendant's agreement, that under the circumstances, the Court would try the case strictly between the parties, and that in the absence of actual evidence of the agent having direct or implied authority to accede to the pencil additions, he could not bind the plaintiff; and that until the latter had assented to the alterations, the agreement was only a proposal, and might be abandoned by the defendant: and the bill was dismissed, with costs. *Lucas v. James*, 18 Law J. Rep. (N.S.) Chanc. 329; 7 Hare, 410.

Under two agreements for sale (one of which was to be completed on the 1st of June and the other on the 29th of September 1846) disputes arose upon the title and upon certain valuations incident to the purchase. The conveyances were engrossed on the 4th of January 1847, and the vendor made two requisitions to the purchaser to complete, the first on the 11th of January and the second on the 25th of January 1847, and intimated that non-compliance with the requisitions would be treated by the vendor as a breach of the agreements. The purchaser did not comply; but his solicitors reiterated claims to certain deductions and abatements. The disputes continued until after the 13th of February 1847, when the purchaser filed a bill for specific performance:—Held, that this was not such a default by the plaintiff as would prevent him from having specific performance, but it appearing by the correspondence that the purchase was delayed up to and until after the filing of the bill, not by the claims of deduction, but by the purchaser's want of means to pay even as much of the purchase-money as, upon his own view, he had to pay, the Court dismissed the bill, but gave the defendant no costs, except on the terms of returning the deposit. *Gee v. Pearce*, 2 De Gex & S. 325.

The landlord of a workshop, which he held under a lease, agreed in writing to underlet it at a yearly rent, with an option to the tenant to take an under-lease upon the same terms for twenty-one years, from the previous Lady-day. The tenant continued in possession under this agreement for four years, when he received notice to quit. He then applied to his landlord for a lease for twenty-one years, according to the agreement. Some months afterwards the landlord obtained possession of the premises under a warrant of possession, from a district court. The tenant filed a bill against the landlord for specific performance and an injunction. It appeared at the hearing, that the tenant had not kept the premises in repair. The Court dismissed the bill, with costs, and expressed a doubt whether the plaintiff had not, by his delay alone, lost his option to renew. *Nunn v. Truscott*, 3 De Gex & S. 304.

If property not intended to be sold be, by the

ignorance or neglect of the vendor's agent, included in a contract of sale with other property intended to be sold, a case may arise in which the Court will refuse to compel a specific performance of the whole contract; and, if the purchaser should decline taking so much as was intended to be sold, the Court would not rescind the contract, but would leave the purchaser to his remedy at law. This course, however, will not apply to sales under orders of the Court, where the Court must decide whether the sale is to be carried into effect or the property resold; but in these cases it is expedient, as far as possible, to adopt the rules which regulate the practice as between ordinary vendors and purchasers.

Thus, in a sale under the order of the Court, where it was clear that a portion of the property was not meant to be included in the contract, the Court, in the absence of proof of misconduct in the purchaser or his agent, refused to compel a specific performance, excluding the portion in question. *Atwanley v. Kinnaird*, 2 Mac. & G. 1.

(C) PRACTICE ON BILL FOR.

[See PRACTICE, IN EQUITY, Demurrer.]

A contracted to sell to B a mortgage of tolls for a term, held by A under a drainage act. An objection was made by B to the title, on the ground that the will of F, a former owner of the mortgage, had been proved by G his executor, in the Prerogative Court of Canterbury, and that the will of G had been proved by his executor in the Consistory Court of Lincoln. In a suit for a specific performance of the contract,—Held, that B could not compel A to cause the will of G to be proved in the Prerogative Court of Canterbury. *Williams v. Bland*, 15 Law J. Rep. (n.s.) 331; 2 Coll. C.C. 575.

In a suit for the specific performance of a written agreement, the defendant will not be allowed to set up as a bar to the suit that the written agreement does not contain all the terms of the real agreement, unless the proof of the omission by mistake of some term in the written agreement be very clear.

In a suit by the Droitwich Patent Salt Company, for the specific performance of an agreement by the British Alkali Company to take a lease or transfer of the works &c. of the former, it was objected, by the defendants, that such an agreement would be destructive of the fundamental objects of the plaintiffs' company, and the Court, at their request, sent this question to be tried at law. *Clay v. Rufford*, 19 Law J. Rep. (n.s.) Chanc. 295.

A married woman having separate property and living apart from her husband, entered verbally into an agreement to take a leasehold house for a term. The agreement was reduced to writing, and signed by the lessor's agent, and handed to her. She retained it, but did not execute it, or any counterpart. In letters written by her and her solicitors, it was referred to as an agreement, and she entered into possession. In a suit by the lessor to enforce payment of the rent according to the agreement as a charge upon her separate estate, the Court directed a reference as to the lessor's title.

Waiver of production of lessor's title cannot be insisted on by him in a suit for a specific performance of an agreement for a lease, unless it is expressly alleged by the bill. *Gaston v. Frankum*, 2 De Gex & S. 561.

After answer to a bill by a vendor for specific performance, a reference as to title was directed upon motion, notwithstanding the answer stated that the time for completing the contract had long since expired, and that the vendor had not complied with the requisitions on the abstract, and that the purchaser had given notice of rescinding the contract.

Where the dispute is as to the application of conditions of sale, and the propriety of the conditions is undisputed, the question is one of title, and not of contract.

Where time is not originally of the essence of the contract, a purchaser cannot rescind the contract without notice, or before the expiration of his notice, on the ground of delay on the part of the vendor in complying with his requisitions of title. *Wood v. Machu*, 16 Law J. Rep. (n.s.) Chanc. 21.

STAMP.

[See ATTORNEY AND SOLICITOR—BILL OF EXCHANGE—PLEADING, AT LAW.]

- (A) AGREEMENTS.
- (B) APPOINTMENT.
- (C) AWARD.
- (D) BILLS AND NOTES.
- (E) BONDS.
- (F) CONVEYANCES.
- (G) DEEDS.
- (H) LEASES.
- (I) LETTER OF ATTORNEY.
- (K) MEMORANDUM.
- (L) MORTGAGES.
- (M) POLICY OF ASSURANCE.
- (N) RECEIPTS.

Alteration of certain stamp duties by the 13 & 14 Vict. c. 97; 28 Law J. Stat. 276.

(A) AGREEMENTS.

[See (I) Letter of Attorney.]

A contract made by several letters, written not by the contracting party himself, but by his agent, is within the proviso in the Stamp Act, the 55 Geo. 3. c. 184, schedule, part 1, 'Agreement,' and requires a stamp of 1*l.* 1*s.* only. *Grant v. Maddox*, 15 Law J. Rep. (n.s.) Exch. 104; 15 Mee. & W. 739, n.

A defendant in replevin, in support of his right as bailiff to distrain, gave in evidence the following document, signed by the party under whom he made cognizance: 'I, J. Ware, of, &c., having, on the 7th of October 1843, borrowed from Mr. J P (the defendant,) 300*l.*, did then pledge with him certain title-deeds of houses in T, held by me, in order to secure to him 300*l.*, with interest. I did then authorize the said J P to receive the rents of the said houses during my right and interest therein; and I hereby confirm and allow to be good and valid all acts, distresses, &c., and particularly a distress taken upon W P (the plaintiff), tenant of one of the said houses by the said J P, and hereafter to be made and taken by him in the care, management, and recovering of the rents of the said houses. And I ratify and confirm all acts, distresses,

&c. made or to be made, &c. by the said J P, to the end that the rents of the said houses may be secured and taken by the said J P during all my estate or interest:—Held, that this document did not require a stamp, either as an agreement accompanied with a deposit of title-deeds for making a mortgage, or as an authority to distrain, or as an agreement to distrain. *Pyle v. Partridge*, 15 Law J. Rep. (N.S.) Exch. 129; 15 Mee. & W. 20.

By an instrument in writing, not under seal, reciting that T D had purchased a piece of ground, with four messuages built thereon, in one of which the plaintiff resided, it was agreed that the plaintiff should continue to reside therein during the residue of T D's interest therein, provided the plaintiff should so long live, at the annual rent of 1s., and in the event of his dying during the continuance of the term his widow should reside therein on the same terms; and T D further agreed to assign all his interest in the premises so purchased to the plaintiff, on payment, within seven years, of 140l., together with all expenses:—Held, that the instrument required an agreement stamp as well as a lease stamp. *Love-lock v. Frankland*, 16 Law J. Rep. (N.S.) Q.B. 182; 8 Q.B. Rep. 371, 379.

In an action by the payee against the maker of a promissory note for 485l., in which the defendant had pleaded that he did not make the note, it was proposed, in addition to proof of defendant's handwriting of the signature of the note, to put in an unstamped agreement between the same parties, of the same date as the note, in which it was recited that the one had bought of the other the lease of a public house for 485l., and had given a note for that sum as a security for the purchase-money, and by which it was agreed that the vendor should hold the lease of the house till the purchase money was paid:—Held that, as the agreement was one that ought to have borne a stamp, it was not receivable in evidence, even for the purpose of proving the admission contained in the recital. *Keane v. James*, 2 Car. & K. 725.

The following document was held to be within the exemption in the Stamp Act, 55 Geo. 3. c. 184. sched. part 1. 'Agreement,' relating to goods, wares, or merchandise, and not to require a stamp:—"Gentlemen,—In consideration of your consigning to my friends, Messrs. H G, of C, sixteen casks of sherry wine, and engaging to pay me 1 per cent. on the amount of the proceeds, I hereby agree to guarantee to you the proper sale of the said wines and the payment of the proceeds in due time." (Signed) &c. *Sadler v. Johnson*, 16 Law J. Rep. (N.S.) Exch. 178; 16 Mee. & W. 775.

A contract for the sale of railway scrip is not a contract for the sale of goods, &c. within the meaning of the exemption in the Stamp Act, sched. tit. 'Agreement.' *Knight v. Barber*, 16 Law J. Rep. (N.S.) Exch. 18; 16 Mee. & W. 66.

"Memorandum of one hundred and seven pounds had by me of S, being an advance on books sent in for immediate sale by auction:—Held, to be an agreement relating to the sale of goods, and admissible without a stamp. *Southgate v. Bohn*, 16 Law J. Rep. (N.S.) Exch. 50; 16 Mee. & W. 34.

The defendant, by agreement in writing, gave up certain premises, with the goodwill, &c., to the plaintiff for 7l. 10s., and agreed not to open a shop

in the same line of business within a mile, under a penalty of 20l.:—Held, first, that the agreement did not require a stamp. Secondly, that it was not void as being in restraint of trade. *Pemberton v. Vaughan*, 16 Law J. Rep. (N.S.) Q.B. 161; 10 Q.B. Rep. 87.

A letter of allotment, which is not a mere acceptance of the terms stated in the letter of application, does not require an agreement stamp. *Vollans v. Fletcher*, 16 Law J. Rep. (N.S.) Exch. 173; 1 Exch. Rep. 20.

An agreement, made at a time when the 55 Geo. 3. c. 184, schedule, part 1, 'Agreement,' was in force, and under which it required a stamp of 1l., was, subsequently to the 7 Vict. c. 21. coming into operation, stamped, under a penalty, with the stamp of 2s. 6d., as required by the 2nd section and schedule of the latter act:—Held, that the agreement was admissible in evidence. *Deakin v. Penniell*, 17 Law J. Rep. (N.S.) Exch. 217; 2 Exch. Rep. 320.

If at the time of making an agreement the subject-matter of it does not appear to be of the value of 20l., a stamp does not become necessary merely because the value as subsequently ascertained a little exceeds that amount. *Liddiard v. Gale*, 19 Law J. Rep. (N.S.) Exch. 160; 4 Exch. Rep. 816.

An agreement of reference of all matters in difference in a cause does not require a stamp when it does not appear that the matter of the agreement is of the value of 20l. *Lloyd v. Mansel*, 19 Law J. Rep. (N.S.) Q.B. 192; 1 L. M. & P. 822.

The following document was held not to require an agreement stamp:—

"I do hereby request S B, bailiff to the Earl of D, my landlord, who, on the 4th of November 1848, having distrained my goods on the premises which now I hold situate at, &c. for 100l. as rent due to the said S B from the said premises, and I request him to forbear the sale thereof until the 2nd of February 1849, to enable me to discharge the said rent; and I do hereby request, agree and consent that the said goods so distrained shall remain at my proper cost in his possession upon the said premises until the 2nd of February 1849; and I undertake to give up the same goods and not to replevy the same, and that this distress shall remain in full force during that time; and I do hereby undertake to give up peaceably possession of the premises and effects distrained on the 2nd of February 1849, and pay all costs and charges attending this distress. As witness my hand, this 4th of November 1848.—Noah Fishwick." *Fishwick v. Milnes*, 19 Law J. Rep. (N.S.) Exch. 153; 4 Exch. Rep. 825.

In an action for wages for the salary of an actor three letters were put in from the defendant to the plaintiff. The first was dated the 17th of November 1848, "If you are disposed to take a weekly salary of 2l. and a clear half annual benefit, I think I could receive you at Christmas, provided the terms suit you (and a month's notice on either side in case of separation). Let me have your reply." The second, dated the 14th of April 1849, stated that the defendant was obliged to offer lower terms for the summer season, and offered 1l. 10s. per week, and gave notice that if this offer was not accepted, the plaintiff's services would not be required after the 26th of May. No answer from the

plaintiff was put in evidence. The third letter, dated the 21st of April, ran as follows:—"I have received your letter, and on reconsideration will give you the same terms, 2*l.* per week for the summer season":—Held, on motion to enter a nonsuit according to leave reserved, that these letters were properly admitted without a stamp, as amounting only to a proposal, and not constituting an agreement in writing." *Hudspeth v. Yarnold*, 19 Law J. Rep. (N.S.) C.P. 321.

(B) APPOINTMENT.

The appointment in writing of a person to be treasurer to a board of guardians at a yearly salary, requires a stamp. *Regina v. Welch*, 2 Car. & K. 296.

(C) AWARD.

The defendants, who were coach-proprietors, were in the habit of horsing a coach for certain stages, and of having a monthly account made out, containing the names of the proprietors, the amount of the receipts and disbursements, the number of miles worked by each, and the proportions of the earnings to which each was entitled. The materials for the account were obtained partly from the way-bills, and partly furnished by the defendants to the clerk of one of them. The practice was for the clerk to send a copy of his account to each of the proprietors, shewing the amount which each proprietor had to receive or pay. By the terms of the account, each proprietor was to receive the difference, as the case might be, from one or more of the other proprietors:—Held, that this account was not an award, and was admissible in evidence without a stamp. *Goodyear v. Stimpson*, 15 Law J. Rep. (N.S.) Exch. 191; 15 Mee. & W. 16.

(D) BILLS AND NOTES.

An order signed by A, addressed to his bankers, directing them to pay a sum of money to B, and which was forthwith placed in B's hands, who with A immediately went to the banking house and delivered it to the bankers, requires a bill stamp under the 55 Geo. 3. c. 184.

Though the intention of A and B was that the order should be immediately delivered to the bankers, yet the fact that it was according to the agreement delivered by A to B, brought it within the Stamp Act. *Parsons v. Middleton*, 6 Hare, 261.

(E) BONDS.

Bond for 2,000*l.*, conditioned for payment to the trustees of a banking company of all and every such sum and sums not exceeding in the whole 1,000*l.*, which, from time to time, should be and remain due and owing from the obligor to the company, on the balance of his account current with the company, together with such interest and commission as should be due:—Held, not a bond "given as a security for the repayment of money lent, advanced, or paid, or which may become due on an account current, &c.; where the total amount of the money secured or to be ultimately recoverable thereupon is uncertain, and without limit," within the meaning of the 55 Geo. 3. c. 184. schedule, part 1. tit. 'Bond;' and that an *ad valorem* stamp of 6*l.*

was sufficient. *Frith v. Rotherham*, 15 Law J. Rep. (N.S.) Exch. 133; 15 Mee. & W. 39.

A bastardy bond, in the penal sum of 100*l.*, conditioned to indemnify parish officers from all costs, charges, and expenses, by reason of the birth and maintenance of a bastard child, until such child should obtain a settlement out of the parish, is sufficiently stamped with a stamp of 1*l.* 15*s.* *Bownes v. Marsh*, 16 Law J. Rep. (N.S.) Q.B. 36; 10 Q.B. Rep. 787.

A bond made in 1812 conditioned for the replacing stock of the value of 792*l.* and for paying the amount of the dividends in the mean time, was stamped with a 3*l.* *ad valorem* bond stamp:—Held, that the stamp was sufficient under the 48 Geo. 3. c. 149, although there was of even date with the bond an insufficiently stamped agreement, (accompanied with a deposit of title-deeds,) for making a mortgage of the estate comprised in the title-deeds as a security for the replacement of the stock and payment of the sums in lieu of dividends. *Blair v. Ormond*, 19 Law J. Rep. (N.S.) Q.B. 228.

(F) CONVEYANCES.

Any written instrument, operating as the record of a transfer of property, is a conveyance within the meaning of the Stamp Act.

Such an instrument, if it be "a memorandum, letter, or agreement, relating to the sale of goods, wares and merchandise," is exempted from all stamp duty, but if it operate as a transfer of anything else, it must be stamped as a conveyance.

The word "fixtures" means the right of severance of chattels attached to the soil, but not part of the freehold. A transfer of "fixtures" is, therefore, at least the transfer of the right of severance; and whether a memorandum of the sale of fixtures transfers any interest in the chattels themselves, or not, it is a conveyance within the words of the Stamp Act, which include the "transfer of any right;" and as fixtures are not goods, wares and merchandise, it is not within the exemption. Therefore, a memorandum using words in the past tense, "Memorandum that A B has sold the goods and fixtures in a shop to C D," signed by both parties, was held to require an *ad valorem* stamp as a conveyance. *Horsfall v. Key or Hey*, 17 Law J. Rep. (N.S.) Exch. 266; 2 Exch. Rep. 778.

H being seised in fee of certain land, agreed with the defendant, a builder, to execute to him a lease of the land and of a house which it was agreed the defendant should build thereon for ninety-nine years, at a rent of 9*l.* 5*s.* The defendant was to lay out 600*l.* in building the house. The house having been built, O contracted to buy for 850*l.* all the defendant's interest in the said house and land. The defendant, in order to effect this contract, procured an indenture to be made between himself, H, and O, whereby H leased the house and land in question to O for ninety-nine years, at the rent of 9*l.* 5*s.*, payable to H. The purchase-money was not stated in the lease, which was the principal and only deed whereby the house and land were conveyed:—Held, that the lease to O was a conveyance upon the sale of land within the schedule of the 55 Geo. 3. c. 184; that duty was payable thereon as upon a conveyance; and that the defendant and O were liable to penalties for not truly insert-

ing the consideration in the lease. *Attorney General v. Brown*, 18 Law J. Rep. (N.S.) Exch. 336; 3 Exch. Rep. 662.

(G) DEEDS.

A being entitled to thirty shares in an incorporated company, B to twenty, and C to ten, joined in conveying the same, by the same deed, to D. The several interests did not appear in the deed, and the *ad valorem* stamp was calculated upon the whole shares collectively:—Held, that the deed was admissible in evidence. *Wills v. Bridge*, 18 Law J. Rep. (N.S.) Exch. 384; 4 Exch. Rep. 193.

The indenture mentioned in the first count of the declaration was of four parts, between and executed by the vendors, a trustee, the plaintiff, and the defendant. It recited the title of the vendors to certain copyholds, an agreement for sale to the defendant, that he had taken possession and built a house thereon, an agreement by the plaintiff with the defendant to lend him some money by way of mortgage, and that for the purpose of carrying the agreements for mortgage and purchase simultaneously into effect, a surrender was to be made of the copyholds by the vendors, to a trustee, to secure the money advanced by the plaintiff. The vendors then covenanted with the plaintiff, his heirs, &c., and separately with the defendant, his heirs, &c., that they had a good title, &c., for quiet enjoyment, &c.; and the defendant also thereby covenanted to pay to the plaintiff the sum advanced, with interest. The indenture mentioned in the second count was between and executed by the plaintiff and the defendant; it recited the former deed, default in payment of the sum thereby secured, a further loan by the plaintiff; and the defendant thereby covenanted to pay the whole sum, with interest, and that the copyholds should remain further charged with the entire sum:—Held, that the indenture in the first count was single in its nature and object, though treating of several matters; that it was not within the statute of 12 Anne, c. 9. s. 24, and, therefore, liable only to the single stamp duty of 35s.

Held, that the indenture in the second count was a deed constituting a further charge, and liable only to the *ad valorem* stamp duty of 30s. under the 55 Geo. 3. c. 184. *Rushbrook v. Hood*, 17 Law J. Rep. (N.S.) C.P. 58; 5 Com. B. Rep. 131.

(H) LEASES.

[See (A) Agreements—(F) Conveyances.]

It was stated in an agreement, which amounted to a lease, that A agrees to let certain premises to B for two years, at the rent of 50*l.* a year; that B shall have the right of purchasing the premises at any time during the term, it being understood that A is possessed of the same premises for his own life, and the life of M, and the survivor of them:—Held, that a 30s. stamp was sufficient.

Held also, that by the agreement A was bound to make out a title to the premises for the lives of A and M, and the survivor of them. *Worthington v. Warrington*, 17 Law J. Rep. (N.S.) C.P. 117; 5 Com. B. Rep. 635.

To debt for rent due on a lease, the defendant pleaded, set-off for money had and received. The

plaintiff had granted to the defendant a prior lease at a certain rent, and at a premium of 40*l.*, and being indebted to the defendant for work done to that amount, it was agreed on a settlement of accounts that the work done should be treated as payment of the premium; but the premium was not expressed in the lease. The defendant sought to set off the premium thus paid, on the ground that he was entitled by the 48 Geo. 3. c. 149. s. 24, to recover it by reason of its not having been expressed in the prior lease:—Held, first, that the effect of the 55 Geo. 3. c. 184. was to put leases on the same footing as conveyances, under the 48 Geo. 3. c. 149, and to make it necessary to state the premium or consideration in the lease; secondly, that the transaction amounted to money paid by the defendant to the plaintiff, and that it might be recovered back in an action for money had and received by virtue of the 48 Geo. 3. c. 149. s. 24, and therefore might be set off. *Gingell v. Purkins*, 19 Law J. Rep. (N.S.) Exch. 129; 4 Exch. Rep. 720.

(I) LETTERS OF ATTORNEY.

A, the drawer of certain bills, wrote a letter to B in the following terms:—"I do hereby authorize you to indorse, or cause to be indorsed, my name to three several bills of exchange now in your possession (describing them), which said indorsements I do hereby undertake shall be binding upon me, and I do further undertake to pay you the amount of the several bills as they respectively become due, should they not be duly honoured at maturity:—"—Held, that this was not an agreement, but a letter of attorney, and should be stamped as such under the statute 55 Geo. 3. c. 184. sched. part 1. *Walker v. Remmett*, 15 Law J. Rep. (N.S.) C.P. 174; 2 Com. B. Rep. 850.

(K) MEMORANDUM.

[See (A) Agreements—(N) Receipts.]

In an action for money had and received, the defendant put in evidence the following document, written by the plaintiff, on the back of an unstamped receipt: "Balanced up to this day, as per cash-book 19th of November 1845":—Held, that this document was admissible in evidence without being stamped.

Such a document is good *prima facie* evidence to shew that, up to the day, of its date, there was no debt existing between the parties. *Finney v. Toote*, 17 Law J. Rep. (N.S.) C.P. 158; 5 Com. B. Rep. 504.

In an action against the acceptor of an accommodation bill, the following memorandum, with reference to the bill declared on, was held to be admissible in evidence without a stamp,—"I hereby acknowledge that you have, for my accommodation, accepted a bill of even date herewith, for 25*l.*, payable, &c.; and I agree to provide for the same when due." *Nollet v. Webb*, 5 Com. B. Rep. 834.

Under a plea of payment to an action for goods sold and delivered, a document in the following form is not admissible in evidence without a stamp.—"Memorandum, that any demand we may have against Mr. George Whiting, for ironwork, &c. is this day discharged, in consideration of services

rendered by him to us. N.B. Particulars of our account shall be delivered with stamp receipt." *Livingston v. Whiting*, 19 Law J. Rep. (N.S.) Q.B. 528; 15 Q.B. Rep. 722.

(L) MORTGAGES.

A 25*l.* stamp is not necessary for a mortgage deed to secure an indefinite sum, where a subsequent proviso limits the principal sum to be secured. *Doe d. Smith v. Warner*, 2 Car. & K. 1014.

By a mortgage deed of 1773, J had mortgaged certain premises in fee to M for 600*l.*, with the usual proviso for redemption on payment, &c., but without any power of sale. Further charges to the amount of 400*l.* were afterwards created in favour of M and R, his devisee, who called for the money. A mortgage deed of 1837, reciting the above facts, stated that the plaintiff had agreed to pay 1,000*l.* to R, and had advanced 1,723*l.* to the defendant, the heir-at-law of J; that R, in consideration of the 1,000*l.* paid to him by the plaintiff, had conveyed the premises to the plaintiff in fee, subject to a proviso for redemption on payment of the entire sum of 2,723*l.* The deed contained a covenant by the defendant to pay the sum of 2,723*l.*, but on different days from those specified in the mortgage of 1773, and also a power of sale. It bore a 6*l.* stamp, the proper *ad valorem* duty on a mortgage for 1,723*l.*:—Held, that the deed of 1837 contained more than a transfer of the old mortgage and the advance of a further sum; and that the covenant to pay the 1,723*l.* at other times than those stated in the deed of 1773, together with the power of sale, rendered a deed stamp necessary. *Humberstone v. Jones*, 16 Law J. Rep. (N.S.) Exch. 293; 16 Mee. & W. 763.

By deed between E B (mortgagee) of the first part, M G (devisee for life under the will of the mortgagor) of the second part, and J G (devisee in remainder in fee) of the third part, reciting an original mortgage for 1,000 years, to secure 150*l.* and interest, in consideration of 350*l.* (being 165*l.*, the amount due for principal and interest due on the original mortgage, and 185*l.* further advance) paid by the lessor of the plaintiff, all the parties assigned the premises comprised in the original mortgage to her for the residue of the term of 1,000 years, subject to a proviso for redemption on payment of the whole sum of 350*l.* at a different day from that named in the original mortgage, and M G and J G entered into a fresh covenant to pay the whole 350*l.*, at the time mentioned in the proviso:—Held, that this deed required to be stamped with an *ad valorem* stamp, as upon a new mortgage for 185*l.*, and also upon a deed stamp, as the covenant by the devisees, for payment of the old as well as the new advance created a fresh security. *Doe d. Crawley v. Guttridge*, 17 Law J. Rep. (N.S.) Q.B. 99; 11 Q.B. Rep. 409.

A mortgage given as an additional security for a sum secured by bond which is stamped with the proper duty, is only liable to the ordinary deed stamp. *Watson v. Macquire*, 5 Com. B. Rep. 836.

An assignment of a policy of assurance as security for a debt, with a proviso for redemption, is a mortgage within the 53 Geo. 3. c. 184, sched. part 1,

and therefore liable to an *ad valorem* stamp. *Caldwell v. Dawson*, 5 Exch. Rep. 1.

(M) POLICY OF ASSURANCE.

An instrument for assuring the owners of cattle from loss arising from their death is a policy of assurance, and subject to the stamp duty imposed by the 10 Ann. c. 26. s. 71; and parties improperly omitting to stamp it are liable to the penalty of 5*l.* imposed by that act, and not to that of 500*l.* imposed by the 35 Geo. 3. c. 63. s. 17, and the 55 Geo. 3. c. 184.

The 35 Geo. 3. c. 63. imposes no duty upon any but marine insurances, and the effect of the 55 Geo. 3. c. 184. s. 8. is to preserve all the powers, directions, and penalties of the former act, and make them applicable to the new duties. *Attorney General v. Cleobury*, 18 Law J. Rep. (N.S.) Exch. 395; 4 Exch. Rep. 65.

(N) RECEIPTS.

The plaintiff, having applied for shares in a joint-stock company, received a letter of allotment, and thereupon paid a deposit into the banking house of the company, and received from them the following document:—

"The London and Westminster Water Company.

—London, Feb. 8, 1841.

"Received 100*l.*, to be placed to the account of W C, T D, J P M'D, J W, and J P C.

"For Messrs. Jones, Lloyd, & Co., 100*l.*

"A. Palmer."

"This receipt not transferable. The party to whom these shares are allotted is requested to attend immediately at the offices of the company, No. 7, St. Martin's Lane, Trafalgar Square, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares.—Monday, the 8th of February, is the last day for such attendance":—Held, first, that the document did not require a stamp, being a banker's accountable receipt, within the meaning of the exemption in the 55 Geo. 3. c. 184, Schedule, part 1, tit. "Receipt." Secondly, that the plaintiff was bound to produce the letter of allotment, as it shewed the terms of the contract on which the money had been paid. *Clarke v. Chaplin*, 16 Law J. Rep. (N.S.) Exch. 246; 1 Exch. Rep. 26.

In an action for goods sold, the defendant, in order to prove that the goods in question were sold to D, and not to himself, put in evidence an unstamped paper, containing a bill of parcels, from plaintiff to D, at the foot of which were the words "Settled, W M," (plaintiff). It also appeared that the whole of the paper had been written at one time, and that no money in fact passed:—Held, that the two parts being distinct, so much of the paper as consisted of the bill of parcels was admissible in evidence for the above-mentioned purpose, without a receipt stamp. *Millen v. Dent*, 16 Law J. Rep. (N.S.) Q.B. 374; 10 Q.B. Rep. 846.

In an action against the drawer of a bill of exchange for 9*l.* 5*s.*, accepted by one Marks, the defendant pleaded payment by the acceptor, and gave in evidence the following document:—"Myself v. Marks. Mr. Marks has this day left with me 10*l.* on account of the debt, interest and costs in this action. E. L. Levy, the plaintiff in person."

—Held, that this document did not require a receipt stamp. *Levy v. Alexander*, 19 Law J. Rep. (N.S.) Exch. 113; 4 Exch. Rep. 485.

A receipt not having a proper stamp cannot be used as evidence of a matter collateral to the payment of the money.

Thus in a case where it was sought to prove an agreement for purchase by means of a receipt for the purchase-money, such receipt not being properly stamped,—Held, that the evidence could not be admitted. *Evans v. Prothero*, 2 Mac. & G. 319.

STATUTE.

[See COAL ACTS—CONTRACT, Validity of—MUNICIPAL CORPORATION—PENALTIES—RATE, Church-rate.]

An act for shortening the language of acts of parliament, 13 Vict. c. 21; 28 Law J. Stat. 31.

[See *Bousfield v. Wilson*, 16 Law J. Rep. (N.S.) Exch. 44; 16 Mee. & W. 185, ante, p. 137.]

The intention of the legislature must be ascertained from the words of a statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. *Fordyce v. Bridges*, 1 H.L. Cas. 1.

Where an act is limited in its operations to a particular place, and is expressed to be for the interest of a particular class of individuals, and the parties interested are empowered in general terms to do certain acts, the Court will not construe this as a power to interfere with the rights of strangers to the act, unless the intention of the act to affect such rights can be collected from the express words or by necessary implication.

The question whether an act be public or private is to be resolved not by any formal considerations, *ex. gr.* whether there be a clause declaring it shall be deemed a public act, but by the substance and nature of the case. *Dawson v. Paver*, 16 Law J. Rep. (N.S.) Chanc. 274; 5 Hare, 415.

A local act authorized a company to enter upon lands within a certain manor, and to dig and search for any spring of water, and to convey the water from such springs into the town of South Shields, for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams, or ponds, so as to deprive the occupiers of the lands of water for their own necessary uses, and for the cattle depasturing therein. The company had power to lay down pipes, &c., and the inhabitants, with the consent of the company, might obtain the water by pipes, &c. to communicate with the company's pipes, at certain charges, according to the bore of the pipes:—Held, that the owners or occupiers of lands within the manor were not prevented by the act from sinking wells in such lands, though the effect might be to draw off the water from the company's springs.

Held, also, that the defence, that the defendant, within twenty years of the discovery of the spring by the plaintiffs, sunk a well, and used the water in a manner and for purposes not prohibited by the act, was admissible under not guilty, and a plea denying the plaintiffs' right. *South Shields Water-*

works Co. v. Cookson, 15 Law J. Rep. (N.S.) Exch. 315.

Trespass. Plea, not guilty (by statute). The houses of the plaintiff and the defendant adjoined each other, being separated by an old wall, and the trespass consisted in the defendant having made an addition to each end of the wall by building upon it. The wall in question was situate in the county of Surrey, out of the city of London and the liberties, but within the operation of the Building Act, the 14 Geo. 3. c. 78. It was not a party wall, or a party fence wall, but stood upon the plaintiff's land, and belonged exclusively to him, but the defendant, in building upon it, *bonâ fide* believed it to be a party wall, and intended to comply with the provisions of the 14 Geo. 3. c. 78. The venue was laid in Surrey. The 14 Geo. 3. c. 78. s. 100. enacts, "That every action for anything done in pursuance of the act, where the cause of action arises without the city of London, or the liberties, shall be laid and tried in Middlesex, that the defendants may plead the general issue, and give the special matter in evidence; and if the action be laid in any other county or place than as aforesaid, the jury shall find for the defendant." The 5 & 6 Vict. c. 97. s. 3. repeals so much of any act of a local or personal nature, &c., as entitles parties to plead the general issue, and give the special matter in evidence:—Held, first, that the 14 Geo. 3. c. 78. being of a local and personal nature, the statutable plea of not guilty was taken away by the 5 & 6 Vict. c. 97, and that the defence, that the venue was improperly laid, was not available under the ordinary plea of not guilty, but ought to have been specially pleaded; secondly, that the 14 Geo. 3. c. 78. was, as regarded the 84th and 86th sections, a public act; and, *semble*, that as to defences arising upon those sections, the statutable plea of not guilty was not taken away by the 5 & 6 Vict. c. 97; and thirdly, that the new Building Act, the 7 & 8 Vict. c. 84, was of a local and personal nature.

Quære.—Whether, under the circumstances, the defendant was entitled to the protection of the statute, the 14 Geo. 3. c. 78, the wall built upon by him not being a party wall, or a party fence wall. *Richards v. Easto or Easton*, 15 Law J. Rep. (N.S.) Exch. 163; 15 Mee. & W. 244; 3 Dowl. & L. P.C. 515.

A surveyor appointed under the Metropolitan Paving Act, the 57 Geo. 3. c. xxix, has no right, under the 75th section of the act, to remove a ladder placed against a house for the purpose of white-washing, for that section applies only to the erection of hoards or scaffoldings, or to the placing of posts, bars, rails, or boards, by which an inclosure is made.

A licence granted by the surveyor under that section, to erect a hoard or scaffolding, &c., on the footway of No. 14, Porter Street, was held not to authorize the licensee to erect one in another street or court, although it formed one of the sides of the house in Porter Street. *Davey v. Warne*, 15 Law J. Rep. (N.S.) Exch. 253; 14 Mee. & W. 199.

The 82nd section of a local act of parliament, for paving and improving the town of S, empowered commissioners to pave certain streets, and enacted that the charges thereof should be paid to them by the owners of the land adjoining, in equal shares, and that it should be lawful for such commissioners to recover such charges by action. The 83rd sec-

tion, beginning with "provided always," enacted, that before the commissioners should pave the streets as aforesaid, they should give notice to the owner of land, &c., adjoining the street, requiring him to pave the same; and if the owner should neglect to pave for six months, it should be lawful for the commissioners to pave the same and to recover the expenses from such owner, in such manner as in the said act was mentioned. A declaration in debt by the plaintiffs, as commissioners, to recover from the defendant his share of the expenses of paving a certain street in S, stated that the defendant was owner of land within the said street; that the commissioners paved the same; that his share of the expenses amounted to 217*l.*, and alleged as a breach that he had not paid the same:—Held, on demurrer, that the giving a notice to the defendant to pave the streets was a condition precedent to the plaintiff's right of action; and therefore, that the declaration was bad, for not containing such an averment. *Mayor, &c. of Salford v. Ackers*, 16 Law J. Rep. (N.S.) Exch. 6; 16 Mee. & W. 85.

By the act, 57 Geo. 3. c. xxix, for better paving, improving, and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein, all rates made after the passing of that act for paving or repairing the streets in any parochial or other district by virtue of any local act, or of the said act, are (by section 24.) to be laid on all persons who shall inhabit, hold, occupy, be in possession of or enjoy any messuages, tenements, lands, grounds, &c., situate or being within any of the streets within the said parochial or other district. By section 76. power was given to number the houses, &c. within the streets. By the act, the 11 Geo. 3. c. 15, for the better paving part of the High Street, Whitechapel, and for removing obstructions and annoyances therein, commissioners appointed under the act were empowered, for defraying the charges attending the execution of the powers of the act, to rate all and every person and persons who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, &c., "within the said street." To the north side of High Street, Whitechapel, is Kent and Essex Yard, around and within, and opening into which are several dwelling-houses and other buildings, all of which lie and are situated at the back of other houses and premises which front the High Street. The only entrance into the yard is through carriage gates, and along a covered gateway. The yard is a private place, and the paving commissioners have no jurisdiction over it, and do not pave or cleanse it. The houses on either side of the yard abut on other streets and not on High Street, and neither the houses in the yard nor the gateway are numbered:—Held, that the inhabitants of Kent and Essex Yard were liable to be rated in respect of the paving, &c. of High Street, Whitechapel, the yard being within that street for such purpose. *Baddeley v. Gingell*, 17 Law J. Rep. (N.S.) Exch. 63; 1 Exch. Rep. 319.

A question being raised whether certain trustees appointed under an act of parliament for inclosing a piece of land were to execute conveyances in their own names, or as a corporate body, the Court held, that although the act did not expressly constitute them a corporation, yet as the trusts to be executed were to continue for an unlimited time, the trustees

must, by the very constitution of the body and the powers given them, be taken to be a corporation. *Ex parte Newport Marsh Trustees*, 18 Law J. Rep. (N.S.) Chanc. 49; 16 Sim. 346.

By a local act, the 6 Geo. 4. c. xxxviii., certain Paving and Lighting Commissioners are empowered to make rates and assessments, and to determine what sum shall be assessed in respect of each square yard of pavement or ground belonging to any cathedral or other churches, chapels, places of worship, &c.; "and the rate to be assessed upon any cathedral shall be paid by the dean and chapter thereof, and the rates and assessments to be assessed upon any other church, or any chapel, place of worship, &c. shall be paid by the churchwardens, chapelwardens, trustees, &c. respectively." In an action brought by the treasurer of such Commissioners against the churchwardens of a parish for the amount of an assessment made under the above act upon the parish church and churchyard,—Held, that the churchwardens were personally liable to the payment of the assessment, and that the fact that they had no parochial funds in their hands was no answer to the action.

Semble—that the churchwardens might compel a church-rate to be made to reimburse themselves the amount of such assessment. *Hopkinson v. Puncher*, 18 Law J. Rep. (N.S.) Exch. 6; 3 Exch. Rep. 95.

The 8 & 9 Vict. c. 21. gives power to the Justices of the county of Lancaster to make rates on the division of Manchester for the purposes of the act, and provides by section 21. that all existing powers and provisions relating to county rates shall be taken to apply to rates made under the act. The County Rates Act, 55 Geo. 3. c. 51, provides a limitation of three months as the period within which actions must be brought for anything done in pursuance of the act. The 5 & 6 Vict. c. 97. s. 5. provides, that actions for anything done in pursuance of local or personal acts shall be brought within two years:—Held, that the limitation in the 55 Geo. 3. is incorporated in the 8 & 9 Vict., and that even if the latter act is to be considered as a local one, it must be taken to have repealed the 5 & 6 Vict. c. 97. as far as regards the period of limitation; and, therefore, that an action brought for seizing the plaintiff's goods for a rate under the 8 & 9 Vict. c. 21, was brought too late after the expiration of three months from the seizure. *Boden v. Smith*, 18 Law J. Rep. (N.S.) C.P. 121.

Where a statute requires a majority consisting of a certain proportion of the votes of persons present at a meeting to render valid an act, there must be the specified proportion of those present actually voting for the act, and those who refuse to take any part in the proceedings cannot be considered as absent.

The Watching and Lighting Act, the 3 & 4 Will. 4. c. 90, by section 7. provides that if it shall be determined by a majority consisting of two-thirds of the votes of the rate-payers present at a meeting held for the purpose, that the provisions of the act should be adopted, that such provisions should be thenceforth adopted. At a meeting duly convened thirty-seven rate-payers qualified to vote were present. On the question being put, twenty

voted for adopting the act, and the other seventeen did not vote at all or propose any amendment or adjournment:—Held, that the requisite majority had not voted in favour of the proposition. *In re Rate-payers of Eynsham Parish*, 18 Law J. Rep. (n.s.) Q.B. 210; 12 Q.B. Rep. 398, n.

By a local act, passed in 1795, commissioners were to ascertain the average price of a bushel of wheat during twenty-one years next before the commencement of the act, for the purpose of fixing certain corn-rents to be paid to the rector of a parish in lieu of tithes on the 5th of January and the 5th of July in every year, the first payment to be made on such of those days as the commissioners should direct, and a power was thereby given to the rector or the owners of lands liable to the corn-rents to apply to the Quarter Sessions holden in the week after Easter next after the expiration of twenty-one years, to be computed from the making the award (having given notice of their intention in the preceding January) to have arbitrators appointed to re-ascertain the average price of a bushel of wheat for twenty-one years then last past, who were to report to the Quarter Sessions to be held in the week after the feast of St. Thomas, and the said Sessions were empowered to order the corn-rents to be altered accordingly; and it was enacted that the several rents should from the half-yearly day of payment next after such order continue payable until the same should at the end of twenty-one years next ensuing be again varied by such application, and in such manner as therebefore mentioned, and so from time to time at the end of every twenty-one years for ever. The award was made in August 1803. In January 1825 notice was given by the rector of his intention to apply at the Easter Sessions, 1825, for the appointment of three arbitrators under the act, and they were accordingly appointed at the said Easter Sessions, and reported to the Midsummer Sessions in that year, at which an order altering the amount of the corn-rents was made; and the altered rents were paid thenceforward. In January 1847 notice was given by certain owners of an intention to apply to the next Easter Sessions for the appointment of three arbitrators to re-ascertain the average price of wheat, and an application was accordingly made to that Sessions, which was refused on the ground of its being too late:—Held, first, that the application for a re-ascertainment could only be made at the expiration of twenty-one years from the last appointment of arbitrators; and, secondly, that the application to the Easter Sessions, 1847, was too late. *Regina v. the Justices of Lindsey*, 18 Law J. Rep. (n.s.) Q.B. 163; 13 Q.B. Rep. 484.

The (local and personal) statute, 1 & 2 Vict. c. ci. s. 4, imposes a penalty for delivering any quantity of coals exceeding 560 lb. weight to a purchaser in London or within twenty-five miles of the General Post Office, by means of any "lighter, vessel, barge, or other craft," unless a ticket containing certain particulars be delivered with them:—Held, that the delivery of coals to a purchaser direct out of the vendor's coal brig on to the purchaser's wharf within the district without the intervention of any lighter, barge, or other craft, was not a delivery from a "vessel" within the limited meaning of that word in this section, and therefore did not require

to be accompanied by a ticket. *Blanford v. Morrison*, 19 Law J. Rep. (n.s.) Q.B. 533; 15 Q.B. Rep. 724.

A declaration in case stated, that by their act of parliament the L & B railway company were not to interfere with a certain church or with a yard attached thereto, without the consent of the Bishop of C and payment by the company to the defendants of a sum to be agreed upon between the defendants and the company, in ascertaining which regard should be had to the cost of a site for a new church, and to the value of the said yard. That on payment by the company to the defendants of the sum so to be agreed, the said church and yard should vest in the company, and the sum so paid should be employed by the defendants in purchasing a new site and paying the plaintiff for the value of the said yard. It then averred that the sum agreed upon was 7,732l. 17s.; and that it was paid by the company to the defendants, and thereupon the church and yard vested in the company, whereupon the Bishop of C gave his consent; that the said sum was sufficient to purchase a new site, and also to pay the plaintiff the value of the said yard, 2,000l., of which the defendants had notice, and were requested to pay. Breach, non-payment of the value. The defendants before action offered the plaintiff a sum which they had determined to be the value of the yard, which was consecrated ground, and as such its value to the plaintiff was less than it would be to the company when applied to secular uses. The Judge directed the jury, that the act did not make the determination of the defendants conclusive on the plaintiff, and that in estimating their damages they were at liberty to value the ground as applicable to secular uses:—Held, no misdirection.

Held, also, in arrest of judgment, that the declaration well disclosed the duty of the defendants under the act, and stated a good breach. *Hilcoat v. Archbishop of Canterbury*, 19 Law J. Rep. (n.s.) C.P. 376.

STATUTE OF LIMITATIONS.

[See LIMITATIONS, STATUTE OF.]

STATUTE OF USES.

[See DEED.]

STOCK.

[See ADMINISTRATION OF ESTATE.]

[*Stoman v. Bank of England*, 5 Law J. Dig. 746; 14 Sim. 475.]

A contract to pay the differences which might become due between the parties on the settling day on the sale of some consols is void under 7 Geo. 2. c. 8. *Sawyer v. Langford*, 2 Car. & K. 697.

A transferor of stock, who has duly signed the transfer, cannot afterwards object that the transfer is a nullity, because the transferee did not underwrite his acceptance thereof. The provision in the statute 11 Geo. 4. & 1 Will. 4. c. 13. s. 18, as to such underwriting of the transfer by the transferee,

is directory only. *Foster v. Bank of England*, 15 Law J. Rep. (N.S.) Q.B. 212; 8 Q.B. Rep. 689.

Prior to 1846 an assurance company declared half-yearly dividends of 2l. 10s. per cent. on their stock; but, in that year, declared a half-yearly dividend of 12l. 10s. per cent.:—Held, that a tenant for life of the stock, was entitled to the whole of the dividend. *Price v. Anderson*, 15 Sim. 473.

To an action on the case by the proprietor of stock against the Bank of England, for breach of duty in refusing to pay the plaintiff the dividend in respect of such stock, due on the 5th of April 1841, the defendants pleaded that, before the dividend became due, the plaintiff gave a power of attorney to W to receive and give receipts for the dividends; that the defendants delivered to W, in payment of the dividend, a certain draft or order of the defendants, addressed to their cashier, called a dividend warrant, whereby the cashier was directed to pay the dividend, and that W, on the receipt thereof, gave a receipt to defendants for such dividend; that, according to the usage and custom of bankers and merchants in London for fifty years, all such dividend warrants are transferable and assignable by delivery only, and without indorsement, and that the *bona fide* holder of such dividend warrants is, according to the said usage and custom, entitled to receive payment of the sum mentioned therein from the defendants, on demand; that afterwards W according to the said usage and custom, delivered the said warrant to L & Co., bankers in London, for certain valuable considerations moving from L & Co. to W, by means whereof L & Co. became entitled to receive from the defendants the money mentioned in the warrant; that after the delivery and transfer by W to L & Co., and while they were the lawful holders, and before the plaintiff required payment, L & Co. demanded of the defendants payment of the money in the said warrant expressed, and then required the defendants to hold the same for the use and benefit of L & Co., wherefore the defendants refused to pay the dividend to the plaintiff. To this the plaintiff replied (after admitting the letter of attorney, &c.) *de injuriâ absque residuo causæ*:—Held, that the plaintiff was entitled to judgment *non obstante verdicto*, as it did not appear either by the plea or the statutes which recognize dividend warrants, that payment by dividend warrants was the only or an usual mode of paying dividends.

Held, also, that the plea did not shew that the defendants had incurred any liability to pay L & Co., as the usage and practice of trade alleged in the plea could not alter the general law, by which such an instrument as a dividend warrant does not confer any right on an assignee, the plaintiff not being shewn to be cognisant of, and to have assented to, such usage and practice. And *quære*, whether it would have made any difference, if it had been pleaded as an immemorial custom in London.

Semble, also, that the plea was defective in not stating that L & Co. were *bona fide* holders. *Partridge v. Bank of England*, 15 Law J. Rep. (N.S.) Q.B. 395; 9 Q.B. Rep. 396.

In proceedings under the 56 Geo. 3. c. 60. for the re-transfer of unclaimed stock, where the right is litigated, the proper course is to proceed by petition served upon the Attorney General and the

Commissioners for the Reduction of the National Debt, leaving it to the Court to direct inquiries, as between the co-defendants, or to order a bill to be filed to ascertain the rights of the parties.

It is irregular to bring the Attorney General and the Commissioners before the Court by bill in the first instance. *Hunt v. Peacock*, 17 Law J. Rep. (N.S.) Chanc. 163; 6 Hare, 361.

STOP ORDER.

By decree, a sum in court was directed to be paid to the plaintiff, a person not a party to the suit, claiming a portion of it as against the plaintiff, applied for a stop order, and having shewn a *prima facie* case the Court ordered the fund to be retained, on the terms of his filing a bill within ten days to establish his right. *Feistel v. King's College, Cambridge*, 11 Beav. 254.

Form of stop order where husband and wife join in an assignment of the wife's reversionary chose in action. *Moreau v. Polley*, 1 De Gex & S. 143.

Stop order on box containing securities. *Williams v. Symonds*, 9 Beav. 523.

Order in the nature of a stop order granted on the application of the assignee of the interest of the sole next-of-kin of a lunatic. *In re Moore*, 1 Mac. & G. 103; 1 Hall & Tw. 214.

STOPPAGE IN TRANSITU.

[See BANKRUPTCY, Proof of Debt.]

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. *Cowas-jee v. Thompson*, 5 Moore, P.C. 165.

A & Co., foreign factors, by direction of B & Co., merchants at Liverpool, shipped coffee at Rio, on board the *V*, a vessel belonging to the bankrupts, and bound for Cork, and a market. The coffee was obtained partly with funds provided by the bankrupts, but chiefly on the credit of A & Co. An invoice was made out by A & Co., stating that the goods were shipped by order, and on account, and at the risk, of the bankrupts. The captain of the vessel signed bills of lading, stating that the coffee

was shipped by A & Co., and was to be delivered freight free to their assigns. A & Co. drew drafts on the bankrupts for the balance of the price of the coffee, and transmitted by post to the bankrupts a copy of the invoice and the bill of lading, indorsed in blank. After the shipment the bankrupts (before any act of bankruptcy), at Liverpool, at the request of B, a partner in the firm of A & Co., signed and delivered a letter addressed to a third party, in the following terms, "according to arrangement with B, we request that you will hold to his order the bills of lading that have to come forward for the cargoes per *V*, which vessel will be laden on our account by A & Co., until the drafts drawn, and to be drawn against said cargoes are paid." After an act of bankruptcy the bill of lading arrived by post, and was delivered in pursuance of the above letter to B. B, after the fiat, pledged it for a large sum of money with C & Co., who were innocent and *bonâ fide* indorsees of the bill of lading. Subsequently to this pledge, the *V* arrived, and the assignees took possession of the cargo. C & Co. brought trover against the assignees:—Held (under a plea of not possessed), that A & Co. were to be considered, though partially paid, as vendors to the bankrupts, and that, from the form of the bill of lading, *primâ facie* the goods were shipped to be carried for them, in which case the right to stop *in transitu*, and the power of rescinding the contract, would continue until the bill of lading indorsed was received by the vendees,—until which time it would be also competent for the vendees, though voluntarily and in contemplation of bankruptcy, to make the agreement actually made with B.

Held also, if the shipment had that effect, that it was a question for the jury, whether the agreement between the bankrupts and B was such as to authorize him to transfer the bills of lading for the purpose of raising money.

But held, that notwithstanding the form of the bill of lading, it was a question for the jury whether the coffee was not put on board to be carried for and on account of the vendees, in which case the shipment on board the vendees' own ship would be a final delivery, and any subsequent alteration of the contract would be void as against the assignees, if a fraudulent preference.

The Judge having summed up in such a manner as was likely to lead the jury to believe that a preference in contemplation of bankruptcy was invalid, unless there was a threat or pressure with immediate power of making it available by legal steps,—Held, a misdirection, and that all the circumstances should be left to the jury to enable them to say whether the preference was voluntary on the part of the bankrupts.

Lastly, it was held that the plaintiffs, though innocent indorsees for value, could make no title against the assignees under the Factors Acts, as those acts are confined to persons intrusted as agents by the true owners; and that the facts shewed that B was not intrusted at all by the assignees, if they were the true owners, and also that B claimed to hold in his own right and not as an agent. *Van Casteel v. Booker*, 18 Law J. Rep. (n.s.) Exch. 9; 2 Exch. Rep. 691.

B, residing at Birmingham, ordered goods for the Valparaiso market of the defendants, who had

a house at Manchester. The defendants duly forwarded them to L, H & Co., shipping agents at Liverpool employed by B to receive and forward his goods; they forwarded also some pattern cards, and in their letter to L, H & Co. said, "We have forwarded by Pickford's the pattern cards of four cases sent by them this evening, marked, &c., for shipment to Valparaiso; you will see the same put on board, with the goods and property, directed as B may direct the same to be shipped." They sent the invoice of the goods to B. The goods were loaded by L, H & Co. on board a vessel for Valparaiso, but were afterwards re-landed by an order of an agent of B, and sent back to the defendants to be differently packed. Before the day of payment for the goods, or the re-packing, B became bankrupt. The defendants having kept the goods, the assignees brought trover:—Held, that the possession of the goods as well as the property vested in B when B's agent exercised the ownership of relanding the goods, and sending them to be re-packed; that the transitus would have ended there had it not been already determined by the original delivery to L, H & Co.; and that the defendant's knowledge that the goods were to be sent to Valparaiso, and of which they informed L, H & Co., made no difference.—Held, also, that the vendors, though in the lawful possession of the goods, had no right to retain them as against the assignees.

The terms of the contract between B and the defendants were not completely agreed upon, the mode of payment being unexpressed, but the parties intended to bind themselves by the contract, leaving the payment to be determined by what was reasonable:—Held, that the contract in this form would have been sufficiently binding and complete; but that in this case there was sufficient to infer that the mode of payment had been settled by agreement. *Valpy v. Gibson*, 16 Law J. Rep. (n.s.) C.P. 241; 4 Com. B. Rep. 837.

I, a merchant in America, shipped certain cargoes of goods to the account of C & T merchants in this country, against whom a fiat in bankruptcy issued on the 8th of May. Immediately on the arrival of the cargoes on the 5th, 7th, and 9th of May, the defendants during the continuance of the transitus, gave notice to the master and consignees of a claim to stop the goods *in transitu* on behalf of I. The defendants were not the agents of I, nor had they received any authority from I to make the stoppage. On the 11th of May the plaintiff, the official assignee of C & T, demanded from the masters and consignees the cargoes which were then on board the vessels in port, and undelivered, but delivery of them was refused. On the same day the masters handed over the cargoes to the defendants, who, on the 12th of May, refused to deliver them to the plaintiffs, the assignees of C & T, on demand. On the 13th H having received from I a power of attorney, executed on the 28th of April, to stop the goods *in transitu*, on the same day adopted and confirmed the previous stoppage of the defendants, and I before the commencement of the action adopted and ratified the acts of the defendants and H:—Held, first, that there could be no valid stoppage *in transitu* after the demand of the goods by the plaintiff on the 11th of May; secondly, that the ratification by I, after the transitus was ended, was

too late, and had not the effect of altering retrospectively the property in the goods, which at that time, notwithstanding the act of the defendants, had become vested in the plaintiffs. *Bird v. Brown*, 19 Law J. Rep. (N.S.) Exch. 154; 4 Exch. Rep. 786.

SUBPŒNA.

It is no objection to granting an attachment against a party for disobeying a Crown Office subpœna, requiring him to appear before Justices, to testify, &c. concerning the place of the last legal settlement of A B, &c., that it is not stated in the subpœna or shewn by the affidavits that one of the Justices was of the quorum. *Regina v. Vickery*, 17 Law J. Rep. (N.S.) M.C. 129; 12 Q.B. Rep. 478.

In an action on the case against a witness for not attending at a trial to give evidence in obedience to a subpœna, the plaintiff must prove that he has sustained damage by the defendant's absence.

Where there are several issues for trial, the fact that the plaintiff had no good cause of action does not shew that he has not sustained damage by the absence of a witness, for such damage may have accrued in respect of the costs of issues on which the evidence of the witness was material.

A declaration in case alleged that the plaintiff had impleaded T F in a certain plea of trespass; that certain issues joined in that suit were to be tried; that the defendant was served with a copy of a subpœna to testify, &c., and then averred that the plaintiff had a good cause of action in that suit; that the testimony of the defendant, in obedience to such writ of subpœna, was necessary and material to the trial of the issues, and that the defendant neglected to appear and give evidence, by reason of which neglect the plaintiff was obliged to withdraw the record, and was compelled to pay certain costs, and lost the benefit of certain costs, &c. The defendant pleaded, *eightly*, that the plaintiff had not a good cause of action. There were other pleas, traversing all the material averments in the declaration, on all of which issues were joined. The plaintiff obtained a verdict on all the issues, except that on the *eight* plea, which was found for the defendant:—Held, that the plaintiff was entitled to judgment *non obstante veredicto*, and that there was no necessity for a repleader. *Cowling or Cowling v. Cox*, 18 Law J. Rep. (N.S.) C.P. 100; 6 Com. B. Rep. 703.

SUITORS' FUND.

[See ANNUITY.]

SUNDAY.

The sale of beer, &c. prohibited on Sundays during certain hours by the 11 & 12 Vict. c. 49; 26 Law J. Stat. 158.

SURGEON AND APOTHECARY.

The right of an apothecary to charge for attendances is matter of contract, either express or implied from the usage of the place. *Smith v. Chambers*, 2 Ph. 221.

In debt by an apothecary for charges incurred in London, to which the defendant pleaded *nunquam indebitatus*, the plaintiff produced at the trial a certificate of qualification entitling him to practise in the country, and he had not paid the extra fee of 4l. 4s. to the Apothecaries Company, which was necessary by the 19th section of the 55 Geo. 3. c. 194. to entitle him to practise in London:—Held, that he was not prevented from recovering in the action by the 21st section of the statute, which enacts, that no apothecary shall recover unless he proves at the trial that he has obtained a certificate. *Young v. Geiger*, 18 Law J. Rep. (N.S.) C.P. 40; 6 Com. B. Rep. 541.

Debt for goods sold and delivered, work done, and materials provided, and on an account stated. The particulars of demand consisted of items for "medicines and attendances." At the trial, the plaintiffs' assistant proved that they were surgeons, and that he had visited and dispensed medicines to the defendant, and that on one occasion he had bled the defendant:—Held, that *prima facie* the charges were charges in a medical case; and that the plaintiffs were therefore bound to prove that they were certificated as apothecaries, or that they had been in practice previous to the 1st of August 1815. *Proud v. Mayall*, 3 Dowl. & L. P.C. 531.

TAXES.

Forms of proceedings under assessed taxes and income tax acts provided by the 9 & 10 Vict. c. 56; 24 Law J. Stat. 125.

The property and income tax continued for three years by the 11 Vict. c. 8; 26 Law J. Stat. 21.

The acts authorizing composition for assessed taxes continued and amended by the 13 & 14 Vict. c. 96; 28 Law J. Stat. 269.

TENANT FOR LIFE.

[See POWER—STOCK.]

[*Phillips v. Barlow*, 5 Law J. Dig. 751; 14 Sim. 263.]

A testator devised real estate to trustees to pay debts, and to convey the real estate, subject to such debts, to his son upon marriage, in strict settlement. The trustees accordingly conveyed the estate to the testator's son for life, with remainder in strict settlement:—Held, that the son could convey the legal estate under the 11 Geo. 4. & 1 Will. 4. c. 47. s. 12.

Where the estate of infants is concerned, the Master should be directed to settle the conveyances absolutely, and not in case the parties differ. *Cheese v. Cheese*, 15 Law J. Rep. (N.S.) Chanc. 28.

As between tenant for life and remainder-man, the thinnings of fir-trees under twenty years of age belong to the tenant for life. *Pidgeley v. Rawlins*, 2 Coll. C.C. 275.

The tenant for life, under the will of a testator (not a trader,) of freehold and copyhold estates ordered to be sold, in a creditors' suit, for the payment of his debts, may convey and surrender to purchasers under the 1 Will. 4. c. 47, and the 3 & 4 Will. 4. c. 104. *Branch v. Browne*, 17 Law J. Rep. (N.S.) Chanc. 435; 2 De Gex & S. 299.

Tenant for life held, upon the terms of the will, entitled to the actual income made of the testator's property invested in mortgages and shares from the time of the death until the conversion. *Sparling v. Parker*, 9 Beav. 524.

Residuary devise and bequest upon trust to pay the dividends, interest, &c. of real and personal estate to the separate use of the testator's daughter or daughters for life, and after her or their decease to pay, transfer, and equally divide the whole of his real and personal estate among the issue of his daughter or daughters, and for want of such issue to pay certain legacies, and to sell the residue of the real and personal estate not consisting of money:—Held, to entitle the tenant for life to the enjoyment of the personality in specie. *Hunt v. Scott*, 1 De Gex & S. 219.

A testator gave all his real and personal estate and effects upon trust to pay the rents and profits, dividends and interest to a tenant for life, with trusts over in remainder, and declared that notwithstanding the gift of his freehold and leasehold estates, the trustees might sell them, except his dwelling-house, at such time as they should think fit. The testator's estate consisted partly of leasehold property and long annuities:—Held, that the tenant for life was entitled to the enjoyment of the income of both these descriptions of property in specie. *Burton v. Mount*, 2 De Gex & S. 383.

A testator, after certain specific bequests, gave all other his estate and effects to trustees, upon trust, after his decease, to call in all monies that might be due to him upon bonds, notes, or other securities, and thereout and out of any other part of his personal estate to pay his debts, &c., and invest the residue in government stocks, and receive the dividends, interest, and annual proceeds thereof from time to time as the same should become due and payable, together with the dividends, interest, and annual proceeds of such other government stocks as he might be possessed of at the time of his decease, and to pay thereout an annuity of 20*l.*, and to pay the whole remaining dividends, &c. of the said stocks and funds as the same should be received, to his wife for life, with remainders over. The testator, at the time of his death, was possessed of 220*l.* long annuities, which were not required for the payment of debts:—Held, that the tenant for life was entitled to the enjoyment of the long annuities in specie. *Milne v. Parker*, 17 Law J. Rep. (N.S.) Chanc. 194.

Tenant for life of bank stock held entitled to a bonus to be made out of the interest and profits on the capital stock of the bank. *Preston v. Melville*, 16 Sim. 163.

Interest at 4*l.* per cent. allowed to tenant for life of trust fund for arrears. *Willcocks v. Butcher*, 16 Sim. 366.

Estates were limited by settlement to the use of trustees for a term, upon trust, in the first place by cutting, &c. and converting into money

certain timber, or by demising, mortgaging, or selling the settled estates, or by any other reasonable means, to raise certain charges; and subject to the term, the estates were limited to the use of several successive tenants for life, without impeachment of waste, with divers remainders over in tail. The trustees proposed to raise the charges by mortgage of the estates, without resorting to the timber:—Held, on demurrer to a bill filed by a remainder-man to restrain the trustees from so doing, that the course about to be adopted by them was right; that, as between the tenant for life and the remainder-men, the former was to keep down the interest, and the corpus of the estate to bear the charges; and that the tenant for life, being unimpeachable for waste, was entitled, as part of the profits of the estate, to the timber which he had a right to cut. *Marker v. Kekewick*, 19 Law J. Rep. (N.S.) Chanc. 492.

TENANT IN COMMON.

[See TRESPASS.]

Mere occupation by one of several tenants in common of an estate if unaccompanied by exclusion, does not make him liable for rent to his tenants. *M'Mahon v. Burchell*, 2 Ph. 127.

Two persons being tenants in common, one entered into possession in 1827, with the consent of the other, upon an understanding that he should pay an occupation rent when called upon to do so. The tenant in possession died in 1839. The survivor claimed to be allowed six years' rent:—Held, by the Vice Chancellor, that the claim must be allowed, and that the statute 4 Anne, c. 16, was not repealed by the 3 & 4 Will. 4. c. 27. *Henderson v. Eason*, 15 Law J. Rep. (N.S.) Chanc. 457; 15 Sim. 303. See 2 Ph. 308.

One tenant in common can maintain trespass against the other for an actual expulsion from a messuage of which they are tenants in common.

The defendant let a messuage, &c. to the plaintiffs and one Hart as tenants from year to year, who occupied and paid rent to the defendant. After some time Hart surrendered his interest in the messuage, &c. to the defendant, who thereupon became co-tenant in common with the plaintiffs. Defendant entered, and expelled therefrom the servant of the plaintiffs. In trespass for breaking and entering the messuage, &c., and expelling the plaintiffs:—Held, that proof by the defendant of his cotenancy in common with the plaintiffs was no defence to the action.

Quære—Can the defence of a tenancy in common with the plaintiff be proved under "not possessed," or must it be specially pleaded? *Murray v. Hall*, 18 Law J. Rep. (N.S.) C.P. 161; 7 Com. B. Rep. 441.

Defendant (an officer of the Palace Court) seized under a *fi. fa.* issued against S the partnership goods of S & M. Defendant sold the goods to different persons who took them away, and he paid the proceeds to the execution creditor. M afterwards became bankrupt, and his assignees brought trover against the defendant:—Held, that the mere sale of a chattel by one tenant in common is not such a

conversion as enables his co-tenant to maintain trover.

There may be such a disposal of the subject of the co-tenancy by one tenant as would amount to a conversion.

Under "not guilty" in trover the defendant may shew there was not a wrongful conversion. *Mayhew v. Herrick*, 18 Law J. Rep. (n.s.) C.P. 179; 7 Com. B. Rep. 229.

TENANT IN TAIL.

A testator having contracted to grant a building lease, died before he had executed the lease, and by his will gave his property to four successive tenants for life, and to each of their first and other sons in tail male in succession. All the tenants for life were alive, but the fourth was the only one who had a son, who was an infant. The Court directed the infant tenant in tail in remainder to join in executing the lease which the testator had contracted to grant, under the 17th section of the 1 Will. 4. c. 60. *Cullum v. Upton*, 19 Law J. Rep. (n.s.) Chanc. 276.

TENDER.

The question as to whether a tender was made conditionally or not is for the jury. *Marsden v. Goode*, 2 Car. & K. 133.

The custom of the Caen stone trade being to pay freight half in cash and half by a bill at two months, the agent of the owners of Caen stone which was brought by a vessel to an English port, verbally offered the captain of the vessel which brought it half the amount of the freight in cash, and also offered to give the captain per proc. the acceptance of the principal for the other half, if the captain would draw a bill. This the captain refused:—Held, a sufficient tender of the freight, as it was the duty of the captain to draw the bill. *Luard v. Butcher*, 2 Car. & K. 29.

To a declaration containing counts for use and occupation, and other *indebitatus* counts, each count claiming a certain sum exceeding 7*l.*, the defendant pleaded a tender of 7*l.*, "parcel of the monies in the declaration mentioned:"—Held, that the plea did not necessarily admit that something was due on each count. *Robinson v. Ward*, 15 Law J. Rep. (n.s.) Q.B. 271; 8 Q.B. Rep. 920.

To a declaration in debt, consisting of two counts, demanding the sum of 26*l.* in each count, the defendant pleaded as to 5*l.*, parcel, &c., tender of 5*l.* before action brought. Replication, that, at the time of the tender, and before making the demand and refusal thereafter mentioned, there was owing from the defendant to the plaintiff a larger sum than 5*l.*, to wit, the sum of 13*l.*, being an indivisible sum due on an entire contract, and that the plaintiff then demanded that larger sum, which the defendants refused to pay:—Held, that the replication was good in substance and in form, inasmuch as the tender of part of an entire debt is a bad tender, and the existence of a set-off should come by way of rejoinder. *Dixon v. Clarke*, 16 Law J. Rep. (n.s.) C.P. 237; 5 Dowl. & L. P.C. 155; 5 Com. B. Rep. 365.

The plaintiff being tenant to the defendant at the

yearly rent of 52*l.*, sent a person to him with the following letter:—"I have sent by the bearer 26*l.* 5*s.* 7½*d.* to settle one year's rent." The defendant refused to take it, saying that more was due. No question was left to the jury:—Held, that the tender was sufficient. *Bowen v. Owen*, 17 Law J. Rep. (n.s.) Q.B. 5; 11 Q.B. Rep. 130.

In an action of debt, with a count for the detention of a horse, the defendant pleaded to the count in detinue a lien of 10*s.* for trying the horse in harness. The plaintiff replied a tender. At the time the horse was demanded of the defendant he claimed the sum of 1*l.* 7*s.* for keep, &c., including the sum of 10*s.* for the trial, whereupon the defendant said the charge was exorbitant, and tendered the sum of 19*s.* 6*d.*:—Held, that the plea of tender was not proved.

Proof of money received upon a condition does not support a count for money had and received. *Hardingham v. Allen*, 17 Law J. Rep. (n.s.) C.P. 198; 4 Com. B. Rep. 793.

THELLUSON ACT.

[See DEVISE—POWER.]

[*Elborne v. Goode*, 5 Law J. Rep. 753; 14 Sim. 165.]

A testator devised his estates to trustees in trust for the plaintiff, then a minor, for life, with remainder to his first and other sons in tail. He afterwards directed that if any person beneficially entitled to the possession or receipt of the rents and profits of the estate should be under twenty-one years, his trustees should apply a competent part thereof for the maintenance and advancement of such minor, and invest the residue in the purchase of freehold estates to be settled to such uses and trusts as would best correspond with the uses and trusts of the devised estates:—Held, that this clause was void for remoteness, and the tenant for life upon his attaining twenty-one was entitled to the accumulations, and to the estates purchased therewith. *Browne v. Houghton*, 15 Law J. Rep. (n.s.) Chanc. 391; 14 Sim. 369.

A testator devised real estates to trustees for 2,000 years, and subject thereto, he settled the estates upon his son for life, with divers remainders over in tail. He declared that the trusts of the term were to raise by sale or mortgage money sufficient to make up the deficiency of his personal estate to pay debts other than debts due on mortgage and legacies, and to apply the rents in payment of the interest on mortgages and the annuities given by his will, and also to set apart 500*l.* a-year for the discharge of the incumbrances on his estate. This sum the trustees were yearly to invest, and accumulate in stock, and, when sufficient, the trustees were authorized to apply the same in payment of any mortgage, without waiting until the time for accumulation had expired. The surplus rents were to be paid to the parties entitled to the estate, under the limitations; when the trusts were satisfied the term of 2,000 years was to cease. The leasehold estates were bequeathed to the trustees of the term upon trusts nearest corresponding with those declared of the real estate:—Held, that the trusts of the term were valid, and that the accumulations

directed were within the exception of the 39 & 40 Geo. 3. c. 98. s. 2, and that the trusts did not exceed the period allowed by law. *Bateman v. Hotchkin*, 16 Law J. Rep. (N.S.) Chanc. 514; 10 Beav. 426.

Testator devised his real estate upon trust to accumulate till A's youngest child attained twenty-one. Before that event and after twenty-one years from the testator's death had expired, his heir-at-law died:—Held, that the forbidden accumulations went to the personal representatives of the heir. *Sewell v. Denny*, 10 Beav. 315.

A testator directed the income of a fund to be paid to A, B, C, &c. for their lives, and on the death of the survivor the fund to be sold, and the proceeds thereof, and also the proceeds which should have accumulated in respect thereof, to be divided among certain persons:—Held, that though there were accumulations which had arisen after the expiration of twenty-one years from the testator's death, the case was not within the 39 & 40 Geo. 3. c. 98. *Corporation of Bridgnorth v. Collins*, 15 Sim. 538.

Rents of Irish estates were directed to be accumulated and become part of the personal estate:—Held, that although the Thellusson Act did not apply to Irish estates, it applied to the rents as invested from time to time, and that although the rents, which ought to be considered as *corpus*, might be invested for more than twenty-one years from the testator's death, yet that the income thereof could not. *Ellis v. Maxwell*, 12 Beav. 104.

Testator, after providing for an annuity to his daughter, gave his residuary personal estate to be equally divided between his grandson and granddaughter (by name) as tenants in common; but in case of the death of the grand-daughter under twenty-one and unmarried in the lifetime of the grandson, or of the death of the grandson in the lifetime of the grand-daughter under twenty-one, the whole to go to the survivor; and after directing payment during their minorities for maintenance, he directed the clear surplus of the residuary estate to be accumulated by his executors and added to the principal of the grand-children's shares, and directed that the shares and accumulations should not be received until after the death of the annuitant. By articles on the marriage of the grand-daughter, under age, it was agreed that when she became entitled to the absolute and immediate possession of any part of the residuary estate, the same and all accumulations should be settled upon certain trusts for her separate use and her husband and children, with a proviso referring to and dependent on the trust for accumulation in the will. On a bill filed by the grand-daughter in her mother's lifetime for transfer of the fund:—Held, that the direction to accumulate in the will was precarious and ineffectual, and was not rendered otherwise by the settlement, and that the grand-daughter's moiety became capital at her marriage, and that the subsequent accumulations belonged to her for her separate use. *Swaffield v. Orton*, 1 De Gex & S. 326.

By a deed of settlement made in 1817, a sum of stock was vested in trustees, with directions to accumulate the dividends during the joint lives of A B and his wife, and, upon the decease of A B, to pay the dividends to his wife, if she should survive her husband, for life, and upon her death, the sum of stock, with the accumulations, was to go to her

daughter upon attaining twenty-one:—Held, that the direction to accumulate was good for so much of the joint lives of A B and his wife as expired during the life of the settlor. *Ex parte Lady Rosslyn's Trust*, 18 Law J. Rep. (N.S.) Chanc. 98; 16 Sim. 391.

A testator devised real estate to trustees, upon trust for A for life; and directed them, after the death of A, to accumulate the rents for twenty-one years from the death of A, and, at the end of that period, to divide the accumulations in the manner mentioned in the will. The will did not contain any residuary devise or bequest. The testator died in 1824, and twenty-one years from his death expired in 1845. A died in 1837, and twenty-one years from the death of A would expire in 1858.—Held, that the heir-at-law was entitled to the interest of the fund accumulated between 1837 and 1845, and the rents of the property until 1858. *Nettleton v. Stephenson*, 18 Law J. Rep. (N.S.) Chanc. 191.

Testator devised freehold estates upon trust to accumulate the rents during the life of his niece, and on her decease to stand seised of the estates to the use of her first and other sons in tail. The testator died in 1827 leaving his niece surviving:—Held, that the trust for accumulation became void at the end of twenty-one years after the testator's death, and that the heir took the rents during the remainder of the niece's life.

A trust for accumulation, in order to provide for the younger sister of testator's niece and of E S, each of whom took an interest under the will,—Held, not to be a provision for raising portions within the proviso in section 2. of the Thellusson Act. *Halford v. Stains*, 16 Sim. 488.

A testator, by his will, dated in 1806, devised an estate to trustees upon trust to settle the same to the use of such trustees for 2,000 years, and subject thereto to his children in manner therein mentioned; and the testator declared the trusts of the term to be, to pay to any child who, under the limitations therein declared, should for the time being be entitled to the possession or rents of his estate, and who, having attained twenty-one, should be under twenty-five years of age, an annual sum of 500*l.* until he should attain twenty-five or die under that age, and in the next place in trust to receive the surplus as well during the minority of every person so for the time being entitled, as during such time as any such person should be under twenty-five years, and to accumulate the same, and at the end of every or any such period of accumulation to apply the funds so accumulated towards payment of his debts and legacies:—Held, that the trust for accumulation exceeded the boundary of legal limits, and was void. *Scarsbrick v. Skelmersdale*, 19 Law J. Rep. (N.S.) Chanc. 126.

A testator devised real estates to trustees, for the term of ninety-nine years, upon trust, to raise 2,000*l.* a year for so much of the life of J B as should fall within twenty-one years from the time of his death, and during such other time as there should be in existence a younger child of J B, and to invest and accumulate the said annuity, and to stand possessed of the fund for the benefit of the younger children of J B. The testator then devised the estates, so subject, to J B in strict settlement.

J B survived the testator:—Held, that the gifts for the younger children of J B were portions within the meaning of the 2nd section of the *Thellusson Act*. *Beech v. Earl St. Vincent*, 19 Law J. Rep. (N.S.) Chanc. 130.

THREATENING LETTERS.

The law as to threatening letters and accusing of crimes with intent to extort money extended by the 10 & 11 Vict. c. 66; 25 Law J. Stat. 215.

Indictment for sending a threatening letter under the statute 4 Geo. 4. c. 54. s. 3. The first count charged G with sending it to R and threatening to burn R's houses. It was proved that R had only a *reversionary* interest in the said houses. *Quære*—whether G could be convicted on that count.

The second count charged G with sending to R and threatening to burn the said houses, laying them as the property of B the tenant. It was proved that G dropped the letter in a public road near R's house, that A found it and gave it to H, who opened it, read it, and gave it to E, who shewed it both to B and R:—Held, that this was a sending within the statute. *Regina v. Grimwade*, 1 Den. C.C. 30.

The prisoner wrote to the prosecutors a letter in the following terms:—"Gentlemen, you say that B O N will accede to the terms proposed, and send part of the money to any place that may be named," &c. "I must have sufficient means at my disposal or all will be lost. I am fully assured that 20,000*l.* will not cover the horrid catastrophe, which is not only to stop your bank for a time but perhaps for ever, as the books would be destroyed. The match, the most dreadful last resource, has been contemplated by the cracksmen or captain of this most horrid gang, which I fervently pray to be relieved from." The letter then, after pointing out a certain pipe behind which the money was to be deposited, proceeded—"If, therefore, you will send a man you can confide in, and lodge under that pipe 250 sovereigns unseen by mortal eye, I swear by Almighty God most solemnly that the evil to which I have alluded shall be averted," &c. "Let the money be lodged to-morrow, Saturday morning, by half-past eleven, but not one moment sooner, and all shall be well with you; but if I am at all deceived in any possible way, all must fall upon yourselves":—Held, that this was a letter demanding money with menaces within the 7 & 8 Geo. 4. c. 29. s. 8. *Regina v. Smith*, 19 Law J. Rep. (N.S.) M.C. 80; 1 Den. C.C. 510; 2 Car. & K. 882.

Indictment charged the prisoner with sending a threatening letter to A, the threat therein averred being to burn the house of B:—Held, *bad*. *Regina v. Jones*, 1 Den. C.C. 218; 2 Car. & K. 398.

TIME.

[Computation of. See STATUTES.]

In legal matters "a month" means a lunar month; but in commercial matters "a month" always means a calendar month. *Hart v. Middleton*, 2 Car. & K. 9.

The objection, that an offence is laid in an indictment to have been committed on a day which has

not yet arrived, can only be taken advantage of on demurrer, and cannot be taken after a plea of not guilty. *Regina v. Fenwick*, 2 Car. & K. 915.

TITHES.

[See ERROR, When it lies.]

(A) MODUS, EXEMPTION, AND COMPOSITION.

(B) COMMUTATION ACTS.

(a) Award.

(b) Boundary.

(c) Rent-charge.

(1) Apportionment of.

(2) Remedies to recover.

(3) Liability of Lessee of Tithes.

(d) Feigned Issue.

(C) DISAPPROPRIATION OF TITHES.

(D) ACTIONS, SUITS, AND PROCEEDINGS.

(E) PLEADING.

Acts for the commutation of tithes amended by the 9 & 10 Vict. c. 73; 24 Law J. Stat. 183.

The Tithe Commutation Acts explained by the 10 & 11 Vict. c. 105; 25 Law J. Stat. 280.

(A) MODUS, EXEMPTION, AND COMPOSITION.

The defendant and his ancestors, lords of the manor of F, which was part of the parish of F, had for sixty years before the commencement of the 2 & 3 Will. 4. c. 100. held the manor lands discharged of tithes by an annual payment to the rector of the parish of F of 40*l.*, in lieu of tithes within the manor; and, in consideration of this payment, the lord, his heirs and assigns, received the tithes in kind from the occupiers within the said manor:—Held, in an action of debt by the rector against the defendant, for treble value, under the statute 2 & 3 Edw. 6. c. 13, for not setting out tithes, that this was not a "modus, exemption or discharge," within the 2 & 3 Will. 4. c. 100, as a modus and a liability to pay tithe in kind for the same land could not co-exist; but that the right claimed by the defendant was a prescriptive title to a parcel of the tithes, and a payment of 40*l.* a prescriptive rent for them.

Quære—Whether this was a good prescription. *Knight v. Waterford*, 15 Law J. Rep. (N.S.) Exch. 288; 15 Mee. & W. 419.

To a bill by the rector for an account of tithes against the owner and occupiers of land in the parish, they set up a modus of 13*l.* 6*s.* 8*d.*, payable half-yearly; and they shewed receipts for that payment under various descriptions, as "rent for the rectory," and "prescribed rent due to the rector," from the year 1637, with some interruptions; and also receipts for a payment of 8*s.* 9*d.*, which was supposed to be a payment in respect of tenths due from the rector to the Crown.

Held, by the House of Lords, affirming a decree for an account, that the case made by the appellants would not warrant the Court in directing an issue to try the existence of the alleged modus, the evidence against it being free from doubt.

A landowner cannot, like a rector, insist on an issue as a right; but in doubtful cases it is granted. *Cairns v. Raine*, 12 Cl. & F. 833.

Upon the construction of the 2 & 3 Will. 4. c. 100, in a case where the exemption was claimed, not in respect of all tithes, but of particular articles only, some of modern introduction, the Court were equally divided; *Tindal, C.J.* and *Cresswell, J.* holding that a lay owner cannot establish the exemption for one of the periods mentioned in the statute without shewing the legal origin of such exemption,—*Coltman, J.* and *Erle, J.* that he can. *Salkeld v. Johnston*, 2 Com. B. Rep. 749.

The simple non-payment of tithes, in respect of lands bearing titheable matters, for the period prescribed by the 2 & 3 Will. 4. c. 100. s. 1, provided the enjoyment has been as of right, constitutes a total exemption from tithes under that statute.

Where upon certain lands tithes have been paid of some titheable matters, but not of others, there is no exemption for those matters for which tithes have not been paid. *Salkeld v. Johnston*, 18 Law J. Rep. (N.S.) Exch. 89; 2 Exch. Rep. 256.

The enjoyment of land without payment of tithes for the period prescribed by the 2 & 3 Will. 4. c. 100, creates a valid and indefeasible exemption of such land from payment of tithes; and it is not necessary to prove a legal origin for such exemption. The act applies also to the case of a claim of partial exemption on the ground of non-payment of tithes in respect only of some titheable matters; although the same lands have paid tithes of other matters.

Under the same act, a modus liable to the objection of rankness, but which has been acted upon for the period prescribed by the act, will constitute a good exemption—*semble*. *Salkeld v. Johnston*, 18 Law J. Rep. (N.S.) Chanc. 493; 1 Mac. & G. 242; 1 Hall & Tw. 329.

What agreement will be a valid composition for tithes within the meaning of the 2 & 3 Will. 4. c. 100. Construction of section 3. as to proceedings and writs being sufficient to take the case out of the statute. *Thorpe v. Plowden*, 15 Law J. Rep. (N.S.) Exch. 137; 14 Mee. & W. 520.

Feigned issue to try whether the plaintiff's lands were exempted from tithes by reason of a composition or annual payment. The lands in question, in the parish of H, and the advowson of the church of H, were in 1653 conveyed to S E, S D, and M, in trust for S E, with a covenant for quiet enjoyment by S E against the parson of H and others claiming any common. Subsequently, in 1653, S E filed a bill in Chancery against P, the patron of H, and one of the parties to the above indenture, and R, the then parson and rector of H, in which, after reciting that P and R had agreed that S E should hold the said lands discharged from any claim to be made for tithes or common, and that R should accept of 80*l.* yearly, in full lieu and satisfaction of all tithes, and that P and R did agree to consent to a decree to be obtained against P and R by S E, for establishing the said agreement, prayed relief, &c. P and R, by their answer, confessed the agreement, the latter confessing also that he was ready to accept the said sum of 80*l.* in full lieu and satisfaction of all tithes and common, and praying that there might be a decree to establish the said agreement. The plaintiff, who claimed under S E, was the owner of the advowson of H and of

the largest part of the lands in H. The defendant became the incumbent in 1840. The annual sum of 80*l.* had been paid to the incumbents of H for sixty years before the appointment of R, and for three years since his incumbency. A terrier, dated 1822, and signed by the then incumbent, the churchwardens, and the landowner, stated as one of the rights of the incumbent "the tithes of the whole parish with Easter offerings, for which the rector receives a composition of 80*l.* per annum, free from parochial and other rates and assessments."

Held, first, that as for sixty years 80*l.* had been paid for tithes, no weight was due to the language of the terrier, whereby it appeared that by reason of the exemption from rates more than 80*l.* had been in fact paid by the parishioners. Secondly, that the 80*l.* having been expressly paid and received as a modus or composition for the tithe only, the modus was valid, although the rector's abandonment of his claim of common had formed part of the consideration for making the payment. Thirdly, that the bill and answer contained no proof that the agreement between the lord of the manor and the incumbent as to tithes was in writing; that the bill, even if it had stated such an agreement, would not be evidence against the lord of the manor and those claiming under him, nor would the answer be evidence for the defendant. Lastly, that to take the payment of a modus for sixty years out of the operation of the 1st section of the 2 & 3 Will. 4. c. 100, by means of a "consent or agreement in writing," such consent or agreement must be for the payment of that very modus during all or some part of the sixty years, and that by a person who could otherwise have objected to the payment; and therefore that the modus was good. *Toymbee* or *Toymbee v. Brown*, 18 Law J. Rep. (N.S.) Exch. 99; 3 Exch. Rep. 117.

(B) COMMUTATION ACTS.

(a) Award.

The 2nd section of the 7 Will. 4. & 1 Vict. c. 69, and the 34th section of the 2 & 3 Vict. c. 62. may both be in operation separately and independently; the former applying to cases where an old and existing boundary is to be ascertained, the latter to cases where a new boundary is to be set out. And therefore, where an Assistant Tithe Commissioner made an award, purporting to be made under the former act, and also in his affidavit stated that he had proceeded under that act, and had not any intention of setting out a new boundary,—Held, that the award was good under that act, although the boundary line defined by him was part of the boundary line of a county, and the provisions of the latter act were not pursued. Held, secondly, that where an award of a Tithe Commissioner is brought up by *certiorari* under the 7 Will. 4. & 1 Vict. c. 69. s. 3, the Court will enter into objections raised on the face of the award. Held, thirdly, that it was a fatal objection to the award that it did not appear, on the face of it, that the tithes were to be commuted. Held, fourthly, that it was a fatal objection that it did not appear on the face of the award that the request to the Tithe Commissioners on the subject of the boundaries, was signed at a *parochial* meeting, according to the statute 6 & 7 Will. 4. c. 71. *Regina v. Tithe*

Commissioners, in re Dent Boundaries, Newby case, 15 Law J. Rep. (n.s.) Q.B. 105; 8 Q.B. Rep. 43.

A dispute as to the title to tithes between rival claimants (the rector and the vicar) is not "a difference whereby the making of the award is hindered" under the 6 & 7 Will. 4. c. 71. s. 45, and which the commissioners are bound to decide before making their award.

An award of a rent-charge in lieu of certain tithes to which it states that the rector is entitled does not conclusively vest the title to those tithes in the rector, and the vicar may notwithstanding try his right to the substituted rent-charge. *Regina v. the Tithe Commissioners*, 19 Law J. Rep. (n.s.) Q.B. 505; 15 Q.B. Rep. 620.

A suit in Chancery praying an account of tithes due to a vicar is a suit "touching the right to tithes" within section 45. of the 6 & 7 Will. 4. c. 71: and, where during the pendency of such a suit, the Assistant Tithe Commissioner was proceeding to make his award as to the tithes of the same vicarage, under section 50, the Court granted a prohibition to stay his award until after the decision of the suit.

Semble—that under section 45. the Assistant Commissioner may himself decide the suit. *In re Crosby-upon-Eden Tithe Commutation*, 18 Law J. Rep. (n.s.) Q.B. 258.

(b) Boundary.

In one of two adjoining parishes in different counties, the commutation of tithes had been made by voluntary agreement, and in the other by a compulsory award of the Tithe Commissioners.

At the time of the commutations, and previously, a dispute had existed as to the boundary line between the two parishes, the same line being also the boundary line between the two counties. The Tithe Commissioners, against the consent of one of the parishes, proceeded to make an award to settle the boundary:—Held, that under the Tithe Acts, the 6 & 7 Will. 4. c. 71. s. 24, and the 2 & 3 Vict. c. 62. s. 34, they had no power to do so, and this Court restrained them by writ of prohibition.

Whether the writ of prohibition was the proper remedy—*quære*. *In re Tithe Commissioners (Ystradgunlais Commutation)*, 13 Law J. Rep. (n.s.) Q.B. 287; 8 Q.B. Rep. 32.

The award of an assistant Tithe Commissioner, appointed under the 7 Will. 4. & 1 Vict. c. 69, to inquire into and set out the boundary of the township of Stainmore, for the purpose of commutating the tithes of the said township, stated that he had given, and caused to be given, all the notices prescribed by that act and the 2 & 3 Vict. c. 62, and then defined the limits of the said boundary in the present tense throughout. The boundary so set out, it appeared from the affidavit of the Commissioner and others, was the ancient boundary of the township, and had been inquired into and set out as such under the provisions of the 7 Will. 4. & 1 Vict. c. 69. and not under the 2 & 3 Vict. c. 62. But it appeared also, from the same affidavits, that within such boundary was included a tract of land occupied by twenty-one different persons, and claimed to belong to another township, called Brough, and which had been rated and assessed to the poor and highway rates of the township of Brough for upwards of ninety years; that the Commissioner had consulted

the rate-books of the township of Stainmore only, in order to ascertain whether two-thirds in number and value of the landowners in the township of Stainmore had signed the notice required by 7 Will. 4. & 1 Vict. c. 69, and that two-thirds of the landowners of Stainmore, not including the said tract of land, had signed such notice. Held, that the Commissioner having set out the ancient boundary, under the 7 Will. 4. & 1 Vict. c. 69, the notice was insufficient, and therefore the award could not be sustained. *Regina v. Hobson*, 19 Law J. Rep. (n.s.) Q.B. 262.

An award by the Tithe Commissioners, under the 1 Vict. c. 69, and the 2 & 3 Vict. c. 62, as to the boundary of a parish, is not conclusive as to what was the boundary prior to the time when the award was made. *Regina v. Inhabitants of Madeley*, 19 Law J. Rep. (n.s.) M.C. 187; 15 Q.B. Rep. 43.

(c) Rent-charge.

(1) Apportionment of.

In the parish of A, in Kent, there were marsh and other ancient pasture lands, arable lands and wood lands; there was a modus of 1s. per acre, payable to the vicar for all tithes except those of corn and grain, the woodland being exempt from tithe by custom. The Tithe Commissioner awarded a rent-charge to the rector and vicar, in respect of the tithe and moduses, and the award was confirmed under the 6 & 7 Will. 4. c. 71. s. 52. The valuer, appointed under section 53, in his apportionment, charged certain of the ancient pasture lands, not only with the amount payable in respect of the modus, but with a further payment of 1s. per acre to the rector, in part of the rent-charge awarded to him in lieu of the tithes of corn and grain, on the ground that there was a probability of such pasture lands being, at a future period, converted into tillage; and it appeared that, in point of fact, lands within the same district had within living memory been ploughed. Objections having been made before the Commissioners to this apportionment, both on principle and on the facts, they heard the evidence, and decided that they would confirm the apportionment, if they were not forbidden by a superior court. On motion for a prohibition,—Held, first, that it did not lie, the Commissioners having acted within their jurisdiction. Secondly, that the apportionment was correct in principle. *In re Appledore Tithe Commutation*, 17 Law J. Rep. (n.s.) Q.B. 59; 8 Q.B. Rep. 139.

(2) Remedies to recover.

By the Tithe Commutation Act, 6 & 7 Will. 4. c. 71. s. 82, if the half-yearly payment of a rent-charge on land continue in arrear for the space of forty days after it has become due, and there be no sufficient distress upon the premises, a Judge is empowered, upon an affidavit of the facts, to order a writ to issue to the sheriff requiring him to summon a jury to assess the arrears of rent-charge remaining unpaid, &c.

Held, by Pollock, C.B., Alderson, B., and Platt, B. (*Parke, B. dissentiente*) that such Judge's order may be made *ex parte*, *In re Hammersmith Rent-charge*, 19 Law J. Rep. (n.s.) Exch. 66; 4 Exch. Rep. 87.

A Judge's order having issued *ex parte*, under the 6 & 7 Will. 4. c. 71. s. 82, to summon a jury to assess the arrears of rent-charge, after inquisition taken, a rule was obtained to set aside the order and all subsequent proceedings; but, after argument, the Court discharged the rule, without giving any directions as to the costs of shewing cause.

Held, *per Pollock, C.B., Alderson, B. and Platt, B. (Parke, B. dissentiente)*, that the costs upon the rule were properly taxed as costs of the inquisition, for which the writ of *habere facias possessionem* might issue under that section. *In re Hammersmith Rent Charge*, 19 Law J. Rep. (N.S.) Exch. 357; 4 Exch. Rep. 101.

The person entitled to the rent-charge in lieu of tithes, who distrains under the Tithe Act, 6 & 7 Will. 4. c. 71. s. 81, is not entitled to an indemnity in lieu of double costs under the 5 & 6 Vict. c. 97. s. 2, if such person avows under the 11 Geo. 2. c. 19. s. 22, and the plaintiff discontinues his action of replevin. *Newnham v. Bever*, 19 Law J. Rep. (N.S.) C.P. 129; 8 Com. B. Rep. 560.

(3) Liability of Lessee of Tithes.

To an action of covenant by a vicar on a demise of tithes by indenture from the 11th of October 1844, for a year, with a covenant by the defendant for payment of the rent—breach, non-payment of a balance, the defendant justified under the Tithe Commutation Act, the 6 & 7 Will. 4. c. 71, alleging that a commutation of the tithes had been made, that an award in respect thereof had been confirmed by the Tithe Commissioners, that an apportionment of the rent-charge had been confirmed by them on the 13th of September 1845, by force whereof, &c. the rent-charge was to commence from the 1st of October 1844, which was previously to the commencement of the term in the indenture mentioned, by means whereof the lands were discharged from tithes, and the defendant was deprived of all right and title to the same, and of all means of receiving them.

The 88th section of the act empowers a lessee of tithes to surrender and make void his lease:—Held, that the plea afforded no answer to the action, and that the defendant, who had not surrendered his lease, was liable on his covenant to pay the rent. *Tasker v. Bullman*, 18 Law J. Rep. (N.S.) Exch. 153; 3 Exch. Rep. 351.

(4) Feigned Issue.

Where a dispute had arisen before an assistant Tithe Commissioner between the landowners and vicar of a parish, the former claiming an exemption from the payment of all tithes in kind (except certain appropriate tithes admitted by them to be payable to the bishop as rector), and the latter claiming all the tithes, except the said appropriate tithes, to be payable to him in right of his vicarage, —and the bishop made no claim adverse to the vicar, and the Commissioner decided that the lands were subject to the payment of all tithes in kind (except, &c.) to the vicar for the time being; —Held, that the landowners were entitled to raise, by feigned issue, under the 6 & 7 Will. 4. c. 71. s. 46, the question whether the tithes in question were payable or not to the vicar as claimed by him before the Commissioner, and that the right of the bishop

to the tithes in question could not be raised under that issue. *University College, Oxford, v. Garton*, 16 Law J. Rep. (N.S.) Q.B. 381; 10 Q.B. Rep. 760.

If the incumbent of a benefice against whom an award of the Assistant Tithe Commissioner is made dies within the three months allowed by the 6 & 7 Will. 4. c. 71. s. 46, having had notice in writing of such award, without having brought an action to dispute it, his successor cannot do so after the three months have expired.

The landowners of parish A claimed a modus, the existence of which was denied by the rector. Meetings were held before the Assistant Tithe Commissioner, who made his award in favour of the modus on the 30th of March 1846. On the 17th of April 1846 the award was notified in writing to the rector, who died on the 18th of May following, without having commenced an action to dispute it. No successor was appointed to the rectory till the 23rd of July 1848, when the plaintiff was instituted:—Held, that, the period of three months from the time of the service of the notice of the award having expired, the plaintiff was not entitled to commence an action under the 6 & 7 Will. 4. c. 71. s. 46.

Held, secondly, that the Court was bound to interfere summarily on motion, and set aside the writ of summons and other proceedings in an action which had been so commenced. *Homfray v. Scroope*, 18 Law J. Rep. (N.S.) Q.B. 138; 13 Q.B. Rep. 509.

Where a feigned issue was raised under the Tithe Commutation Act, whether a certain modus was payable in respect of all lands in a township, and the evidence shewed that it was payable only in respect of certain old inclosures there, and the Judge at Nisi Prius indorsed the finding of the jury to that effect on the record, under the 3 & 4 Will. 4. c. 42. s. 24, the Court set aside the finding.

The provisions of the 3 & 4 Will. 4. c. 42. s. 24, do not apply to issues tried under the Tithe Commutation Act, as the Court can give no judgment on the verdict found in such cases. *Brown v. Hutchinson*, 18 Law J. Rep. (N.S.) Q.B. 92; 13 Q.B. Rep. 185.

On a motion to set aside the writ issued in an action brought in pursuance of the 46th section of the 7 & 8 Will. 4. c. 71,—Held, that the plaintiff in such action must have an interest in the annual payment to be made or withholden exceeding 20*l*.

Per Maule, J.—Such interest must be a sole interest; and the verdict in an action under this statute binds only the plaintiff and the defendant. *Mathews v. Leapingwell*, 16 Law J. Rep. (N.S.) C.P. 114; 3 Com. B. Rep. 912.

By the 5 & 6 Vict. c. 54. s. 7, it is enacted that where any agreement shall have been made before the passing of the Tithe Commutation Act (6 & 7 Will. 4. c. 71.) for giving land or money, or both, instead of tithes, glebe, &c. which is not of legal validity, and such lands or money, or both, shall appear to the Commissioners to be a fair equivalent for such tithes, glebe, &c., they shall be empowered to confirm and render valid such agreement; and in case the same shall not appear to be a fair equivalent, the Commissioners shall nevertheless be empowered to confirm such agreement, and also to award such rent-charge as with the said land or money, or both, will be a fair equivalent for the said tithes,

&c.:—Held, that in the cases to which this section applies, the Commissioners have not a discretion, but are bound to confirm according to its provisions.

A mandamus to the Tithe Commissioners stated that, by an agreement in writing made in 1697, between the lord of the manor of H, the impropriator of the parish, and certain landowners of the parish, it was agreed that the common fields in the parish should be inclosed, and that the allottees should hold the lands freed and discharged from all commons, tithes, &c. to be claimed by the impropriator or vicar, and that 1s. should be paid yearly to the impropriator for every acre of old inclosures by the persons therein named; that a plot called "The Preacher's Plot" was allotted to the vicar, to be held by him and his successors in lieu of all tithes payable out of the new inclosures, and in lieu of his right of common therein, and that other plots were allotted to him for glebe; that the then vicar accepted and took possession of the said several plots; that the present vicar still held them; that by another agreement made in 1707, between the vicar and the landowners, a composition of $1\frac{1}{2}d.$ per acre on all the lands in the parish, in lieu of all small tithes throughout the parish, was to be paid to him, and that such composition was paid and received until 1812; that tithe of lamb and wool was a rectorial tithe included in the 1s. paid under the first agreement for the old inclosures, and that no tithes in kind had ever been paid in respect of such lands. The writ then commanded the Commissioners to confirm the said agreements; to decide certain suits and differences pending; to decide whether the new inclosed lands were discharged from payment of all great tithes and tithes of lamb and wool, and from payment of all tithes to the vicar by the modus of $1\frac{1}{2}d.$ per acre or otherwise, and to decide whether the old inclosed lands were discharged from payment of all great tithes and tithe of lamb and wool by the modus of 1s. per acre, and from payment of all tithes to the vicar by the said modus of $1\frac{1}{2}d.$ per acre.

The return alleged that the vicar was inducted in 1796, and had never been in possession of all the lands stated to be allotted to him, and that he had received the $1\frac{1}{2}d.$ per acre under the agreement of 1707, in ignorance of its origin, until 1811, when he gave notice to determine it, and insisted on payment of the small tithes in kind, and offered to give up the lands which he held in lieu of them; that in 1812 he filed a bill in Chancery against certain occupiers of land for subtraction of tithes, in which suit a question was raised whether the lands were discharged from payment of all tithes to the vicar by the agreements of 1697 and 1707; that in 1817 a decree was made for an account, and that under it all the defendants except one D, the tenant of the impropriator, paid the arrears of tithes to the vicar; that the impropriator claimed the tithes of lamb and wool in 1819, and filed a bill against the vicar and a landowner, praying to be declared entitled to such tithes, and for an account; that the vicar put in his answer, and the question there was whether the impropriator was entitled to the tithes of lamb and wool as against the vicar, and the bill, together with a supplemental bill filed in 1821, was dismissed, and an appeal by D against the decree was also dismissed, after which D paid the arrears;

that neither of the agreements had been acted on since 1812.

Held, that these agreements were not such as the Commissioners were bound to confirm, as the enactment only applies to such agreements as are being acted on, or only questioned in pending suits, and not to agreements which have been long since abandoned.

Held, also, that the writ being bad in respect of one of the matters commanded was bad *in toto*, and that a peremptory mandamus could not be awarded. *Regina v. Tithe Commissioners*, 19 Law J. Rep. (N.S.) Q.B. 177.

(C) DISAPPROPRIATION OF TITHES.

The 3 & 4 Will. 4. c. 37. s. 124. empowers the Lord Lieutenant and Privy Council in Ireland to "disappropriate, disunite, and divest any rectory, vicarage, tithes, or portions of tithes, and glebes, or part or parts thereof, from and out of any archbishopric, bishopric, deanery, or archdeaconry, dignity, prebend, or canonry, and to unite every such rectory, vicarage, tithes, or portions of tithes to the vicarages and perpetual or other curacies of such parishes respectively, so that each such rectory, vicarage, tithes, or portion of tithes, and glebes, or part or parts thereof, shall with its respective vicarage, perpetual or other curacy, form a distinct parish or benefice:"—Held, that the Lord Lieutenant and Privy Council have authority to disappropriate any part or portion of the tithes of a rectory; that the word "rectory" in the statute must be applied in its widest legal sense, and therefore includes the glebe; and that an order of disappropriation of "rectory," made by the Lord Lieutenant and Privy Council, cannot be restricted to the tithe rent-charge, unless on the face of the order of disappropriation such restriction is manifested.

In an order of the Lord Lieutenant and Council, made under this act, there was a statement of the revenues of three rectories belonging to a cathedral treasurership. The order then went on to say, "There is a further income belonging to the said treasurership, arising from demised lands, amounting to the yearly sum of 80l. 6s. $1\frac{1}{2}d.$ " The glebe lands which were not in express terms mentioned in the order, did amount to nearly the sum thus stated. A small piece of land called the treasurer's garden made up the rest. After this statement of the revenues, the order went on to disappropriate "the rectories, together with the rectorial tithes thereunto belonging," in pursuance of the power given by the act, but said nothing about the glebe:—Held, that the glebe lands were, under this order, disappropriated from the treasurership. *Wilson v. Loveland*, 12 Cl. & F. 677.

(D) ACTIONS, SUITS, AND PROCEEDINGS.

The statute 3 & 4 Will. 4. c. 27. s. 2. enacts, that no land (which includes tithes) shall be recovered but within twenty years after the right of action has accrued to the claimant, or the person through whom he claims:—Held, that the section is confined to cases where there are two parties, each claiming an adverse estate in the tithes; so that a person who had not received tithes for twenty years

could not recover possession of them from another, who for twenty years had received them from the terre-tenant; but that the statute did not bar the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for upwards of twenty years. *Dean and Chapter of Ely v. Cash*, 15 Law J. Rep. (N.S.) Exch. 341; 15 Mee. & W. 617.

A declaration stated that the defendants were the Tithe Commissioners; that one T P A was owner of land in a certain parish subject to tithes; that during his lifetime an award was made of the sum to be paid as rent-charge instead of tithes of the said parish, and confirmed by the defendants; that an apportionment of the said rent-charge was afterwards made, and the expenses thereof paid without dispute or difference; yet the defendants under colour of their office, maliciously, &c. intending to compel the plaintiff as the alleged owner of the said lands without just cause to pay a sum of 39l. 10s. 7d. as the expenses of the said apportionment, falsely and maliciously, and without reasonable and probable cause, did sign a certificate as under the authority of the Tithe Commutation Act, which stated that 39l. 10s. 7d. was the share of the expenses of the apportionment to be paid by the plaintiff, touching which a dispute had arisen between the plaintiff and Earl F; and that the above sum ought to be paid by the plaintiff to Earl F; whereas no such difference existed, and no such sum was owing, as the defendants well knew, and also well knew that the whole share of the expenses of the said apportionment had been long ago paid without dispute or difference; that the defendants afterwards wilfully delivered the said false certificate to one J P on behalf of the said Earl F that it might be produced before two Justices, that they might by warrant cause the amount to be levied by distress on the plaintiff's goods; that the certificate was produced before the Justices, who issued a warrant, under which the plaintiff's goods were distrained upon for the sum of 39l. 10s. 7d.

The defendants pleaded, first, that the grievances were committed after the passing of the Tithe Commutation Act, the 6 & 7 Will. 4. c. 71, and the Notices of Action Act, the 5 & 6 Vict. c. 97, and were committed under the authority of the Tithe Commutation Act; and that a month's notice of action had not been given to the defendants; secondly, that the grievances were done under the authority of the said act of parliament, and that they were committed in the county of Middlesex, and not in the county of Devon. Demurrer thereto. —The Court overruled the demurrer, and the plaintiff replied, traversing that the grievances were committed under the authority of the act of parliament. *Acland v. Buller*, 18 Law J. Rep. (N.S.) Exch. 51; 1 Exch. Rep. 837.

Since the 5 & 6 Will. 4. c. 74, if any tithe, obligation, or composition not excepted in the 7 & 8 Will. 3. c. 6, or exceeding 10l. yearly value, due from any one person, is in arrear, it must be proceeded for before two Justices; and if the title of the claimant or liability of the party sought to be charged is undisputed, two years' arrears may be there recovered; whereas if such title or liability is denied *viâ voce* before the Justices, or at any time in writing, the claimant may proceed by suit in equity,

and recover six years' arrears. *Robinson v. Purday* 16 Mee. & W. 11.

(E) PLEADING.

In an action of debt on the 2 & 3 Edw. 6. c. 13. s. 1. for treble value of tithes carried away before setting out the same, the defendant should not plead several pleas of *nil debet* by statute as to several parts of the lands on which the titheable matters were produced, but should plead one plea of *nil debet* by statute to the whole.

The defendant will be obliged to give a particular of all grounds of exemption, modus, &c., intended to be insisted on at the trial. *Graburn v. Brown*, 16 Mee. & W. 831.

TOWN.

[See HEALTH.]

Provisions in acts for paving, draining, cleansing, lighting, and improving towns consolidated by the 10 & 11 Vict. c. 34; 25 Law J. Stat. 116.

TRANSPORTATION.

Superintendent of convicts abolished by the 9 & 10 Vict. c. 26; 24 Law J. Stat. 73.

TRESPASS.

- (A) WHEN MAINTAINABLE.
- (B) PLEADINGS.
- (C) EVIDENCE.
- (D) DAMAGES.

[See ATTORNEY—FISHERY—INFERIOR COURT — PLEADING, New Assignment—TENANT IN COMMON.]

(A) WHEN MAINTAINABLE.

By the 81st section of the Irish Insolvent Act, the 3 & 4 Vict. c. 107, no person entitled to the benefit of the act by an adjudication of the Court is to be imprisoned by reason of a judgment which is entered up against him, according to the act, but upon arrest or detainer in prison upon any such judgment so entered up, a Judge of any court from which any process has issued in respect thereof, may, under certain circumstances, release such prisoner from custody. And section 82. enacts, that no writ of *ca. sa.* shall issue on any judgment obtained against such prisoner, except upon the judgment entered up against such prisoner, according to the act, and by special order of the Court.

A party who had inserted in his schedule a judgment obtained against him in one of the courts at Westminster, was discharged from custody in Ireland under the above act. He was afterwards arrested in England, and a *ca. sa.* issued by the plaintiff in the original suit, but was discharged on application to a Judge:—Held, that the insolvent could not maintain trespass against the plaintiff for the imprisonment, but that if he had wilfully abused the process of the Court, the insolvent had a remedy against him by action on the case. *Ewart v. Jones*,

15 Law J. Rep. (N.S.) Exch. 18; 14 Mee. & W. 774; 3 Dowl. & L. P.C. 252.

Trespass will not lie against a plaintiff or his attorney for suing out execution, and arresting thereon a defendant who has obtained an order for protection from process under the 5 & 6 Vict. c. 116. *Yarlesley v. Heane*, 3 Dowl. & L. P.C. 265.

Trespass lies by one tenant in common against his co-tenant, (or the licensee of the latter,) for digging up and carrying away the soil of the close of which they are tenants in common; for such an act is an ouster.

In such an action a plea that the close is not the close of the plaintiff, is not supported by proof—that he is tenant in common of it with others who authorized the trespasses. *Wilkinson v. Haygarth*, 16 Law J. Rep. (N.S.) Q.B. 103.

The plaintiffs were seised in fee of a close, but other persons had the right to the exclusive possession of the surface of it during a portion of the year:—Held, that the plaintiffs, as owners of the subsoil, might maintain trespass against persons who had dug holes through the surface into the subsoil during that portion of the year:—but that for an injury, committed during such portion of the year, which affected the surface only, the plaintiffs could not maintain trespass.

The word "close" in a declaration in trespass includes the subsoil as well as the surface. *Cox v. Glue*, 17 Law J. Rep. (N.S.) C.P. 162; 4 Com. B. Rep. 533.

Justices are empowered by the 27th section of the 9 Geo. 4. c. 31. to convict of an assault upon complaint, and the offender, upon conviction thereof before them, is to pay such sum, not exceeding 5*l.*, as shall appear to them to be meet, which sum is to be paid to some one of the overseers of the poor, or to some other officer of the poor of the parish, &c. in which the offence shall have been committed, to be by such overseer or officer paid over to the general use of the rate of the county in which such parish, &c. shall be situate. A conviction, under this section, ordered the party convicted to pay the fine to the treasurer of the county:—Held, that the conviction was bad, and the magistrates liable to an action of trespass at the suit of the party imprisoned under it. *Chaddock v. Wilbraham*, 17 Law J. Rep. (N.S.) M.C. 79; 5 Com. B. Rep. 645.

Where the interest of A, a tenant, ceases before the expiration of the term of letting by the death of his landlord the tenant for life, A will not be presumed to have continued in possession after such death; and in the absence of any subsequent entry or other act done by him, he has not a sufficient possession of the land, either actual or constructive, to entitle him to maintain trespass. *Brown v. Notley*, 18 Law J. Rep. (N.S.) Exch. 39; 3 Exch. Rep. 219.

Trespass will lie against the governor of a prison for causing a prisoner to be removed by force or threats of force from one division of the prison to another, in which he ought not by law to be confined, although he acts in obedience to a rule issued by the Secretary of State, if such rule be not in accordance with the statutes as to the classification of prisoners.

The Secretary of State is also liable to an action

if he improperly directs the gaoler so to remove all persons of a certain class, and the gaoler does remove a person coming within that class.

Semble—that under the 5 & 6 Vict. c. 22. prisoners in the Queen's Bench Prison who had not filed their schedules pursuant to an order of the Insolvent Court, were rightly placed in Class 1. But assuming that the removal of such prisoners to Class 1. was illegal, the 11 & 12 Vict. c. 7. s. 3. is a defence to any action brought for such removal, as it is an act done with regard to the classification of prisoners.

A plea of justification under that statute was not pleaded to the further maintenance of the action:—Held, nevertheless, that the plea was good after verdict. *Cobbett v. Grey*, 19 Law J. Rep. (N.S.) Exch. 137; 4 Exch. Rep. 729.

The plaintiff, by the permission of the defendant, had placed a brass plate, with his name upon it, on the outer door; and the declaration, after alleging the breaking and entry into the apartments, alleged that during the time aforesaid, to wit, &c. the defendant removed and took a certain brass plate from the outer door of the dwelling-house, and kept it so removed, &c. The defendant pleaded (*inter alia*), that the plaintiff was not possessed of the brass plate. There was no evidence, and no point made at the trial, as to whether or not the plate was affixed to the door:—Held, that it must now be assumed that it was not affixed, and that trespass would, therefore, lie for the removal of it.

Quære—Whether it would have lain if it had been proved to be affixed.

Held, also, that the removal of it was sufficiently charged in the declaration, as against the defendant who had pleaded to it, as a distinct trespass, and not as aggravation only. *Lane v. Dixon*, 16 Law J. Rep. (N.S.) C.P. 129; 3 Com. B. Rep. 776.

(B) PLEADINGS.

The judgment in *Harvey v. Brydges*, 5 Law J. Dig. 765, affirmed 1 Exch. Rep. 261.

[*White v. Hill*, 5 Law J. Dig. 765; 6 Q.B. Rep. 487.]

Plea of not possessed. See LIEN.

Trespass *qu. ck. fr.* Plea, that the close was the close and freehold of P, and that the defendant as her servant and by her command committed the trespasses, &c. Replication, traversing the command of P. P was a minor and ward in Chancery:—Held, that the plea was supported by proof that the defendant was the general agent of P and receiver of her rents, appointed by the Court of Chancery; and that he did the acts complained of in the execution of his authority as such general agent. *Ewer v. Jones*, 16 Law J. Rep. (N.S.) Q.B. 42; 9 Q.B. Rep. 623.

In an action of trespass for breaking and entering the plaintiff's apartment, it appeared that the plaintiff had taken furnished lodgings in the defendant's house for a term, and that the only entrance to them was through the defendant's street-door and lobby; and the evidence to shew the breaking and entering by the defendant was, that before the term had expired the defendant had prevented the plaintiff from entering the house, telling him he should no longer have the apartments:—Held, that this was sufficient evidence for the jury to infer a

breaking and entering of the apartments by the defendant. *Lane v. Dixon*, 16 Law J. Rep. (N.S.) C.P. 129; 3 Com. B. Rep. 776.

The declaration alleged that the defendant, with force and arms, &c., and with a strong hand, and against the form of the statute, broke and entered the dwelling-house of the plaintiff, and broke open doors, windows, &c., and in a forcible manner and with a strong hand disseised and expelled the plaintiff. The defendant pleaded as to the breaking and entering, &c. that the dwelling-house, &c. was his soil and freehold:—Held, that the defendant might confine his justification to the breaking and entering, and that the plea was good; the circumstance of entering *manu forti* being matter of aggravation, which the defendants were not necessarily called on to justify in a civil action. *Davison v. Wilson*, 17 Law J. Rep. (N.S.) Q.B. 196; 11 Q.B. Rep. 890.

To an action of trespass against the defendant, the keeper of the Queen's Prison, for assaulting and compelling the plaintiff to go to the Arches Court, the defendant pleaded that he was commanded by a writ of *habeas corpus* to take the plaintiff thither, and that the plaintiff refused to go, wherefore the defendant, &c. The plaintiff replied, that the writ was issued at the instance of the plaintiff and no other person, as the defendant well knew, and that the defendant had had notice not to execute it. Rejoinder, that the defendant did not know that the writ was issued at the instance of the plaintiff and of no other person:—Held, that this issue was not supported by evidence that the plaintiff's agent informed one of the defendants, a deputy keeper of the prison and clerk of the papers, and servant of the defendant, that the writ was the plaintiff's writ, and that he was not to be taken before the Court of Arches, the writ not containing any mention of the plaintiff's name. *Herring v. Hudson*, 18 Law J. Rep. (N.S.) Exch. 28; 3 Exch. Rep. 107.

To an action of trespass for an assault, the defendant pleaded, that he was possessed of a gig and horse which were upon a public highway; that the plaintiff seized the horse and attempted to dispossess the defendant of the horse and gig, and was driving them away and dispossessing him of them, wherefore the defendant did defend his possession and resisted the plaintiff's endeavour, and in doing so committed the trespass in question:—Held, that this plea was not supported by proof that the plaintiff, whose horse had been struck by the defendant, seized the defendant's horse, intending to hold it until his master should come up, and for the purpose of inquiring the defendant's name. *Gaylard v. Morris*, 18 Law J. Rep. (N.S.) Exch. 297; 3 Exch. Rep. 695.

Where a party, on being summoned to appear before two Justices for an assault, appeared, and pleaded "not guilty;" and the prosecutor then withdrew his complaint, and the defendant was accordingly discharged,—Held, that this was a hearing and dismissal, which entitled the defendant to a certificate that the charge had been dismissed as not proved, under the 9 Geo. 4. c. 31. s. 27; and that a plea, stating those facts, and that the certificate had been granted, set forth a good defence, under the 28th section, to an action of trespass for

the same assault. *Tunncliffe v. Tedd*, 17 Law J. Rep. (N.S.) M.C. 67; 5 Com. B. Rep. 553.

To a declaration in trespass for false imprisonment, the defendant pleaded that W T recovered a judgment against the plaintiff in an inferior court of record; that the plaintiff was summoned before the Judge for non-payment of the amount recovered, when an order was made for payment by the plaintiff by instalments; that the plaintiff made default in payment of the first instalment, which was duly demanded of him, which being proved before the Judge of the said court, he, according to the form of the statute (8 & 9 Vict. c. 127.) and at the request of the defendant, then being attorney for the said W T and acting upon his retainer, duly ordered (by warrant under his hand and seal directed to the officer of the said court) the plaintiff to be taken and conveyed by him to the debtors' prison for London for forty days (the warrant was set out at length); that the defendant, as such attorney, delivered the warrant to the said officer, who took the plaintiff, to wit, on &c.; which are the same supposed trespasses complained of in the declaration, &c. Replication, that the said Judge did not order that the plaintiff should be committed *modo et forma*. The defendant, at the trial, produced a warrant corresponding with the terms of the plea. It neither appeared on the face of the plea nor warrant that the plaintiff was summoned to shew cause why he should not be committed:—Held, that the plea must be taken to mean that the Judge issued a valid order, which fact was traversed by the replication; that the order produced was invalid for not shewing a summons previous to the commitment, and therefore the plaintiff was entitled to a verdict on the issue taken on the second plea.

Where an attorney justifies an act of trespass by a special plea setting out an order from a Court of competent jurisdiction, such order, if traversed, must be produced, and if such order be not valid, the plea of justification fails. *Kinning v. Buchanan*, 18 Law J. Rep. (N.S.) C.P. 332; 8 Com. B. Rep. 271.

In trespass *quare clausum fregit*, under a traverse of the allegation in the declaration that the close was the close of the plaintiff, the defendant may shew title in himself or some other person, under whose authority he claims to have acted—*Per Wilde, C.J., Collman, J., Maule, J., Erle, J. and Williams, J.* *Dissentiente Coleridge, J. and Wightman, J.* *Jones v. Chapman*, 18 Law J. Rep. (N.S.) Exch. 456.

In trespass *quare clausum fregit*, to a plea of *liberum tenementum*, the plaintiff replied that the defendant had leased to J S for a term which was subsisting at the time of the commission of the trespass by the defendant:—Held, on demurrer to the replication, that it was sufficient without tracing title from J S to the plaintiff, as it shewed that the defendant had not the immediate right of possession, and was consistent with the possession of the plaintiff stated in the declaration. *Ryan v. Clarke*, 18 Law J. Rep. (N.S.) Q.B. 267.

(C) EVIDENCE.

In an action of trespass against three who had all jointly, and by one attorney, pleaded not guilty

"by statute," the Judge at Nisi Prius would not, on the application of the plaintiff's counsel, just before the jury were sworn, allow a *nolle prosequi* to be entered as to one of the defendants, in order that he might be called as a witness for the plaintiff. Neither would the Judge, immediately after the jury were sworn, allow one of the defendants to be acquitted on the application of the plaintiff's counsel, it being stated by the defendant's counsel that he appeared for all the defendants, and objected to such acquittal.

If, in an action of trespass against several defendants, there be at the end of the plaintiff's case no evidence against one of the defendants, it is in the discretion of the Judge whether such defendant shall be then acquitted; and if from the nature of the evidence given for the plaintiff, it is probable that evidence which will be given for the other defendants will fix this defendant with liability, the Judge will not allow his acquittal at the end of the plaintiff's case.

In trespass for taking goods, the defence under the statute 11 Geo. 2. c. 19. s. 3, that the goods had been seized after having been fraudulently removed to prevent a distress for rent, cannot be gone into unless specially pleaded; but where, in trespass against a landlord and his broker for taking goods, there was no evidence against the landlord, and this defence was opened but could not be gone into, as not guilty "by statute" was the only plea, the Judge would not certify, under the statute 8 & 9 Will. 3. c. 11. s. 1, that there was reasonable cause for making the landlord a defendant, in order to deprive him of costs. *Spencer v. Harrison*, 2 Car. & K. 429.

Where a sheriff's officer to whom a writ of *fi. fa.* was directed, offered to stay the execution on receiving a sum of money, and his partner and assistants afterwards executed the writ illegally by breaking open an outer door in his absence, and he subsequently withdrew the execution on the payment of the amount of the levy and a bonus to himself:—Held, that there was sufficient evidence to justify a jury in finding him guilty as a co-trespasser, on the ground that he had authorized the unlawful act.

The amount of damages in such a case is a matter for the discretion of the jury, but they are entitled to award the amount paid under the execution as a portion of the damages.

A plea justifying a trespass under a *fi. fa.* must shew that the outer door was open, and if that allegation was not proved the justification fails.

Quare—To what extent a levy under a *fi. fa.* can be justified, when properly pleaded, in a case where the possession of the goods has been illegally obtained. *Duke of Brunswick v. Sloman*, 18 Law J. Rep. (N.S.) C.P. 299; 8 Com. B. Rep. 317.

In an action of trespass for breaking and entering, digging in, &c. the plaintiff's close, it appeared that the close at the time of the trespass was in the occupation of L, the plaintiff's lessee. The plaintiff tendered evidence to shew that she resumed possession of the close for a time after the trespasses were committed, and before action, which was rejected by the Judge:—Held, that the evidence was inadmissible; and that trespass for the continuance is not maintainable by a person who comes into possession after the commission of the trespass.

Pilgrim v. Southampton and Dorchester Rail. Co., 18 Law J. Rep. (N.S.) C.P. 330; 8 Com. B. Rep. 25.

In an action of trespass against two defendants, the plaintiff, to prove the acts complained of, put in evidence a return by one defendant to a writ of *habeas corpus*, in which he stated that in obedience to certain orders issued by the other defendant, he had committed those acts. No evidence was offered that the plaintiff came within these orders; but the counsel for the defendants relied upon the evidence so adduced by the plaintiff as proof of pleas of justification pleaded by both defendants:—Held, that the return was evidence for both defendants, but that in the absence of any other evidence the jury should have found a verdict against both on the issue of not guilty.

Proof of an attachment out of Chancery for non-payment of costs will support an averment in a plea, that the plaintiff was committed by reason of a contempt of the Court of Chancery.

A Judge of Nisi Prius may grant a certificate under the 4 Anne, c. 15. s. 5, that the defendant had reasonable ground for pleading certain pleas, upon an *ex parte* application, even after taxation has commenced. *Cobbett v. Grey*, 19 Law J. Rep. (N.S.) Exch. 137; 4 Exch. Rep. 729.

(D) DAMAGES.

In actions for tort, the Court will not interfere with the damages found by the jury, unless they appear to be grossly disproportioned to the injury sustained. Where, therefore, a landlord caused considerable injury to the crops of his tenant, by selling, felling and removing timber, without applying for leave to enter, and the jury assessed the damages at 300*l.*, the Court refused to interfere, although the net value of the entire crops did not exceed 200*l.* *Williams v. Currie*, 1 Com. B. Rep. 841.

Where a joint trespass has been committed, damages are not to be assessed according to the act of the least or the most guilty of the defendants, but according to the injury the plaintiff has sustained from the joint act of the trespassers; and in such a case the motives of the defendant are not material unless they tend to aggravate or mitigate the injury sustained by the plaintiff. *Clark v. Newsam*, 16 Law J. Rep. (N.S.) Exch. 296; 1 Exch. Rep. 131.

The defendant drove against the plaintiff's chaise, and the collision threw the person sitting in it on to the front part of the chaise, which caused the horse to kick and break the chaise. The declaration stated, that the defendant drove his chaise against the plaintiff's chaise, and thereby greatly crushed and broke to pieces the chaise of the plaintiff:—Held, that the trespass was a continuing trespass; that the plaintiff had properly alleged, and was entitled to recover all the damages occasioned by the collision. *Gilbertson v. Richardson*, 17 Law J. Rep. (N.S.) C.P. 112; 4 Com. B. Rep. 502.

TRIAL.

[See PRACTICE, AT LAW, Trial.]

TROVER.

[See STOPPAGE IN TRANSITU—PLEADING, New Assignment—TENANT IN COMMON.]

- (A) WHEN MAINTAINABLE.
- (B) CONVERSION.
- (C) PLEADING AND EVIDENCE.
- (D) DAMAGES.

(A) WHEN MAINTAINABLE.

The plaintiff, being the owner of a piano, lent it to A, whose landlord seized it under a distress for rent. The landlord remained in possession of the piano for a fortnight, when a sheriff's officer seized it under an execution against A, and removed it to the premises of the defendant, an auctioneer, who afterwards sold it:—Held, that the plaintiff might maintain an action of trover against the defendant, and that trover would not lie, at the suit of the landlord, against the defendant; but that his remedy was against the sheriff's officer for pound breach.

Semble—If the conversion had amounted to pound breach, the defendant would have been liable to the landlord in an action of pound breach, and also to the plaintiff in trover for the conversion. *Turner v. Ford*, 15 Law J. Rep. (N.S.) Exch. 215; 15 Mee. & W. 212.

In an action of trover, where the plaintiff had been endeavouring to baffle his creditors by a merely ostensible transfer of the goods to another, and where they were seized upon premises in which the plaintiff's tenancy had expired:—Held, first, that there was a sufficient possession as against a wrongdoer, without regard to the question of ownership; and, secondly, that the measure of damages was the value of the plaintiff's real and *bond fide* interest in the goods, and not the full value. *Cameron v. Wynne*, 2 Car. & K. 264.

Under an agreement between the plaintiff and the defendants, that one C D should be employed by the "said parties hereto" for a certain time, and the plaintiff should be employed for a certain time also; and "that the said parties hereto" should be allowed to have the use of certain property for a certain period, and at the expiration of the agreement the property should be given up to the plaintiff:—Held, that the words the "said parties hereto" meant the defendants only, and, therefore, that the plaintiff was not a partner with the defendants in the goods.

The goods having been, during the term, applied by the defendants to a purpose in contravention of the agreement, and not having been re-delivered by them at the end of the term:—Held, that the bailment had been determined, and that the plaintiff might maintain trover. *Bryant v. Wardell*, 2 Exch. Rep. 479.

Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman, employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master

signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. In such circumstances, held by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay), that trover would not lie for the goods, for that on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. *Cowas-jee v. Thompson*, 3 Moore, In. App. 422.

Brewers in Dublin had supplied porter in casks to a customer on the terms that the empty casks were to be returned to Dublin at the customer's expense, within six months from the date of the invoice, or paid for at the invoice price at the option of the shippers:—Held, that under this contract as soon as the casks were empty, the customer was in the situation with respect to them of a mere bailee during pleasure, and that the brewers had such an immediate right of possession of the empty casks as would entitle them to maintain trover against any person who converted them to his own use. *Manders v. Williams*, 18 Law J. Rep. (N.S.) Exch. 437; 4 Exch. Rep. 339.

K & Co., merchants at New Orleans, purchased, with their own money, corn, as agents for the plaintiff in England, for the price of which they drew bills of exchange upon the plaintiff, which he accepted. The corn was shipped under bills of lading, making it deliverable to K & Co. or their order, and invoices and a letter of advice were forwarded to the plaintiff, stating that the corn was shipped on his account. The bills of exchange drawn upon the plaintiff were purchased for their full amount, by the defendants, of K & Co. who indorsed and delivered to them the bills of lading as a security for the due payment of the bills of exchange, with a power of sale in case of non-payment. On the day when the bills of exchange fell due, the plaintiff offered payment to the holder of them, but the bills being accidentally mislaid, the money was not then received, but he was desired to pay the following morning, which he was unable to do, and the bills had never in fact been paid. The defendants having sold the corn under the power, the plaintiff brought trover.

Held, that he could not recover, as by the indorsement of the bills of lading to the defendants, a special property passed to them in the corn, subject to which the plaintiff had a general property by the invoice and letter of advice; and that the offer of payment by the plaintiff did not discharge the plaintiff from his duty to pay the bills before his right to the possession of the corn attached. *Jenkins v. Brown*, 19 Law J. Rep. (N.S.) Q.B. 286.

Goods which have been stolen may be recovered in trover from the purchaser of them in market overt, upon a conversion by him subsequent to the conviction of the felon, without any order for restitution having been made; for the effect of the 7 & 8 Geo. 4. c. 29. s. 57. is to re-vest the property in stolen goods in the original owner upon conviction of the felon. *Scattergood v. Sylvester*, 19 Law J. Rep. (N.S.) Q.B. 447; 15 Q.B. Rep. 506.

Trover held to lie against the owner of a ship, for the sale of the cargo by the master, not inconsistent with the authority given to him by the owner. *Ewbank v. Nutting*, 7 Com. B. Rep. 797.

Deer in a park (though an ancient and legal park) may be so tame and reclaimed as to pass to executors as personal property. *Morao v. Earl of Abergavenny*, 8 Com. B. Rep. 768.

If the owner of the freehold seize an animal which has been doing damage to his freehold, but has ceased to do so, where it is not necessary to detain the animal to prevent further damage, and the owner of the freehold detains the animal and feeds it for several days, and then sells it for its full value, the owner of the animal is entitled in trover to recover its full value, without any deduction for its keep, as the owner of the freehold seized the animal in his own wrong. *Wormer v. Biggs*, 2 Car. & K. 31.

(B) CONVERSION.

[*Thorogood v. Robinson*, 5 Law J. Dig. 768; 6 Q.B. Rep. 769.]

Where the defendants meddled with and took an inventory of the plaintiff's goods, and gave him notice they had distrained them:—Held, that there was sufficient evidence to go to the jury of a conversion of the goods to the defendants' own use.

Where it appears to the Court that one of several defendants has been joined in the action merely to exclude his evidence, it will direct a verdict to be entered for him at the close of the plaintiff's case. *Neilau v. Hamny*, 2 Car. & K. 710.

A bill of sale and assignment of goods, described as being in certain warehouses belonging to A, was given by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A, who had seized the goods, it appeared in evidence that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged by instalments a few days afterwards; whereupon the Judges of the Supreme Court held, that there had been no valid transfer, and, consequently, no conversion, and gave an interlocutory judgment and verdict in accordance with such view:—Held, by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial, that the judgment and verdict were not justified by the evidence, and must be reversed, and a new trial granted. *Seal v. O'Dowda*, 6 Moore, P.C. 324.

Where the holder of a dishonoured bill, which had been paid by the indorser, told him to call for it some other day, it being at his attorney's, and he did so; but the bill was not given to him:—Held, not evidence of a conversion. *Towne v. Lewis*, 7 Com. B. Rep. 608.

A contractor having engaged with a railway company to construct a portion of their line, employed a sub-contractor to fence the line, who for that purpose placed timber near it. This timber having been sold to the plaintiff, was afterwards taken away by certain workmen employed on the railway. A claim to the timber having been made on behalf of the plaintiff on a director of the company, the claimant was recommended by him to attend a

meeting of the company, which he did, and was informed by the same director that there was a prospect of an amicable arrangement, and that in all probability his claim would be met:—Held, in trover against the company, that there was not sufficient evidence to make the company liable. *Glover v. North-Western Rail. Co.*, 19 Law J. Rep. (N.S.) Exch. 172; 5 Exch. Rep. 66.

(C) PLEADING AND EVIDENCE.

To an action of trover for a bedstead, the defendant pleaded, that the plaintiff impleaded one W in an action of trover, and obtained judgment for damages sustained on the occasion of the conversion by him of the bedstead in question; that W afterwards, and before the commencement of the present action, paid and satisfied those damages, which were recovered as the full value of the bedstead; that the conversion by W, for which the action was brought against him, and the said damages recovered, was a conversion not later in point of time than the conversion complained of in the present action, and that W, just before the conversion complained of in the present action, sold and delivered the bedstead to the plaintiff, and that the receiving under such sale and delivery was the conversion complained of. Upon special demurrer, held, that the plea did not amount to not possessed; that it gave implied colour, and then avoided the *prima facie* title it admitted; that the Court would not assume that there had been a change in the possession, and that it had become revested in the plaintiff since the original conversion; that the obtaining of judgment and satisfaction for its full value in an action for the conversion of a chattel vests in the defendant in that action the title to the chattel retrospectively; and that the plea was good. *Cooper v. Shepherd* 15 Law J. Rep. (N.S.) C.P. 237; 4 Dowl. & L. P.C. 218.

Trover for two clocks. Plea, that the plaintiff and the defendant were jointly owners of the clocks:—Held, on special demurrer, that the plea was bad. *Higgins v. Thomas*, 15 Law J. Rep. (N.S.) Q.B. 261; 8 Q.B. 908.

In trover, evidence that the goods were delivered to the defendant by the plaintiff's wife, with his authority, is available under "not possessed." *Ringham v. Clements*, 17 Law J. Rep. (N.S.) Q.B. 289; 12 Q.B. Rep. 260.

In trover a written demand of the goods signed by the plaintiff, and attested by a subscribing witness, was served on the defendant:—Held, that, at the trial, a duplicate original of this could not be given in evidence as a demand by the plaintiff, without calling the subscribing witness, but the Judge allowed it to be read as a paper delivered to the defendant, (though not as sent by the plaintiff), in order to allow the plaintiff (if he could) to shew anything that the defendant had said or done in consequence of it. *Briant v. Dormer*, 2 Car. & K. 692.

(D) DAMAGES.

Special damage may be recovered in trover, if laid in the declaration. *Bodley v. Reynolds*, 15 Law J. Rep. (N.S.) Q.B. 219; 8 Q.B. Rep. 779.

TRUCK ACT.

Upon the true construction of the 5th and 19th sections of the 1 & 2 Will. 4. c. 37, (the Truck Act), that statute is applicable only to those persons who contract as labourers, viz., such as contract to use their personal services, and to receive payment for such services in wages.

Therefore where a person contracted, as a sub-contractor, to make a cutting on a projected line of railway, at a certain sum per cubic yard, and employed others with whom he himself worked in making the cutting:—Held, that he was not a “workman or labourer” within the meaning of the 19th section; and that in an action for such work and labour the defendants were not deprived by section 5. of their right of set-off for goods sold and delivered.

Quere—Whether a labourer who is employed to make a cutting on a projected line of railway, and who in the performance of such work removes a quantity of clay which is used in the manufacture of bricks, is a person “employed in or about the working or getting of clay” within the meaning of the 19th section of the above act. *Riley v. Warden*, 18 Law J. Rep. (N.S.) Exch. 120; 2 Exch. Rep. 59.

TRUST AND TRUSTEE.

[See WILL, Revocation.]

(A) TRUST.

- (a) *Constitution.*
- (b) *Construction.*

(B) TRUSTEE.

- (a) *Appointment.*
- (b) *Removal and Change.*
- (c) *Liability and Disability.*
- (d) *Powers, Rights and Duties.*
- (e) *Investment by.*
- (f) *Conveyance by.*
- (g) *Breach of Trust.*

(C) CESTUI QUE TRUST.

(D) TRUSTEE AND MORTGAGEE ACTS.

- (a) *Construction.*
- (b) *Practice under.*

(A) TRUST.

(a) *Constitution.*

A, being resident abroad, wrote to his bankers, requesting them to invest £,000L in the funds, in the joint names of himself and wife, in trust for his son; an answer was returned, that, as the Bank of England would not recognize trusts, the bankers had invested the money simply in the names of A and his wife. A allowed the stock to remain without any trust being declared, and received the dividends till his death:—Held, that no trust was constituted for the son, but that the stock remained under A's dominion, and, on his death, became part of his assets. *Smith v. Warde*, 15 Law J. Rep. (N.S.) Chanc. 105; 15 Sim. 56.

A father having by his will appointed a guardian to his children, with a recommendation that in the event of their mother's death they should be placed

under the care of two female relations:—Held, that the Court was bound to give effect to the recommendation so far as was consistent with preserving the general powers and rights of the testamentary guardian.

Words of recommendation or desire in a will will not raise any trust if such construction would conflict with other more definite and positive provisions. *Knott v. Cottlee*, 2 Ph. 192.

A testator directed, that, as his estates would require more management than his trustees could bestow upon it, his wish and desire was that the plaintiff should be appointed the manager and receiver of the estates:—Held, that this direction was not imperative, and the trustees were not bound to employ the plaintiff as manager and receiver. *Finden v. Stephens*, 16 Law J. Rep. (N.S.) Chanc. 63; 2 Ph. 142.

The testator, by his will, directed that his wife should receive all the rents and profits of his real and personal estate, and pay and apply the same to and for the use of his said wife and the children of their marriage, agreeable and according to her own discretion during her life. On a bill by one of the children against the widow, praying that a proper proportion of the income might be secured for the plaintiff's benefit,—Held, that the plaintiff had an interest, but that she was only entitled at the hearing to an account of the income of the testator's estate and of the application of such income, in order to enable the Court to judge whether the discretion had been fairly exercised.

Where an interest in income is given to a person subject to the discretion of another, the Court will not deprive the trustee of the exercise of that discretion so long as it is fairly exercised. *Costobadie v. Costobadie*, 16 Law J. Rep. (N.S.) Chanc. 259; 6 Hare, 410.

A testator, by his will, gave all his estate to his wife A for her life; and, after her death, as to 2,000L, part thereof, he gave the same to be disposed of by her will, in such manner as she should think proper; but recommended her to dispose of one half to her relations, and the other half to each of his relations as she should think proper:—Held, that the word “recommend” did not create a binding trust, and that A had the power of disposing of the fund in any way that she pleased. *Johnson v. Rowlands*, 17 Law J. Rep. (N.S.) Chanc. 438; 2 De Gex & S. 356.

A brother deposited various sums of money in a savings bank in the name of his sister and himself as a trustee. He kept the depositor's book in his own possession, and drew out small sums as he required them, and made other deposits; he never in his lifetime communicated the circumstances to any one, and died without having made any declaration of trust respecting the money deposited. Upon a claim by the sister,—Held, that no trust was created, the probable intention for opening the account being to evade the provisions of the Savings Bank Act, limiting the amount to be deposited in one name. *Field v. Lonsdale*, 19 Law J. Rep. (N.S.) Chanc. 560; 13 Beav. 78.

Testator devised freeholds and leaseholds to four persons, intending them to hold them in trust for an alien, and shortly afterwards informed three of them of his intent, and those three at his request

wrote letters to him acknowledging the intended trust. After his death, a suit was instituted by two of the devisees against the other two, the alien, the testator's next-of-kin and the Attorney General as representing the Crown, to have the rights of the parties declared.

The Court refused to make any declaration, except that the lands were not subject to any trust. *Burney v. Macdonald*, 15 Sim. 6.

A son acted as his mother's solicitor and with her consent lent 2,500*l.* belonging to her, with other money, upon a bond conditioned for payment to himself absolutely of the amount thereby secured, without any declaration of trust except a memorandum whereby the son acknowledged that he held 2,500*l.*, and undertook to pay the interest thereof to the mother during her life. The son died in his mother's lifetime, and his executors claimed the principal sum, subject to a life interest in the mother as a gift from her to the son:—Held, that the relation of solicitor and client subsisting between the son and mother excluded the ordinary presumption in favour of the transaction being a gift, and threw the burthen of proof upon the executors; and the evidence being insufficient to establish their case, the Court declared the son's executors to be merely trustees for the mother. *Garrett v. Wilkinson*, 2 De Gex & S. 244.

When a father purchases property with his own money and takes a conveyance in the name of his son, the law presumes it to be an advancement for the son and not a trust for the father. Those who allege that it is a trust are bound to prove it, and the evidence for that purpose consists mainly, if not exclusively, of contemporaneous circumstances.

A testator had transferred property into the names of his sons:—Held, that they were advancements, but there being doubts as to his solvency at the time, inquiries were directed on the point. *Christy v. Courtenay*, 13 Beav. 96.

(b) Construction.

A, by a settlement, declared that trustees should be possessed of 4,000*l.*, as to a moiety for M and her children; and, as to the other moiety, for N and her children; and that if both M and N should die without leaving issue living at the time or respective times of their decease, then that the trustees should divide the trust monies among the personal representatives of A in a legal course of administration. M and N both died without having been married. A did not leave a widow:—Held, that the persons intended to be benefited were the next-of-kin of A living at his death. *Wilson v. Pilkington*, 16 Law J. Rep. (N.S.) Chanc. 169.

Testator gave all his leasehold estates, and all other his estate and effects upon trust for the benefit of his wife and daughters and the children of the latter. In declaring the trusts he used the word "rents" as well as dividends and annual produce; and empowered his trustees to sell his leasehold estates and to invest the proceeds on mortgage of freehold or other leasehold estates, and to lease any part of his estates:—Held, in a suit to carry out the trusts of the will, that the leaseholds were not to be sold. *Bowden v. Bowden*, 17 Sim. 65.

(B) TRUSTEE.

(a) Appointment.

[See PRACTICE, IN EQUITY, Lunatic.]

[*Warburton v. Sandys*, 5 Law J. Dig. 773; 14 Sim. 622.]

A testator appointed A, B, and C executors and trustees of his will, providing that if either of them or any succeeding trustee should die, or neglect, or refuse to act, &c., it should be lawful for the survivor of them the said A, B, and C, and such new trustee or trustees to be nominated in their stead, to appoint a new trustee or new trustees instead of the said A, B, and C or either of them, or any future trustee so dying or refusing, &c. as aforesaid. A having disclaimed the trust, and B having died, it was held that C could alone appoint new trustees under the power. *Cafe v. Bent*, 5 Hare, 24.

Testator empowered his wife (who was a *cestui que trust* under his will) during her life, and after her death the then surviving or continuing trustee of his will, to appoint new trustees as often as his first or future trustees should die, &c. One of the trustees named in the will died before the testator:—Held, that the widow had no power to appoint a new trustee in his room. *Winter v. Rudge*, 15 Sim. 596.

Where a testator devised estates to trustees, their heirs and assigns, on certain trusts, and the surviving trustee devised them upon the same trusts on which he held the same,—Held, that the *cestuis que trust* were entitled to have new trustees appointed of the original will. *Ockleston v. Heap*, 1 De Gex & S. 640.

The Master directed to appoint a new trustee, though some of the *cestuis que trust* were infants, and another out of the jurisdiction. *Hunter v. Gibson*, 16 Sim. 158.

A and B were named as trustees in a marriage settlement, but both of them died without having executed it, and without having had any of the trust property vested in them. The settlement contained the usual power for the appointment of new trustees. In a suit for the appointment of new trustees,—Held, that it was not competent to the Court to direct that the new trustees should have the power of naming their successors in the same manner as if they had been the original trustees. *Oglander v. Oglander*, 17 Law J. Rep. (N.S.) Chanc. 439; 2 De Gex & S. 381.

A settlement contained a proviso that in case either of the trustees should die or become unwilling to act in the trusts, it should be lawful for the acting trustees or trustee for the time being, or the executors or administrators of any surviving trustee, to nominate any fit person to supply the place or places of the trustee or trustees respectively so dying or becoming unwilling to act. On the death of one trustee the survivor executed a deed, reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, and conveying the trust property to such new trustee:—Held, that the surviving trustee had power to nominate a sole trustee to act in his place, and that the appointment by recital was good.

Held, also, that a joint and several receipt for purchase-money given by three persons, only one

of whom had power to give a receipt, was a valid receipt by such one who had power. *Miller v. Priddon*, 18 Law J. Rep. (N.S.) Chanc. 226.

In a suit for the appointment of new trustees, occasioned by the refusal of the surviving trustee to exercise a power of appointment, a reference was made to the Master to approve of proper persons. Exceptions to his report on the ground that he had not regarded the right of nomination given to the surviving trustee by the instrument creating the power, but not raising any objections to the fitness of the persons nominated by the Master, were overruled. *Middleton v. Reay*, 18 Law J. Rep. (N.S.) Chanc. 153; 7 Hare, 106.

A deed conveyed property to two trustees upon trust to sell, and contained the usual power of appointing new trustees, reserving to each of two parties to the deed, his executors, administrators, and assigns, the power of appointing from time to time one of such new trustees. One of the donees died without exercising this power. By his will he appointed three executors, but one of them renounced probate:—Held, that an appointment of a new trustee by the two acting executors was a valid appointment. *Granville (Earl of), v. M'Neile*, 18 Law J. Rep. (N.S.) Chanc. 164; 7 Hare, 156.

A power in a settlement to appoint new trustees having become inoperative by the death of both, it was asked, in a suit for the appointment of new trustees, that the power might be extended to authorize the executors or administrators of the surviving trustee to appoint new trustees:—Held, that the ordinary reference to the Master could alone be made. *Holder v. Durbin*, 18 Law J. Rep. (N.S.) Chanc. 479; 11 Beav. 594.

It is not contrary to the practice of the Court to appoint three trustees in the place of two nominated in a will containing no power to appoint new trustees. *Birch v. Cropper*, 2 De Gex & S. 255.

By an indenture of settlement three trustees were appointed. The settlement contained a power for the *cestuis que trust* in case the trustees therein named, or either of them, should die, or be desirous of being discharged from the trusts, to appoint any other person or persons to be a trustee or trustees in the place of any such trustee or trustees so dying or being desirous to be discharged. One trustee died, and the other two were desirous of being discharged, upon which two new trustees only were substituted. The two continuing trustees refused to transfer the fund to the new trustees, upon the ground that the appointment was not properly executed, and paid the trust fund into court under the Trustee Act:—Held, upon petition for payment of the money out of court, that it was competent for the *cestui que trust* to appoint two trustees only, and that the old trustees were not justified in paying the money into court, and they were ordered to pay the costs thereby occasioned, and their costs of the petition. *In re Fagg's Trust*, 19 Law J. Rep. (N.S.) Chanc. 175.

A testator appointed A, B, and C to be trustees of his will, and declared that, if the trustees thereby appointed or any of them should happen to die, it should be lawful for the surviving trustees or trustee to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying; and that, on such

appointment, the trust premises should be conveyed, so that the same should be vested in the surviving trustees and such new trustees, or in such new trustees solely, on the same trusts. A died in the lifetime of the testator:—Held, that it was the intention of the testator that there should be three trustees of his will, and that a new trustee might be appointed in the place of A. *Lonsdale (Earl of) v. Beckett*, 19 Law J. Rep. (N.S.) Chanc. 342.

Under a power enabling a surviving or continuing trustee to appoint a new trustee in the place of a trustee dying, going to reside abroad, becoming incapable of acting, &c., the surviving trustee, although himself residing abroad, may appoint another trustee in the place of the one deceased.

Although taking up his permanent residence abroad in such a case does not *ipso facto* deprive a trustee of his office, yet it is such a disqualification as entitles the *cestuis que trust* to have a new trustee appointed in his place.

It is the duty of trustees having power to appoint new trustees, to make such appointment impartially as between their *cestuis que trust* and not without communication with them. *O'Reilly v. Alderson*, 8 Hare, 101.

(b) Removal and Change.—[See (a) Appointment.]

Trustee removed for inconsistency of duties.

Where fraud is alleged against a trustee but fails, and he is removed on grounds not of misconduct, he is entitled to all the costs of the suit. *Passingham v. Sherborn*, 9 Beav. 424.

Cestuis que trust proposed to pay off a mortgage on the trust property, by raising the necessary funds at less expense and at a lower rate of interest than would be required by another mode of raising the monies proposed by the solicitor of the trustees. The *cestuis que trust*, without the concurrence of the trustees, carried out their proposal, and pending these transactions, one of the trustees of the settlement retired, and in his room a near relative of their solicitor was appointed a trustee, but without any communication on the subject with the *cestuis que trust*. The trustees afterwards gave notice of their intention to sell the property under a power of sale and exchange, and to defray out of the proceeds their costs, charges, and expenses of negotiating the treaty for the loan which they had proposed to effect. The sale was prevented by injunction, and a bill filed by the *cestuis que trust* against the trustees and their solicitor:—Held, at the hearing, that the contemplated sale, if carried out, would have been a breach of trust; that, under the circumstances, the trustees ought to be removed and new trustees appointed, but that no costs of suit in respect of such removal or appointment ought to be given, because another suit might be necessary in respect of the transfer and further charge effected by the plaintiffs; and that the bill ought to be dismissed as against the solicitor, without costs. *Marshall v. Sladden*, 19 Law J. Rep. (N.S.) Chanc. 57; 7 Hare, 423.

A power to appoint a new trustee on an existing one becoming incapable to act does not apply to a trustee going to reside abroad. *Withington v. Withington*, 16 Sim. 104.

Part of a trust fund had been wasted without any prospect of the guilty party being able to replace

it. The Court refused to appoint new trustees of the remaining portion of the trust fund only; but for the protection of such new trustees, directed an inquiry whether any part of the fund had been lost, and under what circumstances, and whether any and what steps ought to be taken for the recovery thereof. *Bennett v. Burgis*, 15 Law J. Rep. (N.S.) Chanc. 231; 5 Hare, 295.

(c) *Liability and Disability.*

A trustee depositing a trust fund with his bankers with directions to invest it in consols, is answerable for the omission of the bankers to invest, where he made no inquiries for five months, when the bankers failed. *Challen v. Shippam*, 4 Hare, 555.

Where a bill charges a trustee with having fraudulently let trust property at an undervalue, to obtain personal benefit to himself, but the allegation of fraud is altogether disproved, the Court will not inquire whether a higher rent might not have been obtained, so as to charge the trustee for neglect or omission.

Where a trustee has let trust property at a proper rent, but it afterwards appears probable that either from the outlay of the tenant, or the rise of agricultural produce, a higher rent may be obtained, the trustee will not necessarily be charged with the difference between such higher rent and that which is actually received, although he does not immediately raise the rent. *Ferraby v. Hobson*, 16 Law J. Rep. (N.S.) Chanc. 499; 2 Ph. 255.

By a marriage settlement, it was covenanted that 5,000*l.* consols, part of the wife's property, should be transferred to the trustees upon trusts for the husband, wife and children. At that time there was 4,946*l.* standing in the wife's name. The trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband:—Held, that the trustees were personally responsible, and were not relieved under the indemnity clause. *Fenwick v. Greenwell*, 10 Beav. 412.

A, on her marriage, assigned a debt due to her from B to trustees on trust, when requested by her to call in and invest it and hold it in trust for A, her husband and children. B, with full notice, but without such request, paid part of the money to the husband by order of the trustees, and the rest to the trustees, for the purpose of being advanced to the husband in breach of trust. The money was lost:—Held, that B, as well as the trustees, was responsible for the breach of trust. *Andrews v. Bousfield*, 10 Beav. 511.

A, an intended wife, conveyed property to trustees for herself until marriage, and then for her separate use, without power of anticipation, and subject to certain interests to her husband and children, to herself. Before the marriage the trustees committed a breach of trust, against which A, by her solicitor, gave an indemnity. The marriage took effect two years after the settlement, and the husband died without children:—Held, that the indemnity was subsisting, and that the trustees were released from their liability. *Ghost v. Waller*, 9 Beav. 497.

Stock standing in the names of trustees was mortgaged to secure 1,200*l.* and interest, and notice of the mortgage was given to the trustees both by the mortgagor and mortgagee. Upon his marriage

the mortgagee assigned the 1,200*l.* to H and H, and it was declared that the receipt or receipts of them, or the survivor of them, should be a sufficient discharge; and one of them, being the solicitor of the mortgagee, was allowed to retain all the deeds in both transactions. The trustees, at the request of the mortgagors, sold a portion of the 3,000*l.*, and paid off the 1,200*l.* and interest, which was received by the mortgagor's solicitor, and trustee of the settlement, without the authority of his co-trustee. He gave up the deeds relating to the mortgage, and signed a receipt "for self and co-trustee," but he never invested the money upon the trusts of the settlement; but he survived his co-trustee, and died insolvent. Upon a bill filed by the new trustees of the mortgagee's marriage settlement against the trustees of the 3,000*l.*—Held, that the receipt of one trustee was no discharge; that the being intrusted with the deeds for safe custody did not authorize one trustee to receive the trust money; and that the trustees of the 3,000*l.* must repay the 1,200*l.*, with interest and costs. *Hall v. Franck*, 18 Law J. Rep. (N.S.) Chanc. 362; 11 Beav. 519.

A power was given to trustees to invest money on some good and approved freehold or leasehold securities. The trustees invested 2,600*l.* on the security of four houses and three acres of building ground near Birmingham, which had been valued at 3,500*l.* and estimated to produce 175*l.* a-year. The actual rent at the time of the mortgage was 105*l.* The property was afterwards sold by the trustees, and a loss incurred of 350*l.* The conduct of the trustees was honest and fair and not tainted by fraud or improper motive:—Held, that they were not liable to make good the loss. *Jones v. Lewis*, 18 Law J. Rep. (N.S.) Chanc. 430.

A trustee received rents and paid them into a bank, where they were left for many years. A suit was instituted and a receiver appointed. The bank failed, and it was held that the *cestui que trust*, who were infants, must not be prejudiced by the neglect of the trustee, who was liable to refund the money lost. *Drever v. Mawdesley*, 18 Law J. Rep. (N.S.) Chanc. 273.

A person who assumes the character of a trustee incurs the liability of a trustee. *Rackham v. Siddall*, 16 Sim. 297.

A trustee having a power of sale, with a trust for interim investment in the funds or on real security, concurred in a sale, and permitted the tenant for life to receive the purchase-money, which was not invested according to the trust:—Held, that the *cestui que trust* had not the option of requiring the trustee to replace the purchase-money, with interest, or to buy such a sum of stock as the proceeds would have purchased if invested at the time.

An allegation in the trustee's answer, that part of the purchase-money had been laid out by the tenant for life in the purchase of an estate of which the plaintiff was in possession, held to be no ground for directing by the decree an inquiry as to the fact, the matter being properly the subject of a cross-suit. *Rees v. Williams*, 1 De Gex & S. 314.

The relation of father and daughter does not of itself render the validity of an arrangement between persons thus related respecting a reversionary interest of the daughter, so doubtful as to justify a trustee in refusing to transfer a fund in pursuance

of the arrangement, without the indemnity of the Court. A trustee so refusing and who did not shew that he had endeavoured to ascertain the real nature of the transaction, was decreed to pay costs. *Firmin v. Pulham*, 2 De Gex & S. 99.

An annuitant, selling under a power of sale, is a trustee, as regards the sale, for the grantor; and the agent for sale of such annuitant is, equally with his principal, affected with all the disabilities attaching to a trustee purchasing for himself. *In re Bloye's trust*, 19 Law J. Rep. (N.S.) Chanc. 89; 2 Hall & Tw. 140; 1 Mac. & G. 488.

A party assuming to act as heir and devisee of a trustee, and committing an act which, if done by the trustee, would have been a breach of trust, cannot relieve himself of liability by asserting that he was not acting as trustee. *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 244.

(d) Powers, Rights and Duties.

[*Davis v. Combermere*, 5 Law J. Dig. 776; 14 Sim. 402.]

A testatrix devised freehold and copyhold estates to a trustee, upon trust to sell and divide the proceeds among her brothers and sisters living at her decease equally, or in other proportions, at the discretion of the trustee. She afterwards executed an unattested codicil, by which she directed that the income of the trust property should be applied for the benefit of such of her brothers and sisters as were not otherwise provided for, and particularly towards the support of one of her brothers P, who was of weak mind; and in case the trustee could not live to execute all the trusts, they were to be performed by such person as he should appoint. He executed a deed of appointment, naming other trustees, and giving directions as to the time for selling the trust estates, and the application of the proceeds; and directed P to be supported out of the income, and the proceeds from one estate to be divided equally among P's brothers and sisters, who should be living at his death, and the proceeds of another estate to be divided at his death among such of his brothers and sisters as should most require it:—Held, that the appointment by the trustee, and the directions contained in it, were not altogether invalid; but the Court directed, that after providing for the comfortable support of P, the proceeds from both estates should be divided equally among all the testatrix's brothers and sisters who were living at the death of the testatrix, except P. *Hitch v. Leworthy*, 15 Law J. Rep. (N.S.) Chanc. 235.

Gift of a residue, after payment of debts, &c. to trustees upon trust to invest in the funds, or on real security, or at their discretion to keep the same in their then state of investment, with a declaration that the receipts of the trustees for the purchase-money of any trust property, sold by them under the will, should be good discharges:—Held, that the trustees were authorized to sell real estate comprised in the residuary devise, although all the debts, &c. had been paid. *Affleck v. James*, 17 Sim. 121.

A power of sale and exchange was given to trustees with the consent of the tenant for life. Judgments were entered up against the tenant for life. Whether the trustees could sell without the concurrence of

the judgment creditors—*quære*. *Leigh (Lord) v. Ashburton (Lord)*, 11 Beav. 470.

The plaintiff advanced to the defendant a sum of money upon the security of certain shares in a trading company, the defendant agreeing to indemnify the plaintiff against all calls or other payments which thereafter might be required in respect of the shares. The shares were regularly transferred into the plaintiff's name, and such transfer was duly registered in the transfer register of the company. The mortgage debt was afterwards paid off, and the plaintiff, at the requisition of the defendant, applied to the directors of the company to re-transfer the shares into the name of the defendant, and took all the necessary steps on his part to obtain such re-transfer. The directors refused to permit a re-transfer to be made. During the pendency of the negotiations, a creditor of the company recovered judgment against the public officer of the company, and proceeded to make the judgment available against the plaintiff as a registered shareholder. Upon a bill by the plaintiff against the defendant, for an indemnity, &c. it was held that the defendant, after payment of the mortgage debt and the requisition to the plaintiff to procure a re-transfer, was equitable owner of the shares, and that the plaintiff was a trustee for the defendant of such shares, and, as such, entitled to an indemnity from his *cestui que trust* against the claims made in respect of the trust property.

Sed quære, if the defendant had not required a re-transfer of the shares, but had submitted to the plaintiff's rights of foreclosure.

A trustee is not bound to wait till he has been compelled to make actual payments, or suffered express loss in respect of the trust property, but is entitled to come for relief as soon as he is under any existing liability. *Phene v. Gillon*, 15 Law J. Rep. (N.S.) Chanc. 65; 5 Hare, 1.

Under a trust for sale of real estate in a settlement by which a trustee was directed to apply the proceeds in paying off certain incumbrances upon the settled estate, as well as upon other family estates, the Court held that the trustee might raise such sums as might be necessary by mortgage of the estates. *Orford (Earl of) v. Albemarle (Earl of)*, 17 Law J. Rep. (N.S.) Chanc. 396.

A debtor assigned his house and business, in trust for the payment of his debts, retaining to himself the management of the business under the superintendence of the trustees, who, on his failing to perform his covenants in the trust deed, were thereby empowered, after having given him three months' notice, to sell the house and business. Such notice was given, but waived by consent of the creditors and trustees, assembled at a general meeting:—Held, that a sale afterwards made by the trustees, without further notice, was unauthorized and unlawful. *Tomney v. White*, 3 H.L. Cas. 49.

(e) Investment by.

[*In re Lord William Pawlett*, 5 Law J. Dig. 777; 1 Ph. 570.]

Trust funds were invested in the purchase of transferable shares in a banking company in the name of one of the trustees, who was also a holder of shares in his own right in the same company,

and afterwards made various sales and purchases of shares therein. There was no distinguishing mark by which the shares could be traced, the same being in the nature of capital expressed by quantity. The trustee agreed to assign some of the shares standing in his name to the banking company, as security for repayment of advances which had been made to him, but no transfer was made. He afterwards became bankrupt, without having shares sufficient to satisfy the trusts and his agreement to assign:—Held, 1st, that the banking company had no lien on any of the shares which had been held in trust.

2nd. That although the shares held in trust might have been changed by sale and re-purchase, the trustee must still be considered as holding, for the purposes of the trust, the same number of shares out of a larger number that were standing in his name at the time of his bankruptcy.

3rd. That as no shares were transferred in pursuance of the agreement, no question as to whether the bank directors were purchasers with or without notice could arise; and of the two equities, for the *cestuis qui trust* and for the bank, the former must be preferred. *Murray v. Pinkett*, 12 Cl. & F. 764.

A, by his will, devised estates to B, his executor and trustee, to be sold, the proceeds to be divided amongst his younger children at twenty-one, and in the mean time to be invested in the parliamentary stocks or public funds of Great Britain, or on real security. B deemed it most beneficial to lay out the sale-moneys on real security, and pending the interval which took place in finding and approving of a proper real security, directed his bankers to invest the same in Exchequer bills, which was accordingly done. The Exchequer bills so purchased remained for upwards of a year in the possession and under the controul of the bankers, undistinguishable from any property they happened to possess. During the treaty for and before the completion of the mortgage, the bankers failed, having, previously to that event, disposed of the Exchequer bills, and appropriated the proceeds to their own use:—Held, that, under the circumstances, the purchase of the Exchequer bills was proper, but that B ought not to have left them in the controul of the bankers, and to have distinguished them from their property, and that he was bound to make good the loss occasioned by his neglect. *Mathew v. Brise*, 15 Law J. Rep. (N.S.) Chanc. 39.

Trustees of a marriage settlement, being empowered to invest the trust-funds in freeholds or copyholds of inheritance with the consent of the husband and wife, authorized the husband to purchase an estate of copyhold for lives, as an investment, and they afterwards sold out part of the funds to pay for the estate, and the husband received the proceeds. The purchase was made without the wife's consent:—Held, that as between the husband and the trustees, he must be considered as having purchased the estate for them. *Trench v. Harrison*, 17 Sim. 111.

(f) Conveyance by.

By a marriage settlement certain policies of assurance effected by the husband upon his life

were assigned to trustees, upon trust to pay the proceeds to the wife for life and then to divide the capital between the children of the marriage. The settlement also contained a covenant on the part of the husband to pay the premiums, and hand over the receipts to the trustees. There was also a power for the husband and wife jointly to appoint new trustees, with a proviso that on such appointment the old trustees should convey to the new trustees. The husband and wife having jointly executed the power of appointing new trustees, the old trustees refused to execute a conveyance of the trust property, upon which a bill was filed to compel them to do so:—Held, that there was nothing vested in the trustees, consequently there was nothing for them to do, and nothing for the Court to direct them to do; and the bill was dismissed, with costs. *Dodson v. Powell*, 18 Law J. Rep. (N.S.) Chanc. 237.

A testatrix, being seised of an equitable estate in fee, devised it to her executors in trust to sell, and out of the proceeds of such sale and her personal estate, to pay her debts, &c., and the legacies given by her in a certain paper signed by her and marked A. The testatrix died without heirs, and the paper A could not be found. The trustee of the legal estate insisted upon his right to hold the estate for his own benefit upon payment of the debts. On a bill by the executors,—Held, that the trustee of the legal estate was bound to convey to the executors, the devisees, without reference to the purposes for which the conveyance was required. *Onslow v. Wallis*, 19 Law J. Rep. (N.S.) Chanc. 27; 1 Hall & Tw. 513; 1 Mac. & G. 506; 16 Sim. 483.

On a bill for specific performance of an agreement entered into by the testator to grant a lease to the plaintiff of certain premises for twenty-one years, which lease was to contain a covenant for the renewal of the lease for two further successive terms of twenty-one years each,—Held, that a devisee in trust, who had no beneficial interest, could not be compelled to enter into any covenant for renewal of the lease, nor to enter into any other than the usual trustee's covenant, that he had done no act to incur. *Worley v. Frampton*, 16 Law J. Rep. (N.S.) Chanc. 102; 5 Hare, 560.

(g) Breach of Trust.

Bankers, under the circumstances of the case, decreed to refund monies which had been drawn by a trustee from a trust account, standing in their books, and placed to the credit of the trustee's private account at the bank, upon the balance of which latter account the bankers were creditors.

Plaintiff decreed to pay, out of a fund recovered from persons who had acquired it by a breach of trust, the extra costs occasioned by making a party defendant, instead of a co-plaintiff, to a bill of revivor.

Plaintiff decreed to pay the costs of a certificated bankrupt, who had been made a defendant to the suit. *Pannell v. Harley*, 2 Coll. C.C. 241.

Where stock stood invested in trust for the mother for life, remainder to her son and daughter and their children, and the daughter knew of an application by the son for a loan from the trustees of part of the trust-moneys, and that the trustees were willing to lend, with the consent of the mother, and

the loan was in fact made; the daughter objected to the loan in her communications with her mother, but did not otherwise oppose it, and had no communication with the trustees on the subject:—Held, that there was no such acquiescence by the daughter as would prevent her charging the trustees with the breach of trust in a suit instituted seven years afterwards.

Held, also, that she was not affected by the knowledge that her mother had untruly stated to the son that she (the daughter) had consented to the loan, such statement not having been communicated to the trustees.

An investment of 2,183*l.* (the produce of stock which trustees were empowered to lend on real security), in a mortgage of house property in a town occupied for commercial purposes, and valued at 2,800*l.*, held not justified.

Held, also, that the trustees must replace the stock, and could not satisfy the trust by replacing the money. *Phillipson v. Gatty*, 7 Hare, 516.

On a bill filed by an incumbrancer of the interest of a deceased tenant for life in a fund against a party sought to be made accountable in respect of a breach of trust affecting the whole fund, to which suit the *cestuis que trust* in remainder were also parties,—a decree directing the restitution of the whole fund was varied, on appeal, by limiting the relief to the restitution of so much only of the interest of the fund as had accrued in the lifetime of the tenant for life.

A trustee having sold certain trust property, and allowed the proceeds to be received by one of the *cestuis que trust*, inquiry directed as to the application of such proceeds, in order to ascertain the specific remedy which the trustee might have against such *cestui que trust*. *Rackham v. Siddall*, 1 Mac. & G. 607; 2 Hall & Tw. 244.

Trustees for sale having sold the trust property, left the conveyance executed by them with their receipt indorsed, in the hands of a solicitor, who received and misapplied the money. They were held liable for a breach of trust. *Ghost v. Waller*, 9 Beav. 497.

A, tenant for life, with power of leasing, agreed to grant a lease of a house, subject, together with other property, to a mortgage which was vested in a trustee, and in which A's wife and unborn children were interested. To enable A to grant a valid lease, the trustee of the mortgage and A's wife joined in releasing the house from the mortgage:—Held, that it was a breach of trust on the part of the trustee to release the house from the mortgage; but that the trustee and A might have joined in granting a valid lease, without discharging the premises from the mortgage.

A discretionary power given to a trustee of a mortgage to act in the premises as the settlor might have done, and to accept part of the debt in satisfaction of the whole, &c., will not authorize him to discharge part of the security. *Dawes v. Betts*, 17 Law J. Rep. (N.S.) Chanc. 315.

(C) CESTUI QUE TRUST.

[Suit by one of several *cestuis que trust*. See *Williams v. Powell*, 2 Ph. 329.]

A trustee, who was also a solicitor, after delivery of his trust accounts, obtained a settlement thereof and release from his *cestui que trust*. Several bills of costs, in respect of professional business transacted by the solicitor touching the trust affairs, were comprised in the accounts. The *cestui que trust* was not informed by the solicitor that he was not obliged to pay the professional charges, nor was any other solicitor consulted at the time of the settlement by the *cestui que trust*:—Held, on a bill filed several years after the settlement of the accounts by the *cestui que trust* against the trustee, containing charges of fraud, and seeking relief in respect of the bills of costs, and praying that the release executed by him to the trustee might be declared void, that the *cestui que trust*, not having proved a case of fraud against the trustee, was not entitled to have the release declared void, and that the bill must be dismissed against the trustee with costs, as to that part of the relief prayed; but that the plaintiff was entitled to relief in respect of the professional charges made by the trustee, and included in the accounts settled, and a reference to the Master to tax the bills of costs, was accordingly directed by the Court. *Todd v. Wilson*, 15 Law J. Rep. (N.S.) Chanc. 450; 9 Beav. 486.

A trustee, who was a solicitor, came to a final settlement of accounts with his *cestui que trust*, and a general release was executed. In the accounts the trustee had taken credit for bills of costs, to which, under the general rule he was not entitled. The *cestui que trust* was assisted on the occasion by an independent solicitor, who perused the bills and settled the release:—Held, that the trustee was entitled to the benefit of the release. *Stanes v. Parker*, 9 Beav. 385.

Trustees authorized to lay out trust money in the public funds, or on mortgage, invested it in a mortgage. The mortgage was paid off, and the amount received by the tenant for life, who invested it in real estate:—Held, that the *cestuis que trust* had the option of charging the tenant for life, either with the sum received, or with the amount of three per cents. which might have been purchased therewith when the breach of trust was committed. *Ouseley v. Anstruther*, 10 Beav. 456.

The circumstance that two parties stand to each other in the relation of trustee and *cestui que trust*, does not affect any dealing between them unconnected with the subject of the trust. Thus the rule that a trustee cannot purchase from his *cestui que trust* does not extend to a purchase by a mortgagee from his mortgagor. *Knight v. Marjoribanks*, 2 Mac. & G. 10; 2 Hall & Tw. 308; 11 Beav. 322.

(D) TRUSTEE AND MORTGAGEE ACTS.

[See ESCHEAT.]

Provisions for securing trust funds and relieving trustees made by the 10 & 11 Vict. c. 96; 25 Law J. Stat. 267.

Further provisions for the relief of trustees by the 12 & 13 Vict. c. 74; 27 Law J. Stat. 140.

The laws relating to the conveyance and transfer of real and personal property by mortgagees and trustees, consolidated and amended by the 13 & 14 Vict. c. 70; 28 Law J. Stat. 114.

(a) Construction.

A tenant for life of estates decreed to be sold for payment of debts, is a trustee for the purchaser within the 1 Will. 4. c. 60. s. 18. *In re Milfield*, 2 Ph. 254.

A testator gave legacies to certain persons for life, with remainders over, and directed the sums to be invested in the names of two trustees. The survivor of the trustees died, having bequeathed all property held by him in trust to A:—Held, that A was not a trustee under the original will, and new trustees were appointed by the Court. *Mortimer v. Ireland*, 16 Law J. Rep. (n.s.) Chanc. 416.

Bengal government notes are land within the meaning of the 1 Will. 4. c. 60. *In re Dyce Sombre*, 1 Mac. & G. 101.

Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the Accountant General under the Trusts Act, 10 & 11 Vict. c. 96. *In re Parry*, 6 Hare, 306.

Where the real estates of an intestate were sold under a decree in an administration suit, and the heir-at-law was a *feme covert*, who declined acknowledging the conveyance to the purchaser; *semble*—that the heir was a trustee within the 1 Will. 4. c. 60.

In such a case, where the costs of the suit exceeded the funds in the cause, the Court directed the costs of the purchasers, occasioned by the refusal of the married woman to make the acknowledgment, to be first taxed and paid, and subject thereto, the costs of the plaintiffs and defendants to be taxed and paid rateably. *Billing v. Webb*, 1 De Gex & S. 716.

(b) Practice under.

Proceedings under the 10 & 11 Vict. c. 96. Orders of June 10, 1848; 17 Law J. Rep. (n.s.) Chanc. 490; 10 Beav. xi.

After a sale made in pursuance of a decree in a creditors' suit for the sale of the testator's real estate, and application of the proceeds in payment of the debt, *semble*, that the devisees of the estate being lunatic, or out of the kingdom, are trustees for the plaintiff within the 1 Will. 4. c. 60.

If the devisees are not such trustees by force of the decree, the Court cannot make them so by declaration to that effect; and if they are trustees by force of the decree, an express declaration thereof (if necessary) should be made by decree, and not upon petition. *Jackson v. Milfield*, 5 Hare, 538.

A petition presented under the 1 Will. 4. c. 60. s. 22, for the appointment of new trustees of trust property, in which adults and infants are interested, ought to be served on the infants as well as on the adults. *Ex parte Yates*, 16 Law J. Rep. (n.s.) Chanc. 72.

Upon a reference, made on a petition for the appointment of a new trustee in the place of an original trustee, who had left this country, the Master found that another of the original trustees had become lunatic. An order was afterwards made for the transfer of the trust funds by the committee, without a second reference in the matter of the lunatic. *In re Buckle*, 15 Law J. Rep. (n.s.) Chanc. 289.

The Court will not make an order under the

Trustee Act, 1 Will. 4. c. 60, for the transfer of stock standing in the name of a deceased trustee whose next-of-kin refuses to administer. *In re Lunn's Charity*, 16 Law J. Rep. (n.s.) Chanc. 187; 15 Sim. 464.

Where a mortgagee has become lunatic, and the mortgagor petitions for a reconveyance by some person, on behalf of the mortgagee, the expense of such petition, and of the order thereon, must be paid out of the lunatic's estate. *In re Townsend*, 16 Law J. Rep. (n.s.) Chanc. 456; 2 Ph. 348.

Where a settlement contains a power to appoint new trustees in certain cases, but the power does not apply to circumstances which have taken place, the Court may appoint new trustees under the 1 Will. 4. c. 60. *In re Foxhall*, 16 Law J. Rep. (n.s.) Chanc. 498; 2 Ph. 281.

A lady, whose title to a sum of stock depended on there being no issue of her marriage with her late husband, presented a petition stating that fact, and praying that the stock, which had been transferred into court under the 10 & 11 Vict. c. 96, might be re-transferred to her. The Court refused to make the order until the fact on which the petitioner's title depended had been found by the Master. *In re Wood's Trustees*, 15 Sim. 469.

If a petition is presented under the 10 Geo. 4. c. 56, or 11 Geo. 4. & 1 Will. 4. c. 60, to have a person appointed to convey property in place of a recusant trustee, the latter ought not to be served with the petition, and if served will be entitled to his costs. *Ex parte Armstrong and Shallcross*, 16 Sim. 296.

A payment of money into court under the Trustee Indemnity Act to an account headed "in the matter of the trusts of the will of S J" is too general. *In re Joseph's Will*, 11 Beav. 625.

A testator bequeathed a fund to his wife for life, with remainders over. The fund was paid into court under the 10 & 11 Vict. c. 96. On a petition by the wife for payment of the dividends, which was not served on any persons claiming under the will,—Held, that she was not entitled to costs out of the capital. *Ex parte Fletcher*, 17 Law J. Rep. (n.s.) Chanc. 169.

A testator bequeathed stock for the benefit of A for life, with the direction that after her death it should fall into the residue. A and her husband assigned her life interest; and the stock was transferred into court under the 10 & 11 Vict. c. 96. On petition by the assignee for payment of the dividends and costs, not served on the residuary legatees, the assignee was held not entitled to costs out of the capital. *Ex parte Peart*, 17 Law J. Rep. (n.s.) Chanc. 168.

The trustees of a will having paid certain funds into court, under the Trustee Act, to which six legatees were entitled, an order was made on petition, allowing two of the legatees to prove their title to part of the fund separately, in order that they might obtain their shares out of court; the petitioners undertaking to pay the costs incurred thereby: and the order was made without prejudice to the rights of the two legatees to institute any suit against the trustees in respect of their interest under the will. *In re Sharpe*, 17 Law J. Rep. (n.s.) Chanc. 395; 15 Sim. 470.

A mortgagee devised the mortgaged estate to three trustees, one of whom could not be found:—Held, that the costs of a petition, under the 1 Will. 4. c. 60, for a reconveyance, were to be borne by the mortgagor. *King v. Smith*, 18 Law J. Rep. (n.s.) Chanc. 43.

An estate was vested in trustees in fee, in trust for a charity, the survivor of whom died intestate, leaving numerous heirs. On a petition presented by the persons administering the trust, the Court ordered that (in default of the heirs of the intestate appearing in answer to advertisements to be inserted in certain newspapers) the Master should appoint a person to convey the estate to the acting trustees. *In re Belke's Charity*, 18 Law J. Rep. (n.s.) Chanc. 152.

Application of the rule as to the costs of proceedings under the 1 Will. 4. c. 60, for obtaining a reconveyance of mortgaged premises, to the case of a lunatic mortgagee, who was a trustee, and where the existence of the trust did not appear on the mortgage deed. *In re Townsend*, 1 Mac. & G. 686; 2 Hall & Tw. 185.

Property of which a lunatic (not so found by inquisition) was mortgagee in fee for 1,200*l.* was sold for 900*l.* His beneficial interest in the purchase-money having been by means of an equitable charge reduced below 700*l.*,—Held, that this case fell within the 1 Will. 4. c. 60. s. 5. *In re Sandford*, 1 Mac. & G. 538; 2 Hall & Tw. 137.

Where money is paid into court by trustees under the 10 & 11 Vict. c. 96, the Court may either adjudicate upon the matter upon petition and affidavits, or may direct a bill to be filed, if the complexity of the case require a more formal proceeding. *In re Bloye's Trust*, 19 Law J. Rep. (n.s.) Chanc. 89; 1 Mac. & G. 488; 2 Hall & Tw. 140.

In a creditors' suit a decree was made that the equity of redemption in estates of a testator devised by him, subject to certain mortgages and incumbrances, should be conveyed to such of the respective mortgagees as should be willing to release the testator's estate from their respective debts. The devisees under the will (two of them being married women) refused to execute a deed of such conveyance, tendered to them by a mortgagee, and approved by the Master. On the petition of the mortgagee, presented under the 11 Geo. 4. & 1 Will. 4. c. 60, a person was appointed by the Court to execute the conveyance in the place of the devisees. *Hood v. Hall*, 19 Law J. Rep. (n.s.) Chanc. 312.

A testator made certain dispositions of his property by his will, and died in 1845. In 1848 A, one of the executors, upon the death of the executor who had acted up to that time, proved the will, and paid a sum of money into court under the Trustee Act. Upon petition by A that the money might be repaid to him for the purpose of discharging certain liabilities of the testator which he had recently discovered, an order was made accordingly. *Ex parte Tournay*, 19 Law J. Rep. (n.s.) Chanc. 257.

Under the act for the indemnity of trustees, a tenant for life petitioned for payment of the dividends to her:—Held, the general personal estate of the testatrix being exhausted, that the costs of the petition must be paid out of the income, and not out of the principal. *In re Lorimer*, 19 Law J. Rep. (n.s.) Chanc. 524; 12 Beav. 521.

To enable the Court to distribute a fund under the Trustee Indemnity Act, it must stand to an account which separates it from the other assets, and disconnects it from all the other trusts of the will. *In re Everett*, 12 Beav. 485.

Trustees are not bound to take any trouble in ascertaining the validity of claims upon the trust fund, but may discharge themselves of all responsibility whenever they please by paying the fund into court under the Trustee Act, and they will be entitled to their costs. *In re Croyden's Trust*, 19 Law J. Rep. (n.s.) Chanc. 172.

On petition under the 1 Will. 4. c. 60. the Court never interferes in the administration of the trusts, but merely substitutes a trustee in the place of the lunatic. *In re Ward*, 2 Mac. & G. 73.

TURNPIKE.

The laws relating to turnpike roads in South Wales further amended by the 10 & 11 Vict. c. 72; 25 Law J. Stat. 224.

The union of turnpike trusts facilitated by the 12 & 13 Vict. c. 46; 27 Law J. Stat. 69.

Provisions as to turnpike roads made by the 13 & 14 Vict. c. 79; 28 Law J. Stat. 204.

Trustees of a turnpike road were authorized to let the tolls, upon giving certain notice of their intention to do so; and the notice was to state the amount which the tolls produced during the preceding year, clear of the expenses of collecting:—Held, that this direction was sufficiently complied with, where the notice merely stated the amount received by the trustees during the preceding year, although during part of that time the tolls were let for a greater sum than they had actually produced, and no expenses were allowed for collecting during that part of the year. *Newman v. Ring*, 15 Law J. Rep. (n.s.) Chanc. 365.

The defendant, as surety for W H, entered into an agreement with the trustees of a turnpike road for the demise of tolls to W H. The agreement concluded "Witness the hands of E W D and E F, two of the trustees of the said turnpike road, and of the said W H, R C B (the defendant) and R W L:—"—Held, sufficient evidence against the defendant, that E W D and E F were trustees.

Held, also, on motion for arrest of judgment, that the declaration need not set out all the circumstances shewing that the meeting at which the tolls were let was duly convened and held in pursuance of the General Turnpike Act, the 3 Geo. 4. c. 126. *Willington v. Browne*, 15 Law J. Rep. (n.s.) Q.B. 23; 8 Q.B. Rep. 169.

A turnpike act of parliament enacted, that all monies which should be received by the trustees of the roads by virtue of the act should be applied—first, in discharging the expenses of the act; secondly, in paying any interest which might from time to time be owing in respect of any money which might have been borrowed on the credit of the tolls; thirdly, in repairing the roads; fourthly, in paying the interest of money thereafter to be borrowed; fifthly, in discharging the principal sums borrowed under the former acts; and, lastly, in discharging the principal sums thereafter to be bor-

rowed. The chairman and clerk of the trustees since the passing of the act had signed accounts by which they admitted that all the expenses of obtaining the act had been paid. An executor of the mortgagee of the tolls having sued the clerk of the trustees in an action for money had and received to recover forty-three years' arrears of interest,—Held, that the action would not lie, the tolls having been received by the trustees in their character of trustees.

Held, also, that the signature of the accounts amounted to nothing more than an acknowledgment that the prior trusts had been satisfied, and that the trustees had funds in their hands for executing the remaining trusts. *Pardoe v. Price*, 16 Law J. Rep. (N.S.) Exch. 192; 16 Mee. & W. 451.

Quære—Whether the 139th section of the Turnpike Act, the 3 Geo. 4. c. 126, is applicable to a party passing without violence through a turnpike gate and not paying the toll, though demanded, under an erroneous impression of his exemption. *Per Lord Denman, C.J., and Erle, J.*, it is not; *per Patteson, J. and Coleridge, J.*, it is. *Regina v. Irving*, 12 Q.B. Rep. 429.

The notice of an intended information before a special sessions, for the purpose of obtaining an order for payment of a portion of a highway rate to the trustees of a turnpike road, under the 4 & 5 Vict. c. 59, need not state what portion of the road is out of repair, or to what purpose the money is to be applied, or that the road is within the division for which the sessions are held.

The order made in pursuance of such information need not adjudicate that the information is true, or that notice was in fact given; it is sufficient if it shews that an information has been exhibited, and that the Justices proceeded to act upon it.

It is not necessary that the order should specify the precise part of the road to the repair of which the portion of the rate is to be applied, the object of the statute being to ascertain the amount of the fund necessary for the general repair of so much of the turnpike road as is within the parish.

Where the order recited an application to the Justices to order a portion of the rates "to be levied by virtue of the statutes in that case made and provided for the repair of the highways within, &c." to be paid, &c., and the order directed a certain sum to be paid "out of the rate which shall next be made for the repair of the highways within, &c."—Held, that the order must be taken to refer to the application, and was, therefore, warranted by the statute.

When such order is made on the surveyor of the highways of a hamlet, it is to be considered as stated by reasonable intendment, that the hamlet is one maintaining its own highways.

The order need not set out the state of the revenues of the trusts, or the length of the roads, or the other particulars into which Justices are to inquire by the statute.

Where an order recited that the surveyors of the highways appeared in pursuance of a notice from the clerk of the turnpike trust given pursuant to the statute; and there was an affidavit stating that, though such notice was in fact given, the surveyors did not appear, but purposely absented themselves, there being no reason to suppose that the

order was intentionally false, and the variance being immaterial to the validity of the proceeding:—Held, that it was no objection to the order. *Regina v. Preston, Regina v. Longbottom*, 18 Law J. Rep. (N.S.) M.C. 4; 12 Q.B. Rep. 816.

A transferee of a mortgage of turnpike tolls, in the general form given by the 3 Geo. 4. c. 126. s. 81, has no title until such transfer has been produced and notified to the clerk or treasurer of the trustees and entered in the proper book kept by such clerk or treasurer.

Where the trustees for managing the turnpike roads of a district held meetings at several places in the district, and appointed separate clerks, who kept separate books at each place,—Held, that it was sufficient for the clerk at one of these places to enter a mortgage made by the trustees meeting at that place in his book, although the general form was adopted, and the mortgage therefore included the whole tolls of the district, and although he himself was the mortgagee.

Where the transfer was prepared by the clerk of the trustees,—Held, that that was a sufficient notification of the transfer.

Where a mortgage was given to the clerk and solicitor to the trustees for money due to him as solicitor, and the mortgage recited the consideration to be money advanced by the solicitor, and the evidence was, that having asked for payment on account of his bill the mortgage was given,—Held, to be a valid mortgage, the transaction being equivalent to an advance of money by him, within the 3 Geo. 4. c. 126. s. 81. *Doe d. Jones v. Jones*, 19 Law J. Rep. (N.S.) Exch. 284; 5 Exch. Rep. 16.

USE AND OCCUPATION.

[See LANDLORD AND TENANT.]

By indenture of lease of the 26th of June 1810, between A, of the one part, and B, of the other part, after reciting a former lease, dated the 27th of July 1801, made between W S, of the one part, and A, of the other part, whereby one undivided moiety of certain lands, and two undivided moieties of certain other lands, containing eighty acres, were demised by W and M S to A for the term of forty years, the whole of the lands, containing eighty acres, and the said moiety of the other lands, were demised by A to B for the remainder of the term of forty years, except the last ten days thereof. A died in 1813, leaving the plaintiff his real and personal representative; and B died in 1818, leaving the defendant his personal representative, who continued to occupy the lands demised until the time of the trial. The rent was regularly paid by B and the defendant to A and the plaintiff up to Lady-day 1841, when the lease expired, and in December 1841 the defendant paid rent for the whole of the eighty acres to M S. The defendant went into evidence to shew that neither A nor the plaintiff had, in fact, any title to the undivided third part of the eighty acres, but that the whole was in M S:—Held, that, at all events, the lease of 1810 established a *prima facie* case of title in the plaintiff, which the defendant must rebut by his evidence, and that the plaintiff had a right to treat

the defendant as a tenant at sufferance of the undivided third part of the eighty acres, and to sue him for the use and occupation thereof after the expiration of the lease. *Bayley v. Bradley*, 16 Law J. Rep. (N.S.) C.P. 206; 5 Com. B. Rep. 396.

A and B entered into an agreement to take premises of C from a day certain at a yearly rent. The agreement was not signed by the plaintiff. In an action for use and occupation, B suffered judgment by default, and the evidence shewed only an entry by A:—Held, that this entry by A was evidence of a parol demise to A and B upon the terms of the agreement, and that his entry was therefore the entry of both, and justified the verdict for the plaintiff. *Glen v. Dungey*, 18 Law J. Rep. (N.S.) Exch. 359; 4 Exch. Rep. 61.

An action for use and occupation cannot be maintained against a lessee of premises who has not entered. *Lowe v. Ross*, 19 Law J. Rep. (N.S.) Exch. 318; 5 Exch. Rep. 553.

Where the plaintiff was entitled to a cottage after his mother's death, and the defendant had resided in it with the mother, rent free, until her death, and had since continued in possession, and had paid no rent, it was held that the plaintiff might recover in an action for use and occupation. *Hellier v. Sillcox*, 19 Law J. Rep. (N.S.) Q.B. 295.

USER.

[See EVIDENCE.]

USURY.

[*Powney v. Blomberg*, 5 Law J. Dig. 787; 14 Sim. 179.]

A sum of money being due from H to the defendant on bills overdue, which had been discounted by the defendant, at a greater rate than 10l. per cent., a deed, being a charge upon land, was deposited with the defendant as a security, nothing being then said about the rate of interest, and afterwards fresh bills were given to the defendant for the same amount, on which the defendant also received a greater rate of interest than 10l. per cent. Trover being brought for the deed by H's assignees,—Held, that the deed was not recoverable, as the transaction was not usurious.

This transaction took place before the statute 2 & 3 Vict. c. 37, respecting usury, which enacts that "nothing therein contained shall extend to any loan or forbearance of any money upon security of any lands":—Held, that this statute had no retrospective effect, and did not therefore affect this question. *Bell v. Coleman*, 15 Law J. Rep. (N.S.) C.P. 2; 2 Com. B. Rep. 268.

To covenant on an indenture, whereby the defendant covenanted to pay to the plaintiff 250l., and interest at 5l. per cent., the defendant pleaded, thirdly, that it was corruptly, and against the form of the statute, agreed that the plaintiff should lend 200l. to the defendant, and that the defendant should pay more than lawful interest, namely, 50l., and that for securing payment of the 250l. the defendant should seal and deliver to the plaintiff an indenture, whereby he should covenant to pay him 250l., and interest at 5l. per cent., and should sell

to the plaintiff certain paintings, goods, &c., and certain crops of grass then growing on, &c.; that for securing payment of the sum of 250l. and interest, the defendant delivered to the plaintiff the indenture in the declaration mentioned, whereby he covenanted for the payment of the 250l., and interest thereon, at the rate aforesaid, and sold to the plaintiff the paintings, goods, &c., and crops of growing grass; that the sum of 50l., and the interest payable on the 250l., exceeded the rate of 5l. per cent., whereby and by force of the statute the indenture was void in law. Fourth plea, that the indenture was obtained from the defendant by the fraud and covin of the plaintiff. Fifth plea, that the defendant assigned to the plaintiff certain paintings, &c., and growing crops, and that the plaintiff sold the same, and received the proceeds of the sale, and satisfied himself the sum of 250l. and interest, and the plaintiff accepted the proceeds in full satisfaction of 250l. and interest. Replication to the third plea, that the agreement and indenture were made and executed after the 2 & 3 Vict. c. 37, (the Usury Act), and whilst the said act was in force. To the fourth plea, *de injuriâ*. To the fifth plea, that the said plaintiff did not sell the said goods, nor receive the proceeds of such sale, nor pay himself the sum of 250l. and interest, nor accept the said proceeds in satisfaction:—Held, that assuming the third plea did not allege such a sale of growing crops as conferred an interest in land, it was, nevertheless, *prima facie*, a good answer to the plaintiff's demand, as shewing a void contract under the 12 Anne, sess. 2. c. 16, which is still in force. And held, that the replication to that plea was bad, in omitting to aver that the security did not relate to land.

Held, also, that the replication *de injuriâ* to the fourth plea was good; and the replication to the fifth plea was not bad for duplicity.

Where the owner of the soil sells what is growing on the land, whether natural produce or *fructus industriales*, on the terms that he is to sever them from the land, and deliver them to the purchaser, the latter acquires no interest in the soil.

Semble—That growing crops are not an interest in land within the 2 & 3 Vict. c. 37. *Washbourne v. Burrows*, 16 Law J. Rep. (N.S.) Exch. 266; 1 Exch. Rep. 107; 5 Dowl. & L. P.C. 105.

A loan upon the discount of bills, payment of which is secured by a warrant of attorney, authorizing the entering up of immediate judgment, which may ultimately be a charge upon land, under the 1 & 2 Vict. c. 110. s. 19, is not a loan or forbearance upon the security of land, within the meaning of the proviso in the 2 & 3 Vict. c. 37. s. 1. *Lane v. Horlock*, 16 Law J. Rep. (N.S.) Q.B. 87; 4 Dowl. & L. P.C. 408.

T, having applied to the defendant for the loan of 500l., received the amount from him on the next day, and delivered to him the following document:—"I promise to pay Mr. H C M or order on demand the sum of 500l., for which I agree to pay him 7l. per cent. per annum, and also to give him my life policy for 500l. and the lease of my house, to receive all benefit arising from the same on default of my payment of the above 500l., which sum I have this day borrowed of him. W H T." The lease and policy were deposited a few days

afterwards. About three weeks afterwards T executed to the defendant an assignment of the house in question to secure the above sum, and subsequently made several payments of interest at the rate of 7l. per cent.:—Held, that the transaction was usurious within the 12 Anne, c. 16; that the instrument not being a promissory note was not protected by the 3 & 4 Will. 4. c. 98. s. 7, and that the assignees of T who had become a bankrupt were entitled to recover possession of the lease and policy.

Quere—Whether the instrument could have been protected by the 3 & 4 Will. 4. c. 98. s. 7, if it had amounted to a promissory note. *Follett v. Moore*, 19 Law J. Rep. (N.S.) Exch. 6; 4 Exch. Rep. 410.

VARIANCE.

[See AMENDMENT, at Nisi Prius—GUARANTIE.]

After reciting two several contracts between the parties, the declaration alleged that they agreed to consolidate them, but the several contracts alone were proved in evidence, and the fact of an agreement to consolidate was negatived:—Held, that the variance was fatal, and that the Court would not amend the declaration. *Moncrieff v. Reade*, 2 Car. & K. 705.

VENDOR AND PURCHASER.

[See CONTRACT—LANDS CLAUSES CONSOLIDATION ACT—SPECIFIC PERFORMANCE.]

- (A) CONTRACTS AND CONDITIONS OF SALE.
- (B) TITLE.
- (C) WARRANTY.
- (D) LIEN OF VENDOR.
- (E) PURCHASER.
 - (a) *Rights and Protection of.*
 - (b) *Liabilities and Duties.*
 - (c) *Payment of Purchase-money into Court.*
 - (d) *Conveyance to.*
- (F) INTEREST ON PURCHASE-MONEY.
- (G) ACTIONS.
- (H) COSTS.

(A) CONTRACTS AND CONDITIONS OF SALE.

Vendors having put forth ambiguous conditions of sale, held bound strictly by those conditions.

Time held to be of the essence of the contract between vendor and purchaser, partly because of the nature of the trade carried on upon the property offered for sale, and partly upon the construction of the conditions of sale. *Seaton v. Mapp*, 2 Coll. C.C. 556.

In a contract for the purchase of land, there was a stipulation that the conveyance should be made subject to certain conditions and restrictions as to building on the land, and to a covenant for their observance, and proper provisions for securing the due performance thereof:—Held, that this contract entitled the vendor to have a power of entry inserted in the conveyance in case of breach of the covenant,

but not to have a term of years or a rent-charge limited to a trustee.

Whether such covenants run with the land, *quere*. *Ex parte Ralph, in re Dobbs*, 1 De Gex, 219.

If a vendor contract with two different persons for the sale of the same estate, the Court will *prima facie* enforce the contract which was first made, and if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate, the Court will, in a suit for specific performance by the first purchaser against the vendor and second purchaser, decree the latter to convey the estate to the plaintiff.

A purchaser offered a price for an estate, and the vendor, by a letter sent by post, received by the purchaser the day after it was put in the post-office, accepted the offer:—Held, that the vendor was bound by the contract from the time when he posted his letter. *Potter v. Sanders*, 6 Hare, 1.

An agreement, signed by A and B, for the sale by A and purchase by B of the fixtures in a lease, at a certain price, and that A should execute an assignment of his interest in the house to B, to bear date on a certain day,—Held, to be a contract by B to take such assignment when executed; and B having inspected the lease and the assignment to A, and subsequently directed A to cause an assignment to him, B, to be indorsed, *totidem verbis*, it was held that B was precluded from calling for the lessor's title. *Smith v. Capron*, 19 Law J. Rep. (N.S.) Chanc. 322; 7 Hare, 191.

Plaintiff purchased of defendants (auctioneers) at a public auction three lots of 100 shares each in a joint-stock company; the name of the owner of the shares was not disclosed at the sale. It was stipulated by the conditions that the money was to be paid within a certain time, and that the transfer should be made as soon as possible. A bill of parcels was delivered to the plaintiff, by the defendants, "for 300 shares in, &c. &c. 15l." Plaintiff paid the money, and repeatedly applied to the defendants for a transfer, who stated they had no power to transfer of themselves, and referred him to B, for whom it was proved they acted as agents at the sale. It was also proved that the shares bought were transferable by an instrument in writing, to be executed by the vendor, at the expense of the purchaser:—Held, that the auctioneers were liable in an action, the owner of the shares not having been named at the time of the sale. That the bill of parcels was good evidence of a contract for the sale of 300 shares, in substitution of three contracts, for 100 shares each. That the answer of the defendants was a waiver of the plaintiff's obligation to tender to them any instrument of transfer. *Franklyn v. Lamond*, 16 Law J. Rep. (N.S.) C.P. 221; 4 Com. B. Rep. 637.

A proposal by a purchaser to take the remainder of a lease was answered by a letter which, after acceding to the proposal, added "we hope to give you possession at half-quarter day":—Held, that this did not introduce a new term, but that the acceptance was unconditional. *Clive v. Beaumont*, 1 De Gex & S. 397.

On a sale, by order of the Court, in September 1845, the conditions of sale provided that the purchaser should pay in the balance of his purchase-money on or before the 26th of December 1845, and be entitled to the rents and profits from the 25th;

but that if the purchaser should make default in such payment, "then from whatever cause the delay might have arisen" he should pay interest at 5l. per cent. from that time until payment, and that the vendors should deliver an abstract and deduce a good title within three days after the confirmation of the order nisi on the Master's report of purchase. The order nisi was confirmed on the 4th of December 1845. On the 23rd of December following, no abstract having been then delivered, the purchaser paid the balance of his purchase-money into a private bank to a separate account, at 2½l. per cent. interest, and gave notice thereof to the vendors. A complete title was not shewn until July 1847. The purchaser then obtained an order for payment of his purchase-money into court, with 5l. per cent. interest from the 26th of December 1845, without prejudice to his right to compensation by reason of the delay of the vendors in completing the title. On petition by the purchaser for compensation,—Held, that either, upon the construction of the conditions, the time for payment of interest at the prescribed rate did not begin to run until a complete title was shewn, or that the purchaser was entitled to compensation out of his purchase-money for the damage sustained by him, by reason of the vendors not having fulfilled their part of the contract; but that the purchaser was not entitled to compensation for the unproductiveness of his purchase-money, the investment being his voluntary act. *De Visme v. De Visme*, 19 Law J. Rep. (N.S.) Chanc. 52; 1 Mac. & G. 336; 1 Hall & Tw. 408; reversing 18 Law J. Rep. (N.S.) Chanc. 159.

Suggestions made by a vendor or purchaser as to the course which might be adopted for the purpose of obviating difficulties in the completion of a contract, are not to be taken as an abandonment of the original contract, and the substitution of a new one. *Monro v. Taylor*, 8 Hare, 61.

If time is to be considered as of the essence of a contract, that point must be made promptly. *Monro v. Taylor*, 8 Hare, 62.

(B) TITLE.

[*Avarne v. Browne*, 5 Law J. Dig. 792; 14 Sim. 303.]

A contracted with B, for the purchase of certain leasehold houses, granted for lives, by an indenture, dated in 1815, which stated that the grant was made in consideration of the surrender to the corporation of a former lease of the same property, also granted for lives, by indenture, dated in the year 1769. The lessee, in the indenture of 1815, was stated to be legally entitled to the surrendered premises:—Held, that B, the vendor, must produce the lease of 1769, and also prove that the lessee of 1815 was absolutely entitled to the premises surrendered, the surrender whereof was the consideration for granting that lease. *Hodgkinson v. Cooper*, 15 Law J. Rep. (N.S.) Chanc. 160; 9 Beav. 304.

Reference as to title directed on motion after answer to a bill for specific performance by the vendor against the purchaser, notwithstanding the purchaser stated that his requisitions on the abstract had not been complied with, although the time for completing the contract had long expired, and he had given notice of his intention to rescind the contract.

Objections to title mean such objections as can only be properly the subject of adjudication upon the investigation of the title; and such are cases where the dispute is as to the application of the conditions of sale, the propriety or validity of the conditions themselves not being questioned.

The purchaser cannot, owing merely to the delay of the vendor in complying with his requisitions, determine the contract without notice, or bring an action for his deposit before the termination of his notice where time was not originally of the essence of the contract. Whether he can do so after the expiration of the notice, where time has not been made of the essence of the contract, or being of the essence of the contract, has been waived, depends upon the conduct of the vendor after notice. *Wood v. Machu*, 5 Hare, 158.

A perfect abstract of title is one which shews such a title as enables a purchaser to complete his purchase. Therefore, where A had contracted to sell lands to B, and B afterwards contracted to sell them to C, and agreed, amongst other things, to furnish C with a full and sufficient abstract of title; and before any conveyance by A to B, A died,—Held, that B, having before A's death delivered to C an abstract, bringing the title down to the contract by A to sell to him, had performed his agreement. *Blackburn v. Smith*, 2 Car. & K. 561.

The owner of land situated on an acclivity conveyed by a deed of 1816 a portion of the lower land, with liberty to enter on upper lands, and fetch water from a spring, and to cut open, cleanse, and cover in such gutters and drains as might be necessary for the purpose of conducting the spring to the lower land, and also with liberty to pass and repass for ingress and egress, on the upper land around or adjoining the conveyed land, and to put any ladders against the cottages then intended to be built upon the conveyed land. By another deed of 1820, other part of the lower land was conveyed, with liberty to take water from specified springs in the higher land, and to make such reservoirs in a particular field, part thereof, as might be necessary for taking up water for family use and other necessary purposes, and with liberty to pass for ingress and egress in the upper land surrounding or adjoining the conveyed land. By other deeds of 1824, other parts of the lower land were released, with all watercourses, particularly as the same ran to an inn on the conveyed land from the upper land. By other deeds of 1825, further portions of the lower land were released, with liberty to fetch water for family and domestic uses at a well on the higher land. By other deeds of 1834 other part of the lower land was released, with liberty to the releasee to make a covered goit or watercourse across the bottom part of a field, part of the upper land, and to open and repair it when necessary. Several years afterwards, the upper land was sold according to a particular describing it as fit for building, and subject to conditions of sale, providing that if any mistake were made in the description of the premises, or if any other error should appear in the particulars, it should not annul the sale; but that compensation should be given or taken. The existence of the easements was not stated in the particulars or conditions:—Held, first, that the fact of the purchaser living in the neighbourhood, being acquainted with the property, and passing constantly

some of the wells on the lower land, did not affect him with notice of the easements.

Secondly, that the existence of the easements granted by the deeds of 1816, 1820 and 1834 alone constituted a material defect of title.

Thirdly, that the easements granted by the deeds of 1824 and 1825 would alone render the title so doubtful, that a purchaser could not be compelled to accept it.

Fourthly, that the purchaser could not be compelled to take the title with compensation. *Shackleton v. Sutcliffe*, 1 De Gex & S. 609.

It is not sufficient for a party who relies on a waiver of title, to allege upon his pleading the facts constituting the waiver; he must shew how he means to use the facts, by alleging that the title has been waived thereby.

Semble—that where the purchaser after transmission to him of the original lease prepares a draft assignment, and makes various objections as to repairs and other matters, but does not require production of the landlord's title, he will be considered to have waived its production.

Semble—that a decree for specific performance should not declare that the agreement ought to be performed, if a good title can be made. *Clive v. Beaumont*, 1 De Gex & S. 397.

The proposals on which the agreement for a lease was based stated that the lease was to be granted under a power; that one of the covenants by the lessor would be, not to let any of the neighbouring land for the making or burning of bricks; and that the lease for carrying the above proposals into effect, was to be in the form of one to be inspected at the office of B. The defendant agreed to accept a lease on the terms of the proposals, and to execute a counterpart of such lease agreeably with the form referred to. By the form referred to, the covenant against brick-making was confined to the lessor's life:—Held, that it was a good objection to the title, that the plaintiff could not bind the land by the covenant beyond his own life.

Practice of the Court in cases where an exception to the Master's report in favour of the title is allowed, and the vendor desires to go back on the ground that he has been stopped by the Master, and can make out a further case: whether it is of course to allow him to do so, or whether the Court will generally require a special application to be made. *Dawes v. Belts*, 17 Law J. Rep. (n.s.) Chanc. 315.

P being lessee of a house underlet to S, with a covenant to indemnify her against the rent reserved by the original lease. S bequeathed the house to P in trust for L, and made P her executor, who in that character executed a deed, purporting to be an assignment to L of the house for the residue of the term granted to S. Afterwards P bequeathed the house to his executors on certain trusts, who demised it to L for the residue of the term granted to S:—Held, that L could not make a good title to the house, as the legal estate had merged by the bequest of S to P, and the demise by P's executors was a breach of trust. *Law v. Urruin*, 16 Sim. 377.

The plaintiff sold by auction shares in certain mines worked on the cost-book principle, and which were described in the particulars of sale as "important mining shares, paying large dividends. Lot. 1. One-half share in the T mine," &c. The

plaintiff filed his bill for specific performance, and a reference to the Master was ordered upon motion to inquire whether a good title could be made. Upon exceptions to the Master's report, that a good title was shewn, it was held (reversing the decision of the Court below, 17 Law J. Rep. (n.s.) Chanc. 79; 6 Hare, 41), that the vendor was not bound to shew the title of himself and his co-adventurers to the mine itself; but it was held, that the production of an entry in the cost-book was not sufficient evidence as to the ownership of the shares.

Where the Master has made a report in favour of the title, and exceptions to the report are allowed, the Court will, at the request of the vendor, send it back to the Master to enable him to make out a good title, without requiring a special application to be made for that purpose; and that, whether the reference was ordered at the hearing or upon motion. *Curling v. Flight*, 17 Law J. Rep. (n.s.) Chanc. 359.

In an action by a purchaser against a vendor of leasehold premises, for breach of contract in failing to make out a good title, it appeared that the premises were demised by A, B and C to J S, who assigned to the defendant. The lease contained a covenant by the lessee to insure the premises in the joint names of the lessors, with a proviso for re-entry on breach of covenant by the lessee. The premises were insured in the joint names of A, B, C, and the defendant:—Held, that this was not a good performance of the covenant to insure; and that the defendant being bound to shew a good lease, the liability to have the lease avoided by the landlord was a valid objection to the title. *Penniall v. Harborne*, 17 Law J. Rep. (n.s.) Q.B. 94; 11 Q.B. Rep. 368.

The plaintiff entered into an agreement for the purchase of the lease of a public house. He paid 50l. deposit, and agreed to pay the remainder of the purchase-money on a certain day; the defendant agreed to assign to him the lease, good-will, &c. on the same day, and it was stipulated that the defendant should not be called upon to prove his title. The declaration assigned for breach that the defendant would not make a title, and would not assign, &c. The defendant was assignee of an under-lease of the public-house, which was subject to the provisions of an original lease. The original lease included other premises, and contained different covenants from those contained in the defendant's lease:—Held, that under these circumstances, the defendant could not perform the agreement, and that the plaintiff was entitled to recover. *Blake v. Phinn*, 16 Law J. Rep. (n.s.) C.P. 159; 3 Com. B. Rep. 976.

The plaintiff contracted to purchase land, under a condition stating that the sale was made by the first mortgagees under a power of sale, and that the purchaser should not require the concurrence of any other persons in his conveyance. The power of sale referred to was to be exercised by the mortgagees on default of payment, and on giving to the mortgagor or leaving at his usual place of abode a three months' notice to pay off principal and interest. It appeared by the abstract delivered that no such notice had been given; but the mortgagor had, prior to the sale, consented to the sale being made without any notice, which he expressly waived. Previous to this waiver the mortgagor had conveyed the equity of redemption to several incumbrancers, who subsequently to the time

for completing the purchase ratified the sale to the plaintiff:—Held, that the plaintiff was entitled to rescind the contract, and recover back his deposit, as the title deduced was not that for which he had contracted; the waiver by the mortgagor not being under the circumstances, and as against the subsequent incumbancers, equivalent to a notice as required by the power of sale. *Forster v. Hoggart*, 19 Law J. Rep. (n.s.) Q.B. 340; 15 Q.B. Rep. 155.

(C) WARRANTY.

There is no implied warranty of title from the mere contract of sale itself, and a vendor is not liable for a bad title unless there be fraud on his part, or an express warranty, or what is equivalent thereto by declarations or conduct. Such warranty may be raised by the usage of trade, or by the nature of the trade carried on by the seller.

Where articles are bought in a shop professedly carried on for the sale of goods, the shopkeeper must be considered as warranting that any purchaser will have a good title to keep the goods purchased.

A harp having been pledged to the defendant, a pawnbroker, by a party who had no title to it, the defendant being ignorant of that fact, sent it for sale to an auctioneer after the expiration of the time for redemption. The auctioneer, describing the sale as consisting of unredeemed pledges and other effects, sold the harp to the plaintiff, who having been compelled to restore it to the true owner, brought an action against the defendant on an alleged breach of title to sell, and for money had and received:—Held, that as the auctioneer had no authority to sell the harp, except as a forfeited pledge, the defendant was to be considered as selling that right only which he himself had, and as undertaking merely that the article was a forfeited pledge, and that he was not cognizant of any defect of title.

Seemle—that the plaintiff could have recovered back the purchase-money on the count for money had and received, as upon a consideration that had failed, if there had been a mutual understanding that the bargain should be rescinded provided the seller should prove not to have a good title. *Morley v. Attenborough*, 18 Law J. Rep. (n.s.) Exch. 148; 3 Exch. Rep. 500.

The defendant, a farmer, purchased of a butcher the carcase of a pig which was exposed for sale in the public shambles, and left it there. Subsequently, the plaintiff offered for the carcase, and was told by the butcher that he had already sold it to the defendant. The plaintiff afterwards met the defendant in the town, and for a trifling consideration the defendant transferred his bargain to the plaintiff. The carcase turned out to be measly and unfit for human food. There was no evidence that the defendant knew when he bought or sold the pig that it was diseased, but there was reasonable evidence that he knew it was intended for human food.

In an action on the case to recover the price of the pig as damages for the breach of an implied warranty,—Held, that the defendant not having dealt in the way of a common trader, and there being no evidence of a warranty or of fraud on his part, was not liable; and the plaintiff was nonsuited. *Burnby v. Bollitt*, 17 Law J. Rep. (n.s.) Exch. 190; 16 Mee. & W. 644.

(D) LIEN OF VENDOR.

The plaintiff, who was entitled to an equitable life interest in leasehold property, under the will of a testator, assigned the same to the defendant, in consideration of a weekly sum to be secured by the covenant of the purchaser; and by the same deed the purchaser covenanted for himself, his heirs, executors, and administrators, to pay the weekly sum, to insure and repair the premises, and to observe the covenants in the lease, and to indemnify the plaintiff in respect thereof:—Held, that the plaintiff had a lien upon the premises for the annuity; and the arrears of the annuity and the costs of the plaintiff suing *in forma pauperis* were directed to be paid out of the rents of the premises. *Matthews v. Bowler*, 16 Law J. Rep. (n.s.) Chanc. 239; 6 Hare, 110.

The plaintiffs conveyed an estate, but retained the conveyance as security for unpaid purchase-money. The purchaser mortgaged the estate, but the mortgagee neglected to ask for the first conveyance:—Held, that the plaintiffs had a lien upon the estate prior to that of the mortgagee. *Worthington v. Morgan*, 18 Law J. Rep. (n.s.) Chanc. 233; 16 Sim. 547.

(E) PURCHASER.

(a) Rights and Protection of.

A trustee having a power of sale for payment of debts, with a direction to divide the residue between certain persons *in esse* at the time, put up the estate for sale twenty-five years after the testator's death, and upon being asked by the purchaser, whether there were or were not any debts unpaid, declined answering the question:—Held, that the purchaser was not bound to presume the debts to have been paid, and that he would have a good title, without seeing to the application of the purchase-money. *Forbes v. Peacock*, 15 Law J. Rep. (n.s.) Chanc. 371; 1 Ph. 717.

The heir-at-law of a testator brought an action at law to try the validity of the will, and failed. An application by him for a new trial was also unsuccessful, but he still threatened to dispute the will. In the mean time the devisees in trust under the will entered into a contract for sale, and filed a bill to compel specific performance by the purchaser:—Held, (reversing the decision of the Court below,) that under the circumstances, the purchaser ought not to be required to complete the purchase until the will had been established: and the cause stood over for the devisees to take proceedings for that purpose. *Grove v. Bastard*, 17 Law J. Rep. (n.s.) Chanc. 351.

Purchaser not entitled to compensation where the misdescription consisted in stating that the premises sold were in the joint occupation of A and B as lessees, the fact being that they had been demised to C, and by C assigned to A, who was, together with B, in the occupation of them at the time of sale.

The purchaser could not in this case be compelled to accept an indemnity. *Ridgway v. Gray*, 1 Mac. & G. 109; 1 Hall & Tw. 195.

A purchaser of lands under the description of "partly freehold and partly leasehold," is entitled to have the boundary dividing the freehold from the leasehold defined by reference to the instruments of

title, or shewn to be capable of being so defined; but the circumstance that the property is described in the agreement as partly freehold and partly leasehold, the boundaries distinguishing the one from the other not being therein, and having not theretofore been clearly defined, is not an objection to a decree for specific performance.

The uncertainty in the boundary or extent of property which arises, not from an instrument being incapable of legal construction, but from its not having theretofore received any such legal construction, is not a ground for refusing specific performance of a contract to sell such property.

If the boundary of property contracted to be purchased can be certainly defined, whether the extent be more or less, the purchaser will be bound by the contract, but whether he will be so bound if the boundary depends on a plan or instrument which is so vague as not to admit of legal construction, *quære*.

A contract by a lessee under an ecclesiastical corporation, whilst he was in treaty with the corporation for the renewal of his lease, to sell the leasehold premises, does not necessarily throw upon him the obligation of procuring the renewal of the lease at his own expense, for the benefit of the purchaser; whether if the vendor, after the contract, procure such renewed lease, the purchaser is not entitled to take it without bearing the expense of the renewal, *quære*.

Although a good title was not shewn by the vendor until during the pendency of the reference, the Court held that the purchaser must nevertheless bear the costs of the suit, it being manifest that, if the particular evidence which completed the title had been produced before the bill was filed, yet the suit would not have been avoided. *Monro v. Taylor*, 8 Hare, 51.

Upon a petition asking for leave to re-sell one of two lots, in consequence of a purchaser's unwillingness to complete his purchase, it was ascertained that one of the lots, a reversionary interest, had fallen into possession, and that the money had been paid into court, which made the purchase desirable:—Held, as the purchaser had not been discharged, that he was still entitled to complete the purchase; but the Court imposed terms, and limited the time for payment into court of the balance beyond what had been received for the reversionary interest. *Robertson v. Skelton*, 19 Law J. Rep. (n.s.) Chanc. 561; 13 Beav. 91.

(b) *Liabilities and Duties.*

The defendant granted to the plaintiff an annuity, re-purchaseable upon giving six months' notice. Y only was employed in the transaction by both parties. In May 1830 notice was given to the plaintiff that the annuity would be re-purchased in November. In August the defendant placed in Y's hands a sum of money, part of which was to be applied in re-purchasing the annuity. In October the plaintiff, upon the application of Y, executed a re-assignment of the annuity, but did not receive the money nor sign any receipt for it. Y retained the money in his hands, and continued the payments of the annuity to the plaintiff, and shewed the deed of re-assignment to the defendant, as a proof that the money had been duly paid. Y afterwards died insolvent:—Held, that the loss must fall upon the defendant,

and that the plaintiff was entitled to receive the money for the re-purchase of the annuity, and to the arrears. *Vandeleur v. Blagrove*, 17 Law J. Rep. (n.s.) Chanc. 45.

In July 1846 two houses were purchased under a decree of this Court, and, pending a reference to the Master upon the title, the back walls fell down, and damaged the adjoining premises. Upon an application to this Court by the vendor (which was dismissed, with costs, against the purchaser, who repudiated the application, on the ground that he had no interest), a reference was made to the Master, who certified that various sums, amounting to 51*l.* 10*s.*, should be expended to remove the rubbish and reinstate the adjoining premises, and repair the houses to render them habitable. By another order the work was directed to be done, and the expenses, and also a fee of 2*l.* 2*s.* to the district surveyor, and 1*l.* 1*s.* to the solicitor of the owner of the adjoining premises, together with the costs of that and a former application, were directed to be paid by the receiver, without prejudice to any question by whom or out of what fund they should ultimately be borne. On the 8th of March 1849 the Master certified that a good title was made; and, upon a petition, the vendor asked that the purchaser might pay his purchase-money, with interest from the time when the purchase ought to have been completed, and that he might pay the sums expended in repairs, fees and costs, amounting together to 172*l.* 6*s.* 10*d.*, and be let into possession, and that he might pay the costs of a prior motion and of this petition:—Held, that the estate belonged to the purchaser from the date of the order confirming the Master's report *nisi*; that possession belonged to the vendor till the payment of the purchase-money, subject to his accounting for the rents received; that the vendor ought to be paid all expenses subsequently incurred; that losses happening pending the contract fell on the purchaser; that any immediate obligation requiring an expenditure of money fell upon the purchaser, who was liable for the monies expended for repairs and fees; that the estate, and not the purchaser, was liable for the costs of the trustee, in whom the legal estate was vested; that the purchaser must pay his purchase-money into court, with interest; that the purchaser was entitled to further inquiry respecting the expenditure; that, if satisfied with the inquiry made, the sums paid for repairs, &c. must be deducted out of the rents, without costs on either side,—but if a further reference was required, the costs were reserved.

Held, also, that the vendor was not entitled to interest from the time mentioned in the conditions of sale; but only from the confirmation of the Master's report of a good title. *Robertson v. Skelton*, 19 Law J. Rep. (n.s.) Chanc. 140; 12 Beav. 260.

(c) *Payment of Purchase-money into Court.*

Where property was sold under an order of the Court, in which the plaintiff was interested to the extent of one-eighth part, and three of the defendants, who were interested in the other shares, and were in possession of the property, became the purchasers of part of the property, they were required to pay the whole amount of their purchase-money into court, notwithstanding there were incumbrances upon the property, and the purchasers claimed to be

entitled to allowances for improvements. *Bulmer v. Allison*, 15 Law J. Rep. (N.S.) Chanc. 11.

According to the practice, a purchaser ought to pay his purchase-money and interest thereon into court, without any deduction from the interest in respect of income tax. *Holroyd v. Wyatt*, 16 Law J. Rep. (N.S.) Chanc. 174; 1 De Gex & S. 125: s. p. *Humble v. Humble*, 12 Beav. 43.

Motion, with the consent of all parties, that a purchaser might pay his purchase-money into court without accepting the title, refused. *Denning v. Henderson*, 16 Law J. Rep. (N.S.) Chanc. 178; 1 De Gex & S. 689.

Purchase-money of estates sold under decrees may be paid into court, without prejudice to the question of title, if a sufficient case is made to induce the Court to make the order. *Morris v. Bull*, 17 Law J. Rep. (N.S.) Chanc. 9.

Notwithstanding the general rule, the Court may, under special circumstances, permit a purchaser to pay his purchase-money into court before he has accepted the title; but in such case express provision must be made against his taking possession until he shall have accepted the title. *Dempsey v. Dempsey*, 1 De Gex & S. 691.

Parties interested in an estate which was sold for a large sum of money, asked that the purchaser might pay a part of the purchase-money into court without prejudice to objections to the title:—Held, that such an order would be contrary to the rule of the court; and though such rule was not inflexible, the Court refused to make the order, even with the consent of the purchaser. *Ouseley v. Anstruther*, 18 Law J. Rep. (N.S.) Chanc. 157; 11 Beav. 399.

(d) Conveyance to.

A vendor of freehold property, who on his own purchase of it had entered into a covenant to observe the covenants entered into with a former vendor, and which prohibited building on the land, put it up for sale, pursuant to particulars and conditions noticing the existence of the covenant, but not stipulating that the purchaser should enter into any covenant on the subject. On a bill for specific performance filed by the purchaser, —Held, that the plaintiff was not entitled to a conveyance, unless on the terms of giving or providing for the vendor a sufficient indemnity against any breach of the covenant on the part of the plaintiff, his heirs, appointees, or assigns.

Held, also, that a covenant, on the part of the plaintiff, his heirs, executors, administrators, appointees and assigns, with the defendant, his heirs, executors and administrators, to the same effect *mutatis mutandis* as that entered into by the vendor on his own purchase, was a sufficient indemnity. *Moxhay v. Inderwick*, 1 De Gex & S. 708.

(F) INTEREST ON PURCHASE-MONEY.

[See (E) Purchaser; (b) Liabilities and Duties.]

An estate was sold, under a decree, in November 1846. One of the conditions of sale was, that the purchase-money should be paid into court on or before the 10th of January 1847, and if, from any cause whatever, the money should not be paid, the purchaser making default should pay interest from that day until the time of payment. There was a serious

defect in the title. The purchaser gave notice to the vendors that the money was lying idle, and in January moved the Court that he might pay in the money without accepting the title. The motion was refused, as being against the practice of the Court. The defect was cured in September. On a motion, subsequently made by the purchaser, for payment of the money into court, —Held, that he was exempted from paying interest. *Denning v. Henderson*, 17 Law J. Rep. (N.S.) Chanc. 8; 1 De Gex & S. 689.

By conditions of sale, interest was payable from November 1846, if from any cause whatever the purchase should not be then completed. The vendors did not make out their title until March 1849: —Held, that interest was payable only from the last-mentioned period. *Robertson v. Skelton*, 12 Beav. 363.

Upon a sale under the Court on September the 14th, there was a condition that the purchaser should confirm the report, and before the 10th of November pay his purchase-money and interest from September the 29th, and be entitled to the rents from that time; and "under no circumstances" was he to be excused paying interest from that time. The purchaser was unable to obtain and serve the order of confirmation until November the 29th. The abstract was delivered on December the 6th, and the requisitions finally answered on January the 17th: —Held, that there was no such delay on the part of the vendor as to release the purchaser from payment of interest. Observations upon *De Visme v. De Visme*, 1 Mac. & G. 336. *Rowley v. Adams*, 12 Beav. 476.

(G) ACTIONS.

In assumpsit for not delivering goods bargained and sold by the defendant to the plaintiffs, and paid for by them, the goods then lying at one F's, where they had been deposited with a larger quantity by the defendant's vendor, and the plaintiffs had had the goods weighed and took away part, but on claiming the remainder they had been removed by a creditor of the original vendor, —Held, that a direction to the jury, whether the defendant ought to have given a delivery order, although not expressly required, was improper, and that he should have directed them that F held the goods as the agent of the plaintiffs. *Wood v. Tassell*, 6 Q.B. Rep. 234.

In an action for breach of an agreement to assign a lease, the plaintiff alleged, as damage, that he had been "put to expense" in investigating the title, &c.: —Held, that, under such allegation he might recover the amount of his attorney's bill for so doing, though not actually paid before action brought. *Richardson v. Chasen*, 16 Law J. Rep. (N.S.) Q.B. 341; 10 Q.B. Rep. 756.

Where a Judge at Nisi Prius reserves certain facts for the opinion of the Court, with the consent of the parties, such facts are in the nature of a special case; and if the verdict can stand consistently with those facts, though they might lead to an opposite conclusion, the Court, in its discretion, will order the verdict to stand, rather than grant a new trial, which could only end in the same verdict with additional expense.

In an action for goods sold and delivered, a verdict was found for the plaintiff, and leave was reserved to enter a nonsuit "if the facts proved did not

support an action for goods sold and delivered." Those facts being ambiguous, the Court refused to enter a nonsuit, as from the facts proved the jury might have inferred a delivery; and they would not grant a new trial, as it would only lead to an amendment of the declaration by inserting a count for goods bargained and sold, and another verdict for the plaintiff. They, therefore, in the exercise of their discretion, directed the verdict to stand for the plaintiff. *Dyer v. Cowley*, 17 Law J. Rep. (N.S.) Q.B. 360.

The plaintiff contracted for the purchase of an estate from the defendant; the plaintiff's solicitor made objections to the title as disclosed by the abstract; the defendant affirmed it to be good, and threatened to re-sell the estate if the plaintiff did not complete. The plaintiff afterwards filed a bill for specific performance against the defendant: the defendant, by his answer, still contended that the title was good. The Master (to whom it was referred) reported that the defendant could not make a good title according to the terms of the contract, and the plaintiff's bill was thereupon dismissed, without costs:—Held, that the plaintiff could not recover against the defendant in an action at law his costs of the Chancery suit. *Malden v. Fyson*, 17 Law J. Rep. (N.S.) Q.B. 85; 11 Q.B. Rep. 292.

By a written agreement between A and B, A was to purchase a piece of land from B, to pay a deposit forthwith, and have immediate possession of the land. B, the vendor, agreed forthwith to furnish A, the purchaser, with a good and sufficient abstract of the title to the land; and it was agreed that all objections to, and requisitions in support of title not delivered in writing within one month after delivery of the abstract should be deemed to be waived. A paid the deposit and entered into possession of the land. B delivered to him an abstract (defective as tracing the title for a period less than sixty years) shewing it to be in a trustee for him. No objection was made within the month. Then the trustee died, and B did not shew for some time who was his heir, or in whom the legal estate was. A gave notice that he rescinded the contract, and demanded back the deposit. A brought assumpsit against B; and the first count was on the special contract, and assigned as breach that B did not deliver a sufficient abstract, which was traversed. The second count was for money had and received:—Held, that the defendant was entitled to the verdict on the traverse of the breach in the first count, inasmuch as it appeared that he had in due time delivered a fair abstract of his title, though it did not go back for sixty years; and also on the second count inasmuch as the plaintiff could not after having taken possession of the land rescind the contract, even if there was a subsequent breach, as a contract cannot be rescinded unless the parties can be placed *in statu quo*. *Blackburn v. Smith*, 18 Law J. Rep. (N.S.) Exch. 187; 2 Exch. Rep. 783.

(H) COSTS.

A suit was instituted by A, as vendor, against B, for the specific performance of a contract of sale of leasehold property. B, by his answer, stated that the sale had been made by auction, and insisted that A was not entitled to a decree, on the ground that he had employed puffers at the sale. At the hearing

of the cause, it was decided that the case set up by B was not a valid defence to the suit, and the usual reference was made to the Master. In the Master's Office, an objection was made by B to the title, which was at once removed by A. The Master found that A had made a good title to the property, but had first shewn a good title in the Master's office. On the cause coming on for further directions, (on the ground that B ought to have ended all litigation after the first decree),—Held, that B ought to pay all the costs of the suit after the first decree. *Woodward v. Miller*, 16 Law J. Rep. (N.S.) Chanc. 16.

VENUE.

(A) CHANGE OF.

(B) BRINGING BACK.

(a) *How.*

(b) *What is material Evidence.*

(A) CHANGE OF.

The Court has power under the 5 & 6 Will. 4. c. 76. s. 109, to direct an action, the venue of which is laid in the city of Bristol, to be tried in the adjoining county, the exception in 38 Geo. 3. c. 52. s. 10. being repealed, as well in civil as in criminal proceedings. *Cole v. Gane*, 15 Law J. Rep. (N.S.) Q.B. 22; 3 Dowl. & L. P.C. 369.

A Judge at chambers has jurisdiction to set aside a rule to change the venue, obtained on the common affidavit.

The time for pleading expired on the 22nd of February; the defendant on the 23rd took out a summons for further time to plead; on the 24th an order was made for further time on the usual terms. The defendant did not draw up the order, but in the afternoon of the 24th (the plaintiff not having signed judgment) delivered a plea, with a rule to change the venue, obtained on the common affidavit. A Judge at chambers having set aside the rule to change the venue, the Court (*Cresswell, J. dubitante*) rescinded the Judge's order. *Darrington v. Price*, 17 Law J. Rep. (N.S.) C.P. 326; 6 Com. B. Rep. 309.

After plea and before issue joined, the defendant applied to change the venue from L to D, on the grounds that most of the witnesses resided in D, and that the expenses of trying the cause in L would be much greater than if it were tried in D.—Held, that the Court will not entertain such an application till the issues to be tried are ascertained. *Hodge v. Churchyard*, 17 Law J. Rep. (N.S.) C.P. 175; 5 Dowl. & L. P.C. 514; 5 Com. B. Rep. 495.

An application to change the venue after issue joined and notice of trial given, must shew at least that the plaintiff will not be injured or delayed by the change, and that it will be more convenient to the defendant. *Hams v. Pawlett*, 17 Law J. Rep. (N.S.) C.P. 210; 5 Dowl. & L. P.C. 780.

The venue in an action on a banker's cheque cannot be changed on the common affidavit. *Webb v. Inwards*, 17 Law J. Rep. (N.S.) C.P. 157; 5 Dowl. & L. P.C. 478; 5 Com. B. Rep. 483.

In a local action, a suggestion to try the cause in an adjoining county cannot be granted before

issue joined. *Tolson v. Carlisle (Bishop of)*, 7 Com. B. Rep. 79.

In an action on a policy of insurance, the Court will not grant a rule to change the venue on the usual affidavit, unless it appears on reading the declaration that the whole cause of action arose in the place to which the venue is sought to be changed. *Butler v. Fox*, 18 Law J. Rep. (N.S.) C.P. 304; 7 Com. B. Rep. 970.

(B) BRINGING BACK.

(a) How.

Where the venue had been changed at the defendant's instance to A, and then restored by the plaintiff to B, it was not restored to A upon an affidavit that the cause of action arose in the latter place, that the defendant's witnesses were very numerous and all resident at A, and that the plaintiff was too poor to pay costs if he failed. *Smallcombe v. Williams*, 7 Com. B. Rep. 77.

Where the venue, in an action for freight, had been changed on the usual affidavit, it was brought back upon affidavits, stating only that the cause of action and the contract for the conveyance of the goods and payment of freight, on account of which the money in the declaration was claimed, arose and were entered into at Newfoundland, and not in the county in which the venue had been changed, without the plaintiff undertaking to give material evidence in the county where the venue was originally laid. *Cundell v. Harrison*, 16 Law J. Rep. (N.S.) Q.B. 81.

(b) What is material Evidence.

In an action for *crim. con.*, the venue having been originally laid in M, the defendant removed it, upon the usual affidavit, to S, whereupon the plaintiff brought it back on the usual undertaking. At the trial, in M, it appeared that the defendant, under an assumed name, had in person proposed to take lodgings at B in S, assigning as a reason that he was privately married, and wished to keep it secret, and subsequently directed an answer to his proposal to be sent to him at an hotel in M, under his assumed name; that an answer by letter was sent, and he subsequently, in S, admitted that he had received it; and afterwards wrote a letter, directing his apartments to be prepared for him, which bore a post-mark such as a letter posted in M would have. It also appeared that at the time the letter was sent to him, and the latter letter bore date, he was at the hotel in M, his usual residence being in S. The defendant was met at these lodgings by the plaintiff's wife on several occasions, when the adultery took place, and both parties were identified as being the persons who so met:—Held, by *Tindal, C.J., Maule, J. and Cresswell, J. (Erle, J. dissentiente)*, that the evidence of what had occurred in M was material evidence, and satisfied the undertaking.

Held also, by all the Judges, that, in order to satisfy the undertaking, it was not necessary to shew that any part of the cause of action, *i.e.* the adultery, took place in M.

Quære—Whether the proper course of enforcing such an undertaking is by nonsuit; and,

Quære, also, whether it is necessary for the defendant to produce the rule on the trial. *Clarke v. Dunsford*, 15 Law J. Rep. (N.S.) C.P. 146; 3 Dowl. & L. P.C. 618; 2 Com. B. Rep. 724.

In an action by A, an agent employed by B to cause advertisements to be inserted in newspapers, evidence that A gave orders to C to insert such advertisement is material evidence in the county in which such orders were given, to satisfy an undertaking upon bringing back the venue. *Parratt v. Benasit*, 3 Com. B. Rep. 884, n.

The plaintiff entered into an undertaking to give material evidence in Middlesex. In an action against the defendant for penalties under the 3 & 4 Will. 4. c. 15. s. 2, "for representing a pantomime, of which, the plaintiff was the author, without his licence, at a place of dramatic entertainment," he called a witness who proved taking the pantomime in manuscript from the plaintiff's house in Surrey, and offering it for sale by the plaintiff's directions to B in Middlesex:—Held, that this evidence satisfied the undertaking. Also, that a pantomime is a dramatic entertainment within the act 3 & 4 Will. 4. c. 15, and protected thereby; and that it was not necessary to prove that the defendant knew that the plaintiff was the author.

Held, also, that in an action of this nature it is sufficient to describe the offence in the terms of the act of parliament. *Lee v. Simpson*, 16 Law J. Rep. (N.S.) C.P. 105; 4 Dowl. & L. P.C. 666; 3 Com. B. Rep. 871.

A plaintiff's undertaking to give material evidence in the county is satisfied by proof of a letter of the defendant, admitting part of the debt, posted in such county, and received by the plaintiff in another county. *Hall v. Story*, 16 Law J. Rep. (N.S.) Exch. 17; 16 Mee. & W. 63; 4 Dowl. & L. P.C. 345.

Proof of anything directly affecting the amount of damages is material evidence within the meaning of the ordinary undertaking on bringing back the venue. *Jones v. Smith*, 17 Law J. Rep. (N.S.) Exch. 255; 2 Exch. Rep. 451.

In an action by ship-brokers for commission for procuring charters for the defendant's ships, including the amount of the stamp, proof that the plaintiffs within twenty-one days from the execution of the charter-party caused it to be stamped at Somerset House in Middlesex, satisfies their undertaking to give material evidence in that county. *Crozier v. Hutchinson*, 18 Law J. Rep. (N.S.) Exch. 316.

In an action for the price of repairs done to a steam-engine, evidence of a purchase by the plaintiff in the county of Middlesex of springs which were necessary to be attached to the engine, is not a performance of his undertaking to give material evidence in that county. *Howe v. Pike*, 19 Law J. Rep. (N.S.) Exch. 53; 4 Exch. Rep. 495.

VESTRY.

[See CHURCH.]

A local act (54 Geo. 3. c. cxiii, relating to St. Mary, Newington) empowers "the governors and guardians to call a vestry meeting of the inhabitants of the said parish on the Easter Tuesday in every year; at which said vestry meeting all the vacancies in the list of governors and guardians shall be filled up by poll or ballot, or in such way of election as shall be deemed most proper and convenient:—Held, first, that although the meeting so assembled must determine the method of election; as by poll, ballot, or other

similar method, yet they must adopt some method which secures the expression of the will of the inhabitants in vestry assembled, as to each candidate; secondly, that on a poll being properly demanded, the vestry may be adjourned for the purpose of enabling all who are entitled, to give their votes, and that the election is not confined to those then present.

The statute, after providing for the appointment of governors and guardians, and for the filling up of vacancies by the remaining governors and guardians, enacts, that after the first year, "the inhabitants of the parish in vestry assembled" are to nominate and choose twelve persons, &c.:—Held, upon motion for a mandamus, that the meeting was to be called by, and therefore the writ directed to, the governors and guardians. *Regina v. Governors and Guardians of St. Mary, Newington*, 17 Law J. Rep. (N.S.) Q.B. 220; 6 Dowl. & L. P.C. 163.

VOLUNTARY CONVEYANCE AND SETTLEMENT.

A executed a voluntary settlement of real and personal property upon his wife and children, and a month afterwards deposited with the plaintiff, by way of mortgage, the title-deeds of part of the estates comprised in the settlement, together with mining and other shares, accompanied with a memorandum of agreement to grant a mortgage with an unqualified power of sale. A becoming bankrupt, the plaintiff filed his bill against A, his assignees, and his wife and children, and the trustees of the settlement, charging that the settlement was void against the plaintiff, under the 27 Eliz. c. 4, and also against A's general creditors, under the 13 Eliz. c. 5, A being insolvent at the time of the execution; and praying a sale or foreclosure:—Held, that the settlement was void as against the plaintiff under the 27 Eliz. c. 4; and that the plaintiff, though an equitable mortgagee, had a title to sustain the suit under the 13 Eliz. c. 5, so far as to let in his specific lien; but whether for the purpose of distribution among the general creditors, *quære*.

Where there is strong evidence of the embarrassment of the settlor's affairs at the date of the settlement, the Court will direct an inquiry as to that fact.

Where the memorandum of deposit of title-deeds contains an agreement to grant a legal mortgage, with an unqualified power of sale, the Court, on the failure of the mortgagor to redeem, has power to direct a sale. *Lister v. Turner*, 15 Law J. Rep. (N.S.) Chanc. 336; 5 Hare, 281.

Proof of a debt existing at the date of a voluntary settlement and unsatisfied at the settlor's death, is not *per se* sufficient to invalidate the settlement; but it must appear that the settlor's property, not included in the settlement, was inadequate to meet his then existing debts and liabilities.

In a suit by a creditor of the settlor, to impeach a voluntary settlement, inquiries were directed as to what debts were owing by the settlor at the time of the execution of the settlement and at his death; and what, at the time of such execution, was the amount of the settlor's property not included in the settlement. *Sharff v. Soulbey*, 19 Law J. Rep. (N.S.)

Chanc. 30; 1 Mac. & G. 364; 1 Hall & Tw. 426; reversing s. c. 18 Law J. Rep. (N.S.) Chanc. 8; 16 Sim. 344.

WAGER.

[See GAMING AND WAGERING.]

By the common law of England, in force in India, an action may be maintained on a wager, although the parties had no previous interest in the subject-matter on which it is laid; if such wager be not against the interest or feelings of third persons, does not lead to indecent evidence, and is not contrary to public policy.

The mere circumstance that a wager concerns the public revenue, or creates a temptation to do a wrong, will not render it illegal.

A wager upon the average price which opium should fetch at the next Government sale at Calcutta, the plaintiffs having to pay the defendants the difference between such price and a sum named, per chest, and the defendants having to pay the difference between such price and the sum so named, if the price should be above that sum, is not an illegal wager, or contrary to public policy, though the proceeds of the opium sold at Calcutta formed part of the Government revenue. The judgment of the Court below, holding such wager illegal, reversed.

The statute 8 & 9 Vict. c. 109, amending the law relating to games and wagers, does not extend to India. *Thackoorseydass v. Dhondmull*, 6 Moore, P.C. 301; 4 Moore, In. App. 339.

WARRANT OF ATTORNEY AND COGNOVIT.

(A) FORM AND EXECUTION.

- (a) *Construction of, in general.*
- (b) *Attestation.*

(B) ILLEGALITY OF.

(C) JUDGMENT ON.

- (a) *When it may be entered.*
- (b) *Practice on entering up.*
- (c) *Impeaching.*
- (d) *Reviving.*

(D) FILING.

(E) SETTING ASIDE.

(A) FORM AND EXECUTION.

- (a) *Construction of, in general.*

A warrant of attorney, executed by two persons, authorized attorneys "to appear for us and each of us, and to receive a declaration for us and each of us, in an action of debt, and thereupon to confess the same action, or else to suffer judgment by *nil dicit* or otherwise to pass against us in the same action, and to be thereupon entered up against us and each of us, and after the said judgment shall be entered up as aforesaid, for us and in our names to execute a release of errors, &c. suffered or done, &c. in the aforesaid judgment":—Held, that this warrant was not several, and did not authorize a judgment against one of the parties executing it, but only against both.

Dalrymple v. Fraser, 15 Law J. Rep. (N.S.) C.P. 193; 3 Dowl. & L. P.C. 818; 2 Com. B. Rep. 698.

A deed or other writing speaks from its execution, and not from the day of its date.

Where, therefore, a warrant of attorney, bearing date the 24th of February 1847, was executed by the defendant upon the 20th of March in the same year, and the defeasance stated that the warrant of attorney was given to secure payment of the money "on the 20th day of March next," it was held, that such payment did not become due until the 20th of March 1848, and execution having issued previous to that time, it was set aside.

Upon motion, by the assignees, to set aside a warrant of attorney given by the bankrupt, the Court will not enter upon the question, whether the same was given by way of fraudulent preference. *Browne v. Burton*, 17 Law J. Rep. (N.S.) Q.B. 49; 5 Dowl. & L. P.C. 289.

(b) Attestation.

A warrant of attorney was attested in the following form:—"Signed," &c. "by the said J K, in the presence of W K T, one of the attorneys of Her Majesty's Court of Queen's Bench at Westminster, and attorney on behalf of the said J K, expressly named by him, and attending at his request to inform him, and I did inform him of the nature and effect of the above written warrant of attorney before the same was executed by him, and I declare myself to be the attorney for the same J K. W K T."—Held, sufficient. *Holt v. Kershaw*, 5 Dowl. & L. P.C. 419.

A warrant of attorney was attested as follows:—"Signed, sealed, and delivered in the presence of H. Whitaker, 10, Lincoln's Inn, attorney for the said Lord Kensington, expressly named by him, and attending at his request, and I hereby subscribe myself to be the attorney for him, having read over and explained to him the nature and effect of the above warrant of attorney before the same was executed by him, and I hereby subscribe my name as a witness to the due execution thereof"; there was no further subscription of the name of the witness; but the above signature, "H. Whitaker," was the name and was in the handwriting of the witness:—Held, first, that the above signature was a sufficient subscription by the witness; secondly, that the form of the attestation was a substantial compliance with the requisitions of the 1 & 2 Vict. c. 110. s. 9, and sufficiently shewed that H. Whitaker was the attorney for the defendant, and that he subscribed as such attorney. *Lewis v. Lord Kensington*, 15 Law J. Rep. (N.S.) C.P. 100; 3 Dowl. & L. P.C. 637; 2 Com. B. Rep. 463.

Where the defendant requested the plaintiff's attorney to name an attorney to act for him in witnessing the execution of a warrant of attorney, which he accordingly did, and the defendant adopted the person so named, who was a stranger to him and to his affairs,—Held, that this was a sufficient nomination under the 1 & 2 Vict. c. 110. s. 9, the defendant having expressly named the attorney, and it being his own fault that the attorney did not know the state of his affairs.

Seem—that where collateral securities are not mentioned in a defeasance to a warrant of attorney written on the warrant, pursuant to the rule, Michaelmas term, 42 Geo. 3, the irregularity is not

one for which the Court will set aside the instrument. *Joel v. Dicker*, 16 Law J. Rep. (N.S.) Q.B. 359; 5 Dowl. & L. P.C. 1.

A cognovit was attested thus:—"Duly executed by the above-named R G, in the presence of me, the undersigned S B, attorney on behalf of the said R G expressly named by him, and attending at his request; and I do hereby declare that I subscribe my name as witness to the due execution hereof, by the said R G, and as his attorney, and that previous to the execution hereof by the said R G, I informed him of the nature and effect hereof. S B, attorney, Birmingham":—Held, sufficient. *Phillips v. Gibbs*, 16 Law J. Rep. (N.S.) Exch. 48; 16 Mee. & W. 208; 4 Dowl. & L. P.C. 275.

The attestation to a warrant of attorney need not state in express terms that the attorney attesting the defendant's execution attends at his request, and that he was named by him. Therefore, the following attestation was held sufficient:—"Signed, sealed, and delivered by the said H H (the defendant), in my presence, and I declare myself to be the attorney for the said H H, and that I subscribed my name as such attorney. G O, solicitor."

Quare—Whether the absence of consideration is any ground for setting aside a warrant of attorney. *Gay v. Hall*, 18 Law J. Rep. (N.S.) Q.B. 12; 5 Dowl. & L. P.C. 422.

(B) ILLEGALITY OF.

Where a charge of embezzlement having been preferred before a magistrate by A against B, and during an adjournment of the case for the purpose of procuring further evidence, the Magistrate being of opinion that a partnership existed between the parties, a warrant of attorney was, on the 13th of October, given by B's father to A, for a sum which, on an investigation of the accounts, appeared to be due from his son, and on the 15th of October, no further evidence being produced, the charge was dismissed:—Held, that the warrant of attorney was given for an illegal consideration, as at the time when it was executed a charge of a criminal nature was pending, which it was calculated to bring to an end. *Ex parte Critchley*, 15 Law J. Rep. (N.S.) Q.B. 124; 3 Dowl. & L. P.C. 527.

(C) JUDGMENT ON.

(a) When it may be entered.

A warrant of attorney, given by S, authorized A and others to sign judgment "as of" Easter term then last past, Trinity term then next, or any subsequent term. Judgment was signed in a subsequent vacation. On the 1st of December a levy was made under a *fi. fa.* On the 8th a fiat of bankruptcy issued against S. On the 11th the official assignee was appointed; and, on the 4th of January, the trade assignees were chosen. On the 12th of January the assignees obtained a rule *nisi* to set aside the judgment for irregularity:—Held, that they came too late, and that the judgment was not irregular for having been signed in vacation. *Alcock v. Sutcliffe*, 16 Law J. Rep. (N.S.) Q.B. 129; 4 Dowl. & L. P.C. 612.

A cognovit, in the simple form, being given before appearance, and nothing further being done for several years, the plaintiff was held to be entitled to

enter an appearance, and proceed on the cognovit, notwithstanding Reg. Gen. Hil. term, 4 Will. 4. r. 35, without obtaining the leave of a Judge, or giving a term's notice. *Thompson v. Langridge*, 17 Law J. Rep. (N.S.) Exch. 4; 1 Exch. Rep. 351; 5 Dowl. & L. P.C. 213.

(b) *Practice on entering up.*

Upon motion to enter up judgment upon a warrant of attorney more than a year old, it is not necessary to shew to the Court that the defendant is now alive, if the defendant has agreed to dispense with the necessity for so doing. *Tripp v. Stanley*, 17 Law J. Rep. (N.S.) Q.B. 19; 5 Dowl. & L. P.C. 262.

On motion to enter up judgment on an old warrant of attorney, it appeared that the warrant of attorney, which was joint, was given to A B and C D, "public officers of the Yorkshire Banking Company,"—but not to them as public officers. The defeasance shewed that the object of the warrant of attorney was to secure to the plaintiffs, as public officers, money therein expressed to have been lent by them as public officers to the defendants, and such further sum as the banking company might advance. The affidavits shewed the original debt to be unpaid, and a further sum to have been advanced by the banking company, but did not allege the debt to be still owing to the plaintiffs, one of them having ceased to be a public officer. The Court permitted the banking company to enter up judgment in the names of A B and C D, as individuals.

The affidavit stated that the deponent believed the defendants to be alive, having seen and conversed with two of them, and "been in company with" the third on a recent day:—Held, sufficient. *Howard v. Batho*, 5 Dowl. & L. P.C. 396.

(c) *Impeaching.*

Assumpsit will not lie by the party against whom a *fi. fa.* has issued on a subsisting judgment, to recover the sum levied under it, on the ground that such judgment was signed on a warrant of attorney, which was obtained by fraud or duress. *De Medina v. Grove*, 15 Law J. Rep. (N.S.) Q.B. 287.

(d) *Reviving.*

An agreement to waive a *scire facias* to revive a judgment upon a warrant of attorney, entered into after judgment has been signed upon the warrant, is valid, although not executed with the formalities rendered necessary for the execution of warrants of attorney by the 9 & 10 Vict. c. 110. s. 9.

Where one of several plaintiffs dies, and execution is issued in the names of the survivors, the absence of a suggestion on the record is not an irregularity which will entitle a defendant to be discharged out of custody. *Cooper v. Norton*, 16 Law J. Rep. (N.S.) Q.B. 364.

(D) *FILING.*

Defendant being indebted to plaintiff in 500*l.*, and in other sums to different creditors, arranged to pay his creditors a composition of 10*s.* in the pound on their debts (except plaintiff), who was to remain his creditor for the full amount, and to take the risk of being subsequently paid. In order to protect defendant from other creditors, a docket was struck by

plaintiff, but no fiat issued upon it; after this the composition deed, and also a deed of release, were executed by all the creditors (except plaintiff), and the amount of the composition fully paid by defendant before the year 1838. On the 29th of September in that year, plaintiff having sued defendant for his debt of 500*l.* defendant gave a cognovit for that sum, upon which judgment was signed on the 17th of October following, but the cognovit was not filed until October 1846. A *fi. fa.* issued on the above judgment, under which defendant's goods were taken in execution in December 1845, and on the 28th of February 1846, a fiat in bankruptcy issued against the defendant, under which assignees were appointed. It appeared that some of the creditors under this fiat were creditors when the former docket was struck, but in respect of different debts, they having executed the deed of release. On an application by the assignees to set aside the judgment and execution as void, under section 8. of the 6 Geo. 4. c. 16.—Held, that the giving of the cognovit, under these circumstances, was not within that section.

Held, also, that judgment having been signed on the cognovit within twenty-one days, it was not necessary to file it, as cognovits stand on the same footing as warrants of attorney in this respect, under the 3 Geo. 4. c. 39. s. 3.

The sheriff having deducted auctioneer's fees from the levy when there had been no auction, it was held that the plaintiff could not be called upon to refund this money. *Bushell v. Boord*, 16 Law J. Rep. (N.S.) Q.B. 57; 4 Dowl. & L. P.C. 359.

(E) *SETTING ASIDE.*

W executed at Brussels, in June 1843, a warrant of attorney to confess judgment; and judgment was entered on it. In January 1846, a rule *nisi* was obtained to set the warrant and judgment aside. There was nothing to shew that W authorized the application, except that the affidavit in support of the rule was made by a party who styled himself clerk to L, "attorney for the above-named defendant:—"—Held, that it ought to have appeared more expressly that the application was made on behalf of W; and the Court discharged the rule, but without costs. *Hume v. Lord Wellesley*, 8 Q.B. Rep. 521.

WASTE.

[See *BARON AND FEME—INJUNCTION, Special.*]

The right of a remainder-man to bring an action or suit within twenty-one years after his title accrues in possession applies to a claim for equitable waste as well as to a claim of the land itself.

In 1797, family estates were settled upon a tenant for life, without impeachment of waste, with remainder in tail male, and in 1809, the tenant for life pulled down the mansion-house, cut the ornamental timber and other trees, destroyed the garden, and converted the estate into a farm. The plaintiff, who was his only son, attained twenty-one in 1819, when he joined with his father in suffering a recovery of the estates, but did not at that time make any claim for compensation in respect of the waste which had been committed. The tenant for life died in 1838, upon which the plaintiff filed his bill against the trustees and devisees of his father's will, claiming

compensation for these acts of waste. The defendants contended that the tenant for life was justified in converting the family mansion into a farm, as it was an advantage to the estate; and that the plaintiff was too late in coming to the Court for compensation:—Held, that the acts complained of amounted to equitable waste, and that the plaintiff was fully justified in waiting till the death of the tenant for life before he filed his bill for compensation, and that the estate of the late tenant for life was liable to account for all the profit received from those acts. *Leeds (Duke of) v. Amherst (Earl of)*, 16 Law J. Rep. (N.S.) Chanc. 5; 2 Ph. 117; affirming s.c. 15 Law J. Rep. (N.S.) Chanc. 351; 14 Sim. 357.

A tenant for years is not guilty of waste in cutting down willow trees for sale, which spring up again from the stools, unless they serve to protect the house, or to support the bank of a stream. *Phillipps v. Smith*, 15 Law J. Rep. (N.S.) Exch. 201; 14 Mee. & W. 589.

Case for waste. The declaration stated that the defendant held a dwelling-house as tenant thereof to the plaintiffs, under a demise made by the plaintiffs to him; by reason of which tenancy it became the duty of the defendant to manage the tenements in a proper manner, and not to permit waste; yet the defendant did not manage the tenements in a proper manner, but, on the contrary, permitted the dwelling-house to become waste and ruinous:—Held, first, that the declaration was bad on general demurrer, as it was consistent with its allegations that the defendant was tenant at will to the plaintiffs, and therefore not liable for permissive waste; secondly, that the statement of the tenancy was not an ambiguous, but an insufficient statement.

Quare.—Whether a tenant from year to year is liable for permissive waste. *Harnett v. Maitland*, 16 Law J. Rep. (N.S.) Exch. 134; 16 Mee. & W. 257; 4 Dowl. & L. P.C. 545.

WASTE LAND.

Though it is the presumption of law that a strip of waste land lying between an old inclosure and a highway belongs to the owner of the old inclosure, yet that presumption may be rebutted by shewing that there is other land also adjoining the strip, to which it may have formerly belonged. *Doe d. Harrison v. Hampson*, 17 Law J. Rep. (N.S.) C.P. 225; 4 Com. B. Rep. 267.

WATER AND WATERCOURSE.

The defendant was the owner of a close containing a well, the water from which had flowed immemorially into an old pond, situate in one of three closes belonging to the plaintiff. The defendant's predecessor in the land having, about the year 1812, changed the course of the water, whereby it ceased to flow into the old pond as before, the plaintiff made three new ponds, one in each of his three closes, and having conducted the water into them, ceased to use the old pond, which became filled with rubbish and overgrown with grass. In the year 1843 the defendant diverted the water from

the three new ponds, whereupon the plaintiff brought the present action. The declaration stated, that, at the time of the grievance, three closes of land, situate, &c. and certain, to wit, three ponds filled with water, one pond thereof being in and upon each of the said closes respectively, were in the possession and occupation of the plaintiff's tenant, and it then stated the diversion complained of:—Held, that the plaintiff, who had failed to prove a right to the overflow of water into the three new ponds, was entitled under this declaration to give evidence of the immemorial right to the overflow of water into the old pond. *Hale v. Oldroyd*, 15 Law J. Rep. (N.S.) Exch. 4; 14 Mee. & W. 789.

The defendant diverted a stream as it passed through his premises, but restored it undiminished in quantity to its former channel before it reached the premises of the plaintiff. The defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances, the Lord Chancellor dissolved an injunction restraining the defendant from diverting and using the water. *Elmshirst v. Spencer*, 2 Mac. & G. 45.

The owner of land entitled by reason thereof to the advantage of water flowing through it in a natural watercourse who has erected mills upon that land and on the banks of the watercourse, and has used such water for working such mills, has, by reason of the possession of such mills, a right to the enjoyment of the water of such watercourse for the purpose of working them, although they have been erected for a period less than twenty years from the time of an action brought for an infringement of such right.

The water of such watercourse having been used by a mill-owner, whose mills were situated above the plaintiffs', for manufacturing purposes, and returned again to the stream, except about 5 per cent. of that used, which had been lost by evaporation,—Held, that this was a sufficient amount of injury to entitle the plaintiffs to a verdict upon the issue of Not guilty.

Where an action had been brought by a person entitled as above mentioned, against the defendants for polluting the water, and the facts were that the defendants had polluted the water by pouring in soapsuds, &c., but that such pollution had done no damage to the plaintiff, because the stream was already so polluted by similar acts of mill-owners above the defendants' mills, that the wrongful act of the defendants made no sort of practical difference,—Held, nevertheless, that upon the issue of Not guilty, the plaintiffs were entitled to have that issue found for them.

No action lies for an injury occasioned by the diversion of an artificial watercourse, where from the nature of the case it is obvious that the enjoyment of it depends upon temporary circumstances, and is not of a permanent character, and where the interruption is by a party who stands in the situation of the grantor.

And where the owners of a colliery had suffered the water pumped out of their colliery to flow along

an artificial channel.—Held, that, in the absence of any grant or prescriptive title, no action lay by the owner of land through which the water had been so accustomed to flow, against an owner of land above and through whose land the sough likewise passed, for diverting such water; for the owners of a colliery thus getting rid of a nuisance to their works by discharging the water into such sough could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but that each might take and use what passed through his land, and the proprietor of the land below had no right to any part of that water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit. *Wood v. Waud*, 18 Law J. Rep. (N.S.) Exch. 305; 3 Exch. Rep. 748.

WATERWORKS.

Provisions usually contained in acts authorizing the making of waterworks consolidated by the 10 Vict. c. 17; 25 Law J. Stat. 58.

WAY.

[*Duncan v. Louch*, 5 Law J. Dig. 806; 6 Q.B. Rep. 904.]

Trespass for breaking and entering a close called the Hencroft. Plea, that C being owner in fee of the said close granted to W H, by indenture, a way over the said close for the occupiers of a certain dye-house, and that the defendant being in the occupation of the dye-house committed the said trespasses. The plaintiff cravedoyer of the indenture, and set it out in his replication. By the indenture C granted, bargained, &c. to W H all those newly erected buildings standing and being partly on the said close called the Hencroft, and partly on B C, together with all and singular outhouses, edifices, buildings, roads, ways, &c. and appurtenances with the said premises usually held, occupied, or enjoyed; the said C reserving to himself exclusively the said Hencroft, with the rights, privileges, and appurtenances within and to the same belonging:—Held, on special demurrer, that the plea was bad in omitting to aver that the way had been usually held, occupied, or enjoyed with the Hencroft. Also, that no right of way was granted by C over the Hencroft. *Tatton v. Hammersley*, 18 Law J. Rep. (N.S.) Exch. 162; 3 Exch. Rep. 279.

A declaration in case by a reversioner for the obstruction of a right of way, by locking a gate, whereby the reversion was injured, was held after verdict for the plaintiff, on motion in arrest of judgment, sufficient, as such an obstruction might occasion injury to the reversion; and it was to be assumed that evidence to that effect had been given. *Kidgell v. Moor*, 19 Law J. Rep. (N.S.) C.P. 177; 1 L. M. & P. 131.

A, being a termor of land, built two houses on it. The whole was then released to him in fee, "with all ways, easements, advantages and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied or enjoyed." By his will, he

devised one house, and the appurtenances thereunto belonging, to B, and the other to C, in similar terms. During A's ownership of both, the entrance from the high road to the principal door of the house afterwards devised to B, was by a carriage drive or sweep, entering from a high road, passing immediately in front of the house afterwards devised to C, to B's door, and then returning round an oval garden in front of C's house, but at a greater distance from it, to the same point of entrance. B's house had a coachhouse opening only into the high road, and a back entrance into the same. After A's death, C made a fence across so much of the carriage drive as passed immediately in front of his house and across the oval garden, leaving the further way to B's front door by the same carriage drive open. B brought trespass, claiming the way as appurtenant to his house and garden:—Held, first, that the way, as used in A's time, during the unity of ownership in him, immediately in front of C's house, did not pass to B with the house devised to him, under the word "appurtenances" in A's will; and, secondly, *comme semble*, that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B's premises could not be had.

Semble—Nothing of absolute necessity to a building, e.g. a gutter in *alieno solo*, to carry off water, &c., is extinguished by unity of ownership. *Pheysey v. Vicary*, 16 Mee. & W. 484.

In an action of trespass the defendants justified under a right of way supposed to have been conveyed to them by J S. The deed was set out onoyer by the plaintiff, and the description of the parcels conveyed contained the following words:—"Together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of, &c. (the premises conveyed) and all persons having occasion to resort thereto, of passing and repassing for all purposes in, over, along, and through a certain road," &c. (describing the *locus in quo*). The defendants in their plea, after stating the conveyance to J S in the terms of the deed, and deducing their title from J S under a conveyance to them of the same "lands, tenements, hereditaments, premises, and appurtenances," as those conveyed to him by the above-mentioned deed, alleged that they being owners and occupiers of the premises, and having occasion for their own purposes to use the right and privilege granted by the conveyance to J S, did on foot, &c. pass and repossess for the purposes of them, the defendants, along the said road, &c. (the *locus in quo*).

Held, first, that the right granted by the conveyance to J S was not restricted to a user of the road for purposes connected with the enjoyment of the land conveyed to him by the same deed. Secondly, that the conveyance to the defendants of the land conveyed to J S and its appurtenances, could not give the defendants, as owners and occupiers of that land, a right of road over other land for purposes unconnected with the enjoyment of the land of which they were owners and occupiers, and therefore did not pass to them the rights which J S had over the *locus in quo*.

A vendor cannot create rights not connected with the enjoyment of the land and annex them to it; nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an

assignee. *Ackroyd v. Smith*, 19 Law J. Rep. (N.S.) C.P. 315.

The nature of the act done by the grantee of a right of way, or of the adverse act acquiesced in by him, and the intention in him, which either the one or the other indicates, is that which is material for the consideration of a jury. *Regina v. Chorley*, 12 Q.B. Rep. 515.

WEIGHTS AND MEASURES.

Vessels whether of earthenware or other material which are ordinarily used as measures are liable to seizure if they do not correspond with the imperial measures, pursuant to the 5 & 6 Will. 4. c. 63. s. 21. *Washington v. Young*, 19 Law J. Rep. (N.S.) Exch. 348; 5 Exch. Rep. 403.

WHARFINGER.

A declaration in case for damage done to the plaintiff's vessel, stated that the defendant possessed a wharf on the Thames, near which there was a wood-work, placed there by the defendant, and being at the bottom of the river, and over which the after-mentioned ship at certain states of the tide would float, but not at other states of tide; that the plaintiff was possessed of a ship then being by sufferance of the defendant at and alongside the wharf for reward to the defendant in that behalf; that the defendant had the management and controul of the wharf, and the mooring and stationing of ships at and near it whilst they were at the wharf for the purpose of using it. Breach, that the defendant unskillfully, &c. placed, moored and stationed the plaintiff's ship in the river, near the wharf and over the wood-work, and detained it there for a long and improper time, and until the ship, on the fall of the tide, struck against the wood-work, and thereby was greatly injured. Plea, that the defendant had not the management and controul of the wharf, and the mooring and stationing of ships, &c. *modo et formâ*.

After a verdict for the plaintiff, a rule *nisi* for arresting the judgment was refused. *Curling v. Wood*, 17 Law J. Rep. (N.S.) Exch. 301; 16 Mee. & W. 628.

WILL.

[For Construction of Devises of Real Estate, see DEVISE. For Construction of Bequests of Personality, see LEGACY. See also SETTLEMENT—THELLUSSON ACT.]

(A) CONSTRUCTION OF WILLS.

(a) General Points.

(b) *Misdescription and Ambiguity—Evidence to explain.*

(B) VALIDITY.

(a) In general.

(b) Signature by the Testator.

(c) Attestation.

(C) PUBLICATION AND RE-PUBLICATION.

(D) REVOCATION AND CANCELLATION.

(E) CODICIL.

(F) PROBATE AND ADMINISTRATION.

(a) In general.

(b) Jurisdiction in Matters of.

(G) PROBATE DUTY.

(H) ELECTION UNDER.

(A) CONSTRUCTION OF WILLS.

(a) General Points.

[*Scott v. Moore*, 5 Law J. Dig. 813; 14 Sim. 35. *Milroy v. Milroy*, 5 Law J. Dig. 813; 14 Sim. 48. *Kidd v. North*, 5 Law J. Dig. 810; 14 Sim. 463. *Morrall v. Sutton*, 5 Law J. Dig. 813; 1 Ph. 533.]

Effect given to an instrument, in the nature of a testamentary disposition, made by a Hindoo, domiciled in the north-west provinces of Bengal. By this instrument, the testator gave his widow a life estate in all his property, and after her decease he gave a moiety thereof to his brother B, and his sons C and D. B and C died in the lifetime of the tenant for life. C and D were divided brothers. C's widow claimed his share:—Held, by the Judicial Committee, first, that C and D took vested interests in the moiety, as tenants in common, the actual enjoyment of the expectant interest being postponed till the termination of the life estate.

Secondly, that in such circumstances, it was not necessary that C's should be reduced into possession, during his lifetime, to enable his widow to succeed to it.

Semble.—That the instrument itself would have operated as a division of the property given, so as to prevent D, who survived, succeeding to his deceased brother's share, as an undivided brother. *Persad v. Beely*, 4 Moore, In. App. 137.

The word "estate," when used in a will, is *genus generalissimum*; and will, of its own proper force, without any proof *abundante* of an intention to aid the construction, carry realty as well as personality, and is not to be confined and restrained to personality only, unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will or from the way in which the word is used in the particular part of the will where the contested use of it arises.

Testator, by his will, devised to J (his heir-at-law) part of his estate in fee, and also a life estate in another portion of his estate, named P; and also gave to F (his wife) a life estate in part of P during her viduity, with remainder to his other son, N, in tail, remainder to his (the testator's) daughters for life; and after giving certain specific chattels to F, the will proceeded as follows: "I give all the remainder of my estate that is now in my possession, or may hereafter be mine, excepting what I have particularly given away, unto my wife, F. And it is my will, that, whatever my estate may consist of, after debts and legacies are paid, that it be kept together under the direction of my wife, F." N died without issue, and F, the widow, also died, unmarried and intestate. The heirs-at-law of J sold the estate P to the appellants, subject to the life-estate of the daughters. In a suit by the appellants against the daughters of the testator, the co-heiresses of F, for a partition,—Held, by the Judicial Committee, affirming the decree of the Court in Bermuda, that the remainder in fee,

in the estate P, passed to F, under the residuary clause, there being nothing in the context of the will to confine the natural and legal meaning of the word "estate" to personalty only.

Observations upon the mistake in the report of *Barnes v. Patch*, 8 Ves. 604. *Mayor, &c., of Hamilton (Bermuda) v. Hodsdon*, 6 Moore, P.C. 76.

A testator resident in Jamaica, and seised of plantations and slaves in the island, by his will, dated June 1834, after giving certain bequests, proceeded as follows:—Also, I give, devise, and bequeath, share and share alike, unto R and her children, all my right, title, and claim to compensation, such as may be awarded to me, as my portion of the compensation-fund, for the emancipation of such slaves as may belong to me and be living on the 1st of August 1834." This will was not attested so as to pass real estate, but was properly executed to pass personalty. By the law of Jamaica, slaves could only be directly devised as real estate. The Act for the Abolition of Slavery (3 & 4 Will. 4. c. 73, passed on the 28th of August, 1833) provided that, on the 1st of August 1834 slavery should cease in the British dominions, and gave to the owners of the slaves a right to their services as apprentices, and to compensation for the loss of their services as slaves. The testator died before this period of manumission arrived. The Court in Jamaica decreed, that the compensation-money partook of the nature of real estate, to the same extent as the slaves, and did not pass under the will.

Upon appeal, held, reversing such decree, that (treating the slaves as real estate) the legislature became purchasers, under the 3 & 4 Will. 4. c. 73, from the date of the act, giving a limited interest in the slaves for a term of years to the vendor, and that the money to be received under the compulsory sale of the slaves was converted into personal estate, and passed to H and her children, as specific legatees, under the will.

Although the testator's will was inoperative as to the real estate, the executors took possession of the real estate, and filed a bill of interpleader against R and her children and the heiress-at-law of the testator, for the administration of the compensation fund:—Held, that the suit was improperly brought, as the question could have been determined by the Commissioners of Compensation, and the executors refused their costs out of the fund.

Where costs had been improperly paid out of the compensation-fund, the reversal of the decree was made without prejudice to the right of the legatees taking proceedings for the recovery of the fund.

The Rules, made in pursuance of the act, and, when allowed by His Majesty in Council, declared to have the same force and effect as the act, must, when made, be construed with reference to the provisions of the act itself. The second and fifth rules of the Commissioners of Compensation to be construed and applied upon this principle. *Richards v. Attorney General of Jamaica*, 6 Moore, P.C. 381.

A testator made his will duly executed so as to pass real estate, whereby he gave considerable interests in his real estate to his daughter, and, subject thereto, gave his property to her children, and in default of issue to his collateral relations; and the will contained a proviso, that if the testator's said

daughter, or her husband, or any person or persons on her, or his, or their behalf, should dispute the will or his competency to make it, or should refuse to confirm the will, as far as he or she lawfully could, when required by the executors to do so, the disposition in favour of the testator's said daughter should be revoked:—Held, that this proviso was good and valid in law. *Cooke v. Turner*, 17 Law J. Rep. (N.S.) Exch. 106; 15 Mee. & W. 727.

A testator, after devising and bequeathing all his real and personal estate to trustees, on trust, from time to time to receive the rents and profits, and therewith to pay various legacies and annuities, directed that they should invest the surplus rents and profits at interest, and suffer the same to accumulate; and he declared that they should stand seised of his said trust estate and the accumulations, upon trust, that when and as soon as any son of either of his nephews A and B should have attained the age of twenty-five years, a valuation of his said trust estate should be made, and that the same should then be divided into as many equal lots as there should be sons of his said nephews then living, and thenceforth separate accounts should be kept of the respective portions; and that each of his said nephews' sons, when and as they should respectively arrive at the age of twenty-five years, should choose one of such portions as the share to be allotted to him and his children, and that thenceforth the said portion or share should be held by the trustees upon trust for the person so selecting the same for his life, and after his decease upon trust, as to one equal moiety, for his eldest son, and his heirs, executors, &c.; and as to the other moiety for the rest of his children, and their heirs, executors, &c. in equal proportions, and if but one child, both moieties for such child absolutely; but if any or either of his said nephews' sons should die under their respective ages of twenty-five years, or having attained that age should afterwards die without leaving issue, the share or shares intended for the person or persons so dying should go to the others and other of the said nephews' sons; and if all but one should die without leaving issue, the trustees should stand seised and possessed of the whole trust estate, in trust for such one surviving nephew's son for his life, and for his children and child as aforesaid; but if all the testator's said nephews' sons should depart this life without leaving issue, then upon trust for such person as should at that time be the testator's heir. At the time of the testator's death, A and B had several sons living, and B had another son born afterwards:—

Held, upon the construction of the will, that the trusts for accumulation and division of the property comprised all the sons of the nephews, who should be living when the first of them should attain twenty-five; and as the son who should first attain that age might not be born until after the testator's death, the gifts were too remote, and therefore void: and the testator's real estates upon his death became vested in his heir.

Held, secondly, that under a bequest of real and personal estates, upon trust to receive the rents and profits, and to pay legacies and annuities, and invest the surplus rents, &c. for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate, so as to constitute a mixed fund.

Boughton v. Boughton, *Boughton v. James*, 1 H.L. Cas. 406.

A bequest in the words following: "And at the death of my sister M, I give and bequeath all the property I die possessed of in remainder to my own dearest niece B, subject to the annuity of 150*l.* as before named to my sister P, but if my niece B should be married at the time of my sister M's death," [which event occurred] "I, in that event, bequeath my property at the decease of my sister M to my sister P for her life," &c.—Held, that the bequest to the niece B was not in general restraint of marriage, but until marriage, and consequently that B was not entitled to a *de bonis non* grant as a residuary legatee of property left unadministered. *Godfrey v. Hughes*, 1 Robert. 593.

A testator gave to his executors beneficially, in equal proportions, all his property which he might not dispose of, subject to his debts and any bequests which he might afterwards make. He afterwards made a codicil in these words, "In a codicil to my will I gave to the corporation of Gloucester 140,000*l.* In this I wish my executors would give 60,000*l.* more to them, for the same purpose as I have before named. I would also give my friends" (several were named, with large legacies), "and I confirm all other bequests, and give the rest of my property to the executors for their own interest." No other codicil was produced.

Held (affirming a decree of the Court of Chancery on a bill filed by the corporation of Gloucester claiming the two legacies), that the purpose of both the legacies must be held to be the same, and that both failed for uncertainty of the purpose. *The Mayor, &c. of Gloucester v. Osborn*, 1 H.L. Cas. 272.

In adjudicating on cases involving the meaning of the words "issue" or "children," the whole context of the will must be taken into consideration; and the Court will, where the context is doubtful, adopt such a construction as will best effect the intention of the testator, and tend to the general benefit of the family which is the object of the bequest. In the case, however, of a gift to "all and every the respective issues of the testator's daughters, either sons or daughters," followed by the frequent use in a subsequent part of the will of the word "issue," it was held, that the word "issues" ought not to be extended or enlarged so as to comprise the issue of a deceased child of one of the testatrix's daughters. *Farrant v. Nichols*, 15 Law J. Rep. (N.S.) Chanc. 259; 9 Beav. 327.

Testator gave all his property to his mother for life, and directed that, at her decease, it should be divided amongst his three sisters, or their children, in such proportion as she should appoint. The mother and one sister died in the testator's lifetime. The deceased sister left no issue, but one of those who survived had children:—Held, that "or" must be read "and," and that, under the circumstances, the property was given to the three sisters and their children in equal shares. *Penny v. Turner*, 15 Sim. 368.

Testatrix, by her will, gave all her real and personal estate to trustees, upon trust for her sister for life, and from and after her decease, upon trust, to sell all her real estate, and to pay the money arising therefrom, to such persons as she should by any codicil direct; but in case she should not by any

codicil bequeath the same monies, she directed that the same should be paid by her said trustees unto and amongst her next-of-kin, in a due course of administration as the law directed in respect of the intestate's personal estates. By a codicil she revoked the bequest after the life estate, and directed that the "said residue" should be paid to her next-of-kin on the part of her mother only, and not to any of her next-of-kin on the part of her late father.—Held, that the next-of-kin *ex parte maternâ* of the testatrix were entitled to the residue of the proceeds of the real estate; and that the residue of the personal estate, subject to the life interests therein given, was undisposed of by the will and codicil. *Say v. Creed*, 16 Law J. Rep. (N.S.) Chanc. 361; 5 Hare, 580.

If the words of a gift are of themselves plain, distinct, and capable of a legal effect, effect must be given to them, notwithstanding any improbability which may arise from other parts of the will. If they are ambiguous in expression or effect, they are not to be rejected for uncertainty, but an indication must, if possible, be collected from the rest of the will of what is meant by the ambiguous words. *Wilson v. Eden*, 11 Beav. 289.

A testator devised his residuary estate in trust for certain tenants for life, with remainder to D F for life, with remainder in trust for the sons of D F as tenants in common, in tail male, with cross remainders, and remainders over. And he directed his residuary personal estate to be laid out in the purchase of land, to be settled to the same uses. By a testamentary paper, of the same date as the will, and headed, "Memorandum, alias directions to my executors," he directed, as to his residuary personal estate, that his executors should apply for an estate of an uncle of the testator as an investment "for the use and behoof of D. F.," and if not attainable, to inquire if any part of a certain other estate was to be disposed of. Neither of the specified properties could be obtained on fair terms as an investment:—Held, that D F did not take any further interest under the codicil than under the will, and that the testator thereby either meant to express merely a recommendation as to the mode of laying out the residuary personalty, or expressed no intention upon which the Court could act. *Fitch v. Friend*, 2 De Gex & S. 405.

A testatrix, by her will, made a residuary bequest to her son, whom she appointed executor. A codicil, after a number of specific legacies, contained the following clause:—"I also direct that all my goods and chattels, real and personal, of whatever description that may be, to me belonging, saving and excepting everything hereinbefore mentioned, go to my executor, to be assets in his hands, towards the execution of the codicil to my last will; and of the 'scruples,' if any, I direct him to bestow the whole in charity." A bill, by one of the next-of-kin against the executor, the Attorney General, and the other next-of-kin, was dismissed, on the ground that the next-of-kin, as next-of-kin, had no claim. *Henniker v. Henniker*, 17 Law J. Rep. (N.S.) Chanc. 120.

A person, on his marriage, entered into a covenant to settle all the real and personal estates which he might have at his death upon his wife for her life. No further trusts were declared. By his will he directed the trustees therein named to stand possessed

of all his real and personal estates for the purposes of the settlement. By a codicil he directed his trustees to take the whole of his real and personal estate into their consideration; and his will was to divide to every child its due share and proportion; also taking into consideration any advances made to the children. And he gave to one of his sons the option of purchasing his dwelling-house. By a second codicil he directed his trustees to convey another house to his daughters, they paying a proper consideration for it:—Held, that there was not an intestacy as to the interest of the testator after his wife's decease, but that all his residuary real and personal estates were disposed of by his will. *Hodgkinson v. Barrow*, 17 Law J. Rep. (N.S.) Chanc. 131.

A testator devised and bequeathed the residue of his estate to trustees, upon trust, to apply the income for the maintenance and education of his niece until she attained twenty-one or married, and then to settle the whole or any part for the benefit of the niece and her children; and in default of children of the niece, then in trust for her mother absolutely; and in trust, as to such parts as should not be settled, for the niece absolutely. After the death of the niece unmarried, the mother obtained a conveyance from the trustees to herself absolutely. Upon a bill being filed by the heir-at-law of the niece, it was held, that the trustees were not authorized, after the death of the niece, to exercise the power of settling, so as to give the property to the mother; but that the heir-at-law of the niece was entitled to it. *Lancashire v. Lancashire*, 17 Law J. Rep. (N.S.) Chanc. 270; 1 De Gex & S. 288.

Certain real estates were settled, on an event which happened, to the use of the survivor of the intended husband and wife in fee. The wife survived. The husband, by his will, devised all his real estates to his wife for life, and after her death to executors upon trust to sell, and subject to certain bequests, &c., gave one fourth of the proceeds to such persons as his wife should appoint, and the remainder equally amongst his executors. All the executors died in the lifetime of the wife, and previously to the date of her will.

The wife by her will (made since the passing of the Wills Act), acting upon the supposition that her husband had intended to include in his will the settled estates, which came to her by survivorship, devised them to the uses concerning the same declared by him in his will:—Held, that the settled estates were not well devised by the testatrix to the uses of her husband's will, but that they fell into and formed part of her residuary estate. *Culsha v. Cheese*, 18 Law J. Rep. (N.S.) Chanc. 269; 7 Hare, 236.

A testator directed his trustees to erect a mansion-house and suitable offices fit for the residence of the owner of his estates (which were worth about 15,000*l.* per annum), on some convenient spot:—Held, that under this direction the trustees were empowered to lay out a garden and pleasure grounds around the mansion, in addition to the house and offices, in such manner as the Master should direct. *Lombe v. Stoughton*, 18 Law J. Rep. (N.S.) Chanc. 400; 17 Sim. 84.

E L., by his will, directed his executors to pay out of specific parts of his personal estate all his funeral expenses and just debts, except a mortgage debt

thereinafter otherwise provided for. He then devised to his daughter H for life, with remainder to her first and other sons in tail, his estate called N; to his daughter F his estate called P for life, with remainder to her first and other sons in tail; and to his daughter L S for life, with remainder to her first and other sons in tail, his estate called T, and some other small estates. In a subsequent part of his will he recited that his estate called T was subject to a mortgage for 6,000*l.*, a great part of which he was intending forthwith to pay off, and he directed that, should there remain any balance at his death, it should be raised by a sale of timber on the T estate and other lands devised to L S. The testator also gave several annuities; the gift to the first annuitant being of 10*l.* a year for life, or 5*l.* and his tenement at the lodge rent free; and he charged them on the estate called N. The testator did not pay off any part of the mortgage of 6,000*l.*, and died leaving his three daughters his sole next-of-kin and co-heiresses-at-law:—Held, in the absence of any disposition, or any apparent intention to exonerate the personal estate, that it ought to be applied to pay off the mortgage on the estate called T, and if insufficient, that the descended estate must be applied, and that any balance must be raised out of the timber.

Held also, that the annuities were charged on the estate called N, in exoneration of the personal estate. *Lomax v. Lomax*, 19 Law J. Rep. (N.S.) Chanc. 137; 12 Beav. 285.

A testator, after directing his debts, &c. to be paid, bequeathed to his wife his monies, plate, &c. (enumerating several particular descriptions of personal property), and all the residue of his personal estate after payment of his debts, &c., and he directed his wife to give to his executors a bond for securing to them the payment of half the value of the said wines, plate, &c., enumerating several of the above-mentioned descriptions of personal property, but not mentioning the residue of his personal estate. The value was to be ascertained within three months from his death, and the plate was to be valued at a fixed price. The money payable on the bond was for the benefit of his nephews and nieces:—Held, that the bond was to be given for half the value of the property only which was specifically enumerated, and not for half the value of the general residuary estate. *Martin v. Welstead*, 18 Law J. Rep. (N.S.) Chanc. 1.

The testator, by his will, gave the interest of monies invested by him in certain loan societies (naming them) to his wife for life, with remainder over; he then gave all monies belonging to him "in the Friendly Society, called the Lodge of Friends Society and all other societies" to his wife absolutely:—Held, reversing the decision below, that the words "all other societies" must mean, societies *ejusdem generis* with that immediately preceding, namely, friendly societies, and that the widow took a life interest only in the monies invested in the loan societies.

Where the words of a will admit of two interpretations, the Court will prefer that construction which will make the whole will consistent. *Marks v. Solomons*, 19 Law J. Rep. (N.S.) Chanc. 555; 2 Hall & Tw. 323.

If a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's

enjoyment of it, to secure certain objects for the benefit of the legatee, upon failure of such objects the absolute gift prevails; but if there be no such absolute gifts as between the legatee and the estate, and particular modes of enjoyment are prescribed, and those modes of enjoyment fail, the legacy forms part of the testator's estate, as not having in such event been given away from it.

In the case of a will containing such a disposition, the intention of the testator is to be collected from the whole will, and not from words which standing alone would constitute an absolute gift.

When the terms of a gift are ambiguous, leaving it doubtful whether or not an absolute interest is given, the subsequent disposition of the subject-matter of the gift in every possible event which can arise, forms an important consideration in putting a construction on those ambiguous terms: such a disposition being apparently inconsistent with the intention of giving an absolute interest in the first instance. *Lassence v. Tierney*, 1 Mac. & G. 551; 2 Hall & Tw. 115.

(b) *Misdescription and Ambiguity—Evidence to explain.*

[See DEVISE, What passes by the Devise.]

A testator devised his estates on trust for "the second son of Edward Weld, of Lulworth, for life, with remainders to his sons successively in tail male, with like remainders to the third and other sons (except the eldest) of the said Edward Weld, and their sons; with remainders to the first and other sons of each brother (except the eldest brother) of the said Edward Weld successively in tail male; with like remainders to the second and other sons (except the eldest) of Lady Stourton, "one of the sisters of the said Edward Weld."

There was not, at the date of the will or death of the testator, any such person as Edward Weld of Lulworth, but it appeared from evidence as to the state of the Weld family that Joseph Weld was the then possessor of Lulworth, that he had an eldest brother living, that Lady Stourton was one of his sisters, and that he had an eldest son, named Edward Joseph, commonly called Edward, and a second son named Thomas, both unmarried:—Held, that the descriptions of the unnamed devisee, taken with the whole context of the will, and with the evidence of the state of the Weld family, clearly designated the second son of Joseph Weld, and that he was entitled as tenant for life in possession to the devised estates. *Lord Camoys v. Blundell*, 1 H.L. Cas. 778.

It is the ordinary rule of a court of equity, in cases where an heir disputes the will, to grant an issue to try that question; but where he does not dispute it, but acts under it, merely denying that certain portions of the land pass under the description used in it, a court of equity has full jurisdiction to determine the question thus raised, without granting an issue, or may grant such issue at its discretion. In such a case, parol evidence of what was considered, in the lifetime of the testator, to be the extent of the lands constituting the estate, is receivable.

A testator, who described himself as of "Ashford Hall, in the county of Salop," devised "all my estate in Shropshire, called Ashford Hall," to trustees, for sale.

Held, that this description was not confined to the mansion-house so called, and the lands immediately adjoining, but extended to such other lands in Shropshire as he possessed at the time of making his will.

Held, also, that the court of equity, in a suit to enforce the trusts of the will, might receive parol evidence to shew what the testator had been accustomed to consider the Ashford Hall estate. *Ricketts v. Turquand*, 1 H.L. Cas. 472.

A testatrix, by her will, bequeathed several legacies, to different individuals, of 3l. per cent. consols, standing in her name in the books of the Bank of England, but at the date of her will, as well as at her death, she possessed no such stock, nor stock of any kind whatever; evidence, however, was adduced to prove, that, about three years previously to the date of her will, the testatrix was possessed of 3l. per cent. consols, sufficient in amount to satisfy the legacies bequeathed by the will, and that she then sold them, and placed the amount arising from the sale thereof in the hands of a friend of her family, who agreed to pay, and did pay her until her death, by half-yearly payments and as interest, the amount she had been accustomed to receive for dividends on the stock previously to the sale thereof. The proceeds of the stock remained in the hands of the friend of the testatrix's family until her death:—Held, that the testatrix was labouring under a mistake as to her property at the date of her will; that parol evidence was admissible to shew how the mistake arose; and that the legatees of the 3l. per cent. consols were entitled to be satisfied their respective legacies out of the testatrix's general estate. *Lindgren v. Lindgren*, 15 Law J. Rep. (N.S.) Chanc. 428; 9 Beav. 358.

An error in the name and sex of a legatee will be rectified by a designation in a will, and by the context, when it can apply to no other person; and parol evidence will be admitted to raise and remove latent ambiguities.

A testator gave an estate upon trust for Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of G, single woman, and who formerly lived in my service, for life, and after her decease for all and every the child and children of the said E. Abbott, as tenants in common. In default of such issue, with remainder over. It appeared that there was no such person as Elizabeth Abbott, a natural daughter of Elizabeth Abbott, single woman, but there was John Abbott, a natural son of Elizabeth Abbott. The testator's relations insisted that the bequest had failed for ambiguity, and they filed this bill, claiming a division of the proceeds of the estate:—Held, that the gift did not fail, and that the children of John Abbott, who was dead, were entitled. *Ryall v. Hannam*, 16 Law J. Rep. (N.S.) Chanc. 491; 10 Beav. 536.

A testatrix made the following bequest:—"to the three children of B 500l. each." At the date of the will and at her death there were nine children of B. Evidence was tendered to the effect that at the time when B had three children the testatrix had made a will containing the same bequest; that when B had six children she had made another will, containing the same bequest; that when B had nine children she had made another will, containing the same bequest (the will in question being the fourth will), and that she, at all four times, knew the number of B's chil-

dren:—Held, that on the assumption that this evidence was admissible (but without deciding that point), each of the nine children was entitled to a legacy of 500*l.* *Daniell v. Daniell*, 18 Law J. Rep. (N.S.) Chanc. 157; 3 De Gex & S. 337.

A testator bequeathed to his sister P “an annuity of 21*l.* a year, which I purchased of J G.” At the date of his will, and the time of his death, the testator had no annuity of 21*l.* a year, but he had an annuity of 46*l.* a year, which he purchased of J G for 300*l.*, and he had insured the life of J G for that amount, at a yearly premium of 25*l.*, and he had entered this annuity in his books as “300*l.* lent to J G at 7*l.* per cent. 21*l.*; 25*l.* premium on policy of assurance for 300*l.*”—Held, that under the form of the bequest P was entitled to the entire annuity of 46*l.*

Where the thing intended to be given is sufficiently indicated, an additional erroneous description of the value of the subject-matter will not vitiate the gift. *Purchase v. Shallis*, 19 Law J. Rep. (N.S.) Chanc. 518; 2 Hall & Tw. 354.

(B) VALIDITY.

(a) In general.

Where a testamentary disposition is propounded under circumstances of suspicion; as where the party propounding it was the drawer, and was benefited by it, and it was executed at a time when the testator was of doubtful capacity, without any evidence of instructions previously given, or knowledge of its contents, the party propounding it must prove that the testator knew and approved of the contents of the instrument.

A codicil, which varied the bequests contained in the will of the testator, to the benefit of the drawer, and which was executed at a time when the testator was supposed to be dying, in the absence of proof of the knowledge, by the testator, of its contents, pronounced against.

Proof of the actual reading over of the instrument to the testator, before execution, is not necessary. *Mitchell v. Thomas*, 6 Moore, P.C. 137.

The principles expounded in the cases of *Paske v. Ollatt* (2 Ph. 323), and *Barry v. Butlin* (2 Moore, P.C. 480), that the burthen of proof lies upon the party propounding a will, and that the Court is not bound to pronounce in favour of a will, unless it is judicially satisfied that it is the last will of a free and capable testator, considered and affirmed.

The execution of a will, by a competent testator, being duly proved, the presumption is, that the testator was cognizant of its contents, and that the instrument expresses his will, unless there be other circumstances to lead to a different conclusion, or to render it too doubtful for the Court to act upon that presumption.

Exaggeration of the conduct of a party benefited by a will, towards the testatrix, though it induce her to revoke the will, and the bequest made in his favour, and to execute another will, to his exclusion, is not such a fraud as to destroy free agency, and render the will invalid.

Neither does such conduct amount to undue influence or importunity. *Browning v. Budd*, 6 Moore, P.C. 430.

Exposition of the doctrine of monomania and partial insanity, as applied to wills.

If the mind is unsound on one subject, provided that unsoundness is, at all times, existing upon that subject, it is erroneous to suppose such a mind is really sound on other subjects; it is only sound in appearance, for if the subject of the delusion be presented to it, the unsoundness would be manifested by such a person believing in the suggestions of fancy, as if they were realities: any act, therefore, done by such a person, however apparently rational that act may appear to be, is void, as it is the act of a morbid or unsound mind.

Delusion is the belief of things as realities, which exist only in the imagination of the patient. The frame of mind which indicates his incapacity to struggle against such an erroneous belief constitutes an unsound frame of mind.

To constitute a lucid interval, the party must freely and voluntarily, and without any design at the time of pretending sanity and freedom from delusion, confess his delusion.

Where delusions are proved to have existed, both before and after the *factum*, the presumption is, that they existed at the time of the *factum*, and in such case, proof of a lucid interval at the time of the *factum*, is thrown upon the party propounding a will. It is immaterial that the delusions do not appear on the face of the will.

A will written in 1834, by a widow, without children, a person originally eccentric, and, in after-life, developing unsound delusions, conferring great benefit on a stranger, the will not betraying, on the face of it, marks of the insanity, in the circumstances, pronounced against. *Waring v. Waring*, 6 Moore, P.C. 341.

Moral insanity or the perversion of the moral feelings not accompanied with insane delusion, which is the legal test of insanity, held to be insufficient to invalidate a will. *Frere v. Peacocke*, 1 Robert. 442.

P, the owner of a freehold house in England, executed in India the following document:—“I hereby appoint E my attorney for me, in my name, and to my use, to demand and receive the possession or rent of my house, &c., and to retain all proceeds of the said property for her own use until I return to England; and, in the event of my death, I do hereby assign and deliver to E the sole claim to the above-mentioned property, to be held by her during her life;” &c.:—Held, that this was a valid will. *Doe d. Cross v. Cross*, 15 Law J. Rep. (N.S.) Q.B. 217; 8 Q.B. Rep. 714.

A married woman made a will, disposing of a fund which she had a power so to dispose of, and of another fund as to which she had no such power, and appointed her husband executor, who proved the will generally:—Held, valid, as being made *ex assensu viri*. *Ex parte Fane*, 16 Sim. 406.

A husband, having been a witness to his wife's will, and after her death having given his written consent to that will, is not afterwards at liberty to withdraw his consent. *Maas v. Sheffield*, 1 Robert. 364.

A letter written by a seaman in the merchant service in the Margate Roads unattested, containing dispositive words, held, under section 11. of the Wills Act, to be his will.

Justifying security is not required when a party cited has not a prior claim to a grant. *In the goods of Milligan, deceased*, 2 Robert. 108.

(b) *Signature by the Testator.*

The words "signed at the foot or end thereof," in the 9th section of the Statute of Wills, 1 Vict. c. 26, are to be construed strictly.

Therefore, where a holograph will, written on a sheet of foolscap paper, the dispositive part of which ended on the third side, leaving, at the foot or end of the third side, a space sufficient to have received the signature of the deceased, and also that of the two attesting witnesses, if not accompanied by a formal attestation clause, was signed, with an attestation clause, in the middle of the fourth side, no part of the will being immediately above it:—Held, not to have been signed "at the foot or end," according to the requisites of the statute, and the will declared invalid. *Smee v. Bryer*, 6 Moore, P.C. 404; 1 Robert. 616.

The signature of a testatrix held to be at the end of her will as required by the statute, though a clause, written previously to the execution, ran partly opposite to and partly beneath the signatures of the testatrix and the attesting witnesses. *In the goods of Powell, deceased*, 1 Robert. 421.

A will written, executed and attested on two sides of a sheet of paper, but containing on the third side a clause, written before execution opposite to a bequest of a legacy, qualifying that bequest, held not to have been signed "at the foot or end," in respect of the addition on the third side. *In the goods of Jones, deceased*, 1 Robert. 424.

A will, with the following testimonium clause, entirely in the handwriting of the testatrix,—"In witness hereof I have hereunto set my hand and seal. Jane Randolph Gunning, this twenty-fifth day of September, eighteen hundred and forty-five," but no other subsequent signature by her,—Held, to have been signed in conformity with the statute. *In the goods of Gunning, deceased*, 1 Robert. 459.

A will dated in 1844, in which there was a space in blank between the dispositive part and the attestation clause, and the residue not disposed of, and the attesting witnesses were unable to depose to any thing beyond having seen the testator's signature at the time of the execution,—Held, not to be signed "at the foot or end." *Ayres v. Ayres*, 1 Robert. 466.

A will, containing a disposition of the entire property, and an appointment of executors on the first page, with two inches in the last line in blank, and under that line a blank of one inch two-tenths, the second page wholly in blank, the third page commencing a testimonium clause, with a revocation of former wills, and the signature of the testatrix written one inch eight-tenths below that clause,—Held, to be signed "at the foot or end." The Wills Act does not require a will to be written continuously. *In the goods of Corder, deceased*, 1 Robert. 669.

A will, written on one side of a sheet of paper with a blank on the last line of one inch seven-tenths, and a space under the last line of one inch two-tenths, and the signature of the testatrix on the second page opposite to the third line of the attestation clause, written as near the top of the second page as possible (for which clause there was not space on the first page), rejected, as not signed "at the foot or end." *In the goods of Howell, deceased*. 1 Robert. 671.

A will prepared with blanks left for legacies was found after a testator's death in an open envelope, which had been twice sealed, with the legacies inserted by the testator, some in black, some in red ink, with sundry alterations and interlineations connected with the legacies, of which the attesting witnesses could give no information:—Held, not to be necessary that a testator and witnesses should execute legacies so inserted. Probate granted of such parts of the will as were in black ink, those in red rejected on facts leading to the presumption of their being inserted after the execution of the will. *Birch v. Birch*, 1 Robert. 675.

A will, written on one side of a sheet of paper, with a blank on the last line of one inch six-tenths, and a space under the last line of five-tenths of an inch, and the signature of the testator on the second page, at eight-tenths of an inch from the top, rejected, as not signed "at the foot or end." *In the goods of Ensell, deceased*, 1 Robert. 702.

A will, with a testimonium clause, after which a space of four-tenths of an inch, then an attestation clause, with a space under it of six-tenths of an inch, and then the signature of the testator,—Held, to be duly signed. *In the goods of Harris, deceased*, 1 Robert. 703.

A will, with the dispositive part concluding on the second page, leaving a blank space of seven-tenths of an inch, and the third page commencing with an attestation clause, after which was a blank of five-tenths of an inch, then the signatures of the attesting witnesses, after which another blank of seven-tenths of an inch, then the signature of the testator:—Held, to be signed "at the foot or end." *In the goods of Brown, deceased*, 1 Robert. 710.

Positive affirmative evidence, by the subscribing witnesses, of the facts of a testator acknowledging his signature in their joint presence, and of their subscribing in conformity with the requisites of the law, is not absolutely essential to the validity of testamentary papers. When the inaccuracy and imperfect recollection of witnesses are established, the Court may upon the circumstances of the case presume due execution. *Leech v. Bates*, 1 Robert. 714.

A will, with a testimonium clause ending in the middle of a line of which the remainder was left blank, and with an attestation clause following under that line, at an equal distance with the rest of the writing, and extending over the width of the page, beneath the last line of which attestation clause, at a distance of two inches eight-tenths, the signature of the testatrix stood:—Held, to be signed "at the foot or end."

The residue of the property was not disposed of. *In the goods of Beadle, deceased*, 1 Robert. 749.

A will, written on a sheet of letter paper and containing on the first page a disposition of the entire property, an appointment of executors and a testimonium clause extending almost to the very verge of the bottom of that page, with the second page in blank, and at the top of the third page the signature of the testatrix, followed by an imperfect attestation clause and the names of two witnesses,—Held, to be signed at the "end." *In the goods of Bailly, deceased*, 1 Robert. 751.

A will, completely filling two sides of a sheet of paper, with a space of four inches blank on the

third page, after which was placed the signature of the testatrix:—Held, as the testatrix was blind, to have been sufficiently signed by her. *In the goods of Hellings, deceased*, 1 Robert. 753.

A will, having the signature of the testatrix immediately after the attestation clause, and a dispositive clause written partly below that signature:—Held, to be entitled to probate without that clause, as it was somewhat doubtful when that clause was written, and as, with it included as part of the will, the will would not be “signed at the foot or end.” *In the goods of Standley, deceased*, 1 Robert. 755.

A will having, after an unfinished testimonium clause, a blank space of one inch eight-tenths, then on the left of that page an attestation clause extending half the width of the page, and opposite to the fourth line of the attestation clause the signature of the testator, which stood at the distance of very nearly three inches below the last line of the testimonium clause:—Held, not to be “signed at the foot or end.” *In the goods of Hearn, deceased*, 2 Robert. 112.

A codicil having, after the last dispositive words, a blank space of one inch, then an attestation clause occupying the entire width of that page, and immediately after that clause the signature of the testator:—Held, not to be “signed at the foot or end.” *In the goods of Hill, deceased*, 2 Robert. 114.

A will, having after the testimonium clause written continuously with the dispositive part of the will, a space in the last line of the testimonium clause sufficient for the signature of the testatrix, and under that line a space of nearly half an inch, and then an attestation clause followed immediately by the signature of the testatrix:—Held, to be “signed at the foot or end.” *In the goods of Whittle, deceased*, 2 Robert. 122.

A will containing on the first page the appointment of an executor, a disposition of the entire property, a testimonium clause with a part of an attestation clause immediately following, but not sufficient space for the whole of that clause, the second page blank, and on the third page the remainder of the attestation clause with the signatures of the testatrix and witnesses immediately following:—Held, to be “signed at the foot or end,” as the attestation clause was, under the circumstances of the case, to be considered as a part of the will.

An affidavit of one attesting witness to the due execution of a will is sufficient, unless more than one witness make an affidavit as to alterations in a will; in that case both or all must also join in deposing to a due execution, if an affidavit to that circumstance be required. *In the goods of Batten, deceased*, 2 Robert. 124.

An allegation propounding a will, occupying with the testimonium and attestation clauses two pages, save three-tenths of an inch, and having at the head of the third page a blank space of two inches two-tenths, after which stood the signature of the testator, close to the left side of that page, and opposite to the second line of the testimonium clause, as set forth in the case, rejected on the ground that the will was not “signed at the foot or end.” *Holbeck v. Holbeck*, 2 Robert. 126.

A will, made in virtue of a power of appointment, and having after the testimonium clause a blank space of two inches eight-tenths, and then the signa-

ture of the testatrix,—Held, not to be “signed at the foot or end.” *In the goods of Beadon, deceased*, 2 Robert. 139.

A will, the dispositive part of which ended on the second page, having a blank space, under the last line, of one inch three-tenths, and at the head of the third page the words “signed by me in the presence of the undersigned,” immediately after which followed the signature of the testator, and then an attestation clause, with the signatures of the witnesses:—Held, not to be “signed at the foot or end.” *In the goods of Shadwell, deceased*, 2 Robert. 140.

On a question whether a testatrix signed her name before or after the witnesses subscribed, one of the attesting witnesses deposed throughout her examination to the impression on her mind that the testatrix signed after them; the other, in the first instance, likewise deposed to the same effect, but after having inspected the paper she deposed that the testatrix signed before them:—Held, under the circumstances of the great experience the testatrix had had in executing wills—of her having sent to a solicitor for instructions in regard to the paper in question—and of the paper on the face of it appearing to be duly signed and attested, that the presumption was that the instrument was executed in conformity with the requisites of the statute. *Brenchley v. Still*, 2 Robert. 162.

A will, having after the testimonium clause an attestation clause, extending half the width of the sheet, with the testator's signature to the right of that clause, but one inch four-tenths beneath it, and a space of two inches eight-tenths blank between the testimonium clause and his signature:—Held, to be “signed at the foot or end.” *In the goods of Dawney, deceased*, 2 Robert. 178.

A will, having a blank space of six-tenths of an inch between the testimonium and attestation clauses, the latter extending not half the width of the page, with the testatrix's signature half an inch beneath, and to the right of the attestation clause, and at a distance of two inches six-tenths below the last line of the will:—Held, to be “signed at the foot or end.” *In the goods of Welch, deceased*, 2 Robert. 179.

A first codicil, with the remainder of the testimonium clause terminating on the second page of the sheet, under which termination was a blank space of seven-tenths of an inch, then a full attestation clause extending half the width of that page, and opposite to the lower part of the attestation clause, at a distance of three inches and two-tenths from the termination of the testimonium clause, the testatrix signed:—Held, to be entitled to probate, together with the will and second codicil, respecting which there was no question.

A third codicil, with the testimonium clause terminating on the second page, under which clause was a blank space of three inches three-tenths, and with the testatrix's signature, at a distance of six inches seven-tenths from the top of the third page, opposite to the lower part of the attestation clause, commencing nearly half way down the third page, rejected, as not “signed at the foot or end thereof.” *In the goods of Woods, deceased*, 2 Robert. 180.

A will, having a blank space of one inch three-tenths between the testimonium and attestation clauses, the latter clause extending half the width of the page, with the signature of the testator opposite

to the last line but one of the attestation clause, and at a distance beneath the last line of the testimonium clause, of three inches eight-tenths:—Held, to be “signed at the foot or end.” *In the goods of Prentice, deceased*, 2 Robert. 182.

Generally, if the signature of a testator be on the same page as that on which the will concludes, and placed after the conclusion, that will be a sufficient compliance with the statute.

A will, having a blank space of one inch three-tenths between the testimonium and attestation clauses, the latter extending more than half the width of the page, and beneath that clause, at a distance of one inch eight-tenths, but to the right, the mark of the testatrix placed at a distance of five inches seven-tenths below the last line of the testimonium clause:—Held, to be “signed at the foot or end.” *In the goods of White, deceased*, 2 Robert. 194.

A will, having a blank space of one inch six-tenths between the testimonium and attestation clauses, the latter extending rather more than half the width of the page, with the testator's signature opposite to the centre of it, and at a distance of two inches four-tenths from the last line of the testimonium clause,—Held, to be “signed at the foot or end.” *In the goods of Holland, deceased*, 2 Robert. 196.

A will, commenced in 1840, with many alterations and blanks appearing, and the residue not disposed of, and having after the appointment of an executor a blank space of four inches seven-tenths, after which followed “this my last will and testament is now signed by me Sarah Susannah Howell, on this 10th day of July 1844,” immediately beneath which were the signatures of the testatrix and attesting witnesses, with an imperfect attestation clause,—Held, that the rule in *White's case* did not apply, as the Judge considered the testatrix did not intend her will to be concluded: probate refused. *In the goods of Howell, deceased*, 2 Robert. 197.

When there is space sufficient for the signature of a testator on the same page as that on which the will concludes, and his signature is not there placed, a will is *not* duly signed.

A will, having in the last line of the second page a blank space of four inches three-tenths, and under that line a blank space of nearly three-tenths of an inch, with the signature of the testator at a distance of two inches three-tenths from the top of the third page,—Held, not to be “signed at the foot or end.” *In the goods of Rowe, deceased*, 2 Robert. 199.

(c) Attestation.

The 7th section of the Indian Will Act, No. 25, of 1838, enacts “that no will shall be valid unless it shall be in writing, and executed in manner herein-after mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, and such signature shall be made or acknowledged by the testator, in the presence of two or more witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.”

A testator signed his will, in the presence of a witness, who subscribed it in his presence; and some time afterwards, upon the arrival of another witness, the testator, in the joint presence of the former wit-

ness, and the other subscribing witness, acknowledged his subscription at the foot of the will. The second witness then subscribed the will, and the first witness, in his and the testator's presence, acknowledged his subscription, but did not re-subscribe.

Held by the Judicial Committee (affirming the sentence of the Supreme Court at Calcutta), that the requirements of the act had not been sufficiently complied with; it being necessary that both witnesses should be jointly present at the same act of the testator, and jointly subscribe it in his presence.

Whether the rules of the ecclesiastical courts in Doctors Commons relating to the doctrine of pre-emption of appeal, apply to an ecclesiastical cause in the Supreme Court at Calcutta, so as to deprive a party of the charter right to appeal within six months from the decree, &c.—*quære. Casement v. Fulton*, 5 Moore, P.C. 130; 3 Moore In. App. 395.

Interlineations and obliterations made, as the attesting witnesses deposed, after the first but prior to a second execution by the testatrix when she acknowledged her signature in their presence, and they attested such second execution by placing their names in the margin opposite to the alterations, pronounced against, as there was no memorandum in any part of the will, or notice in the attestation clause referring to the alterations. Probate decreed as the will originally stood. *In the goods of Martin, deceased*, 1 Robert. 712.

The attesting witnesses, instead of signing their names near to that of the testator on the first side of a sheet of paper where the will ended, and where there was ample space for their signatures, signed under an indorsement on the fourth page; such attestation held to be good, as the Wills Act does not specify where they are to sign. *In the goods of Chamney, deceased*, 1 Robert. 757.

An attesting witness to a will having on the re-execution thereof traced over his previous signature with a dry pen held not to have *subscribed*, but only to have *acknowledged* his signature, which is not sufficient under the statute. The statute requires an act to be done by the witnesses which shall be apparent on the face of the paper. *Playne v. Scriven*, 1 Robert. 772.

A will signed by the attesting witnesses in the same room where the testatrix lay in bed with the curtains closed, and her back to the attesting witnesses, who deposed to her utter inability to have turned herself so as to have drawn aside the curtains,—Held, not to have been signed by the witnesses in the presence of the testatrix. *Tribe v. Tribe*, 1 Robert. 775.

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under the Wills Act; they are not required to sign their names. *In the goods of Christian, deceased*, 2 Robert. 110.

A will, being subscribed by two of the attesting witnesses, capable of writing, with marks,—Held, to be sufficiently subscribed by them. Administration with the will annexed was granted to the residuary legatee for life, as though the will contained sundry directions to executors, their names were specified only under the testator's signature. *In the goods of Amiss, deceased*, 2 Robert. 116.

The Court presumed in favour of the due execution of a will, where one of the attesting witnesses was dead, but his signature was proved; the second

denied his signature, but was disbelieved by the jury on the trial of an issue; and the third proved his attestation, but had no memory as to the signature or publication by the testator. *Hitch v. Wells*, 10 Beav. 84.

A will purported to have been made in 1828, and to have been signed and sealed by the testator, in the presence of A B, C D (a marksman), and E F. A B and E F were both dead, and the handwriting of E F was proved. A witness of the same name as C D was produced, but, through age and infirmity, did not recollect the fact of his having attested the will:—Held, that there was sufficient evidence for a jury to presume the due execution of the will. *Doe d. Davies v. Davies*, 16 Law J. Rep. (n.s.) Q.B. 97; 9 Q.B. Rep. 648.

(C) PUBLICATION AND REPUBLICATION.

[See *Porter v. Smith*, 16 Sim. 251.]

A testator having power to appoint by will "to be by him signed and published," in the presence of two or more witnesses, made a will in execution of the power, which was attested by three witnesses, in the following form: "We, the undersigned, attest to have seen the above testator sign the above will":—Held, that this attestation was sufficient evidence of publication. *Bartholomew v. Harris*, 16 Law J. Rep. (n.s.) Chanc. 106; 15 Sim. 78.

One entire part of a will in duplicate in the possession of a testator being undestroyed, but the other part in the possession of his solicitor having been destroyed by the testator on the execution of a subsequent will made in 1838, in terms revoking the prior will,—Held to be revived by a codicil, made subsequently to the second will, though referring to the first will merely by date, and that such reference sufficiently shews the intention to revive as required by section 22 of the Wills Act, and that parol evidence is not admissible to establish a mistake in the date. *Payne v. Trappes*, 1 Robert. 583.

A testator by a will before the 7 Will. 4. & 1 Vict. c. 26. came into operation, bequeathed a share of his residuary estate to one of his sons. The son died after the Wills Act came into force, leaving issue. After his death the testator made a codicil confirming the will:—Held, that the gift to the son was within section 33 of the 7 Will. 4. & 1 Vict. c. 26, so as to prevent its lapse.

Under section 34 of the same act the effect of the republication by the codicil was the same as if the testator at the date of the codicil had made a will in the words of the former will. *Winter v. Winter*, 16 Law J. Rep. (n.s.) Chanc. 111; 5 Hare, 306.

A codicil executed in 1839 to a will of 1818, held to be a republication of that will, and to have the effect of bringing a bequest in the will to a deceased daughter under the operation of the section 33 of the Wills Act, as no intention to the contrary appeared on the face of either instrument. *Skinner v. Ogle*, 1 Robert. 363.

A testator in 1843 executed his will, in which was contained a clause revoking all former wills. He afterwards duly made and executed a codicil confirming his will, save as altered by the codicil, and subsequently he re-executed the will, on the supposition that the attestation clause of the will was defective, and for that reason only, but did not re-execute the

codicil, or in any way refer to it. It was held, that the re-execution of a will extends to and republishes, notwithstanding the clause of revocation, a codicil, unless an intention to the contrary appear. *Wade v. Nazer*, 1 Robert. 627.

A testatrix, by her will, gave the residue of her real estate to trustees, in trust for her nephew for life, and, afterwards, for his children. She subsequently purchased certain leasehold property, which was conveyed to a trustee to such uses as she should appoint; and by a codicil she appointed the leaseholds in trust for her said nephew and his children. After this the testatrix purchased the reversion in fee of the leaseholds, which was conveyed to another trustee to such uses as she should appoint. The testatrix then made a second codicil to her will, whereby, in pursuance of all powers in her vested, she revoked a specific devise in her will, but expressed no intention of affecting the property purchased subsequently to her will:—Held, that the second codicil did not act so as to republish the will. That the leasehold and reversion in fee did not pass under the gift of the residue, but descended to the heir-at-law. *Jowett v. Board*, 18 Law J. Rep. (n.s.) Chanc. 53; 16 Sim. 352.

(D) REVOCATION AND CANCELLATION.

[See LEGACY, Revoked.]

The testator, by his will, gave, amongst other things, as follows:—"I give unto M E, now living servant with me, an annuity of 20*l*. for her life;" and he charged all the annuities given by his will upon his real estates, and then devised his real estates to his grandson, an infant, in fee. At the death of the testator, in 1808, the clause in the will giving the annuity was found struck through with a pencil line, without any further intimation of the intention of the testator. The annuity was paid by the trustee under the will, out of the rents of the devised estates till 1827, but no further payment had since been made. In 1829, the grandson came of age, and entered into the possession of the devised estates. In 1844 the annuitant filed her bill against the grandson, to recover the arrears, and the defence set up was, that the bequest was revoked. At the hearing, an issue was directed at law to try "whether the clause giving the annuity in question formed part of the will of the testator;" and on the trial of the issue, the Judge directed the jury that the act was equivocal, and that they must find, from the nature of the alteration, and other collateral circumstances, whether the act was final or deliberative only. The jury having found for the plaintiff, the defendant moved for a new trial, on the ground that the Judge ought to have ruled that the pencil erasure was *prima facie* a revocation, and that evidence must be given to rebut that presumption of law. The Court held, that the Judge had rightly directed the jury, and refused the motion; and decreed for the plaintiff, but with only six years' arrears from the filing of the bill. *Francis v. Grover*, 15 Law J. Rep. (n.s.) Chanc. 99; 5 Hare, 39.

S executed a will in 1776, and in 1778 he executed a copy of the will and a codicil in duplicate on the same day. The main object of the codicil was to provide for the lessor of the plaintiff, who was his youngest son, born in 1777. In 1808 S died

leaving four sons him surviving. After his death the will of 1776, with the duplicate codicil annexed, was found in his portfolio; and the will executed in 1778, with the duplicate codicil annexed, in a box in the same room. The will and codicil in the portfolio contained erasures which diverted the limitation of certain estates from the younger sons to the eldest son. The altered will and codicil were proved by the executrix, and acted upon until the death of all the sons of S, except the lessor of the plaintiff, who, when his turn to inherit according to the unaltered will arrived, brought ejectment against the defendant, the successor of the eldest son of S.

The Judge asked the jury, whether the two wills with the duplicate codicil annexed to each, formed the last will of S. Whether the erasures in the will and codicil in the portfolio were intended to be final or deliberative only. And he directed the jury that if their opinion on these two questions was in the affirmative, then the cancellation of one part was the cancellation of the other part, and the passage uncanceled was the last will of S.

Held, that the questions left to the jury and the direction, in point of law, were correct. *Doe d. Strickland v. Strickland*, 19 Law J. Rep. (N.S.) C.P. 89; 8 Com. B. Rep. 724.

A being under engagement of marriage to B, made in 1833 a will bequeathing, after a life interest to his mother, the whole of his property to B, telling her, "that he had made it as a provision for her in the event of anything happening to him." A and B married in November 1833, and had issue surviving at his death. Declarations, subsequent to the birth of issue, of adherence to the will were pleaded:—Held, the Court rejecting the allegation, that the will was absolutely revoked, by reason of a *tacit* condition annexed to the will at its execution. *Matson v. Magrath*, 1 Robert. 680.

A testator having left several wills, by the last executed in 1844 revoked all former wills "except my will bearing date the 13th of December 1831, which relates exclusively to the reversion in fee of the Tong Castle Estate." No will was found fully answering that description; the will of December 13th, 1831, revoked in 1835, did not relate "exclusively" to the reversion in fee of that estate; the only will which did relate "exclusively" to the reversion in fee of that estate bore date May 22nd, 1839:—Held, upon construction and the state of the testator's family, that the will of 1831 was not revived, and that the will of 1839 was intended. Probate decreed of the will of 1844 alone, as the will of 1839, relating to real estate only, was not propounded. *Thomson v. Hempenstall*, 1 Robert. 783.

J. Kidd, by his will, gave 20*l.* to his son, and 5*l.* a piece to such female servants as should be in his service at his decease. By a codicil to his will he gave his servant Biddy 2,000*l.* He afterwards, by an incomplete testamentary paper, made before January 1, 1838, which was admitted to probate, and which was a copy of his will, with some alterations, gave to his son 19*l.* 19*s.*, and to his servant Biddy, if she should be in his service at his decease, 500*l.* No other servant than Biddy was in his service at his decease:—Held, that, so far as the last testamentary paper extended, it revoked the will and codicils; and that Biddy took only the 500*l.* which was given to her by the last testamentary paper.

Kidd v. North, 16 Law J. Rep. (N.S.) Chanc. 116; 2 Ph. 91.

Testator gave the residue of his personal estate to his niece, and appointed her executrix. By a codicil he appointed A and B his residuary legatees and executors:—Held, that though power to prove the will and codicil was reserved to the niece, the gift of the residue to her was wholly revoked. *Evans v. Evans*, 17 Sim. 107.

A testator gave his residuary estate in certain portions between his two grand-daughters and his four grandsons. He afterwards drew a line through the material parts of the bequest, and by a marginal note stated that one grandson being dead and the other three being provided for, he intended to bequeath 1,000*l.* to each of his grandsons, and the residue between his two grand-daughters:—Held, that the first bequest was cancelled, and that the grand-daughters were entitled to the whole fund, subject to the three legacies of 1,000*l.* *In re Ravenscroft*, 18 Law J. Rep. (N.S.) Chanc. 601.

(E) CODICIL.

[See (C) Publication and Republication.]

A codicil (C) duly executed in 1847, and commencing "By this codicil to my will," held not to include, under the term will, unattested additions written subsequently to the operation of the Wills Act, as they were not, prior to the execution of C, in law, either a part of the will, or codicils, and were not specified or referred to in C. *Haynes v. Hill*, 1 Robert. 795.

A codicil, not containing any disposition of property, but simply revoking all former wills, is of a testamentary character, and, if proved, is entitled to probate.

It is not sufficient to plead the want of mind, memory, and understanding of a testator, without pleading some fact to lead up to the incapacity alleged. *Brenchley v. Still*, 2 Robert. 162.

Testator, by his will, directed that certain chattels should be annexed to his mansion-house, and enjoyed by the several persons who should succeed to his real estates under the limitations of his will. By a codicil he limited his estates to other persons, and declared that those limitations should take precedence over the limitations in his will:—Held, that the persons entitled under the limitations in the codicil were entitled to the benefit of the direction respecting the chattels in the will. *Evans v. Evans*, 17 Sim. 108.

(F) PROBATE AND ADMINISTRATION.

(a) In general.

A will executed in 1846, containing in the body of it blank spaces, held to be entitled to probate, as the statute is silent in regard thereto. *Corneby v. Gibbons*, 1 Robert. 705; also, *In the goods of Kirby deceased*, 1 Robert. 709.

A will, pleaded to have been executed in 1843 as a contingent will only, and, by reason of the contingency not having occurred, not to be entitled to be joined in probate with other papers, held, not to be contingent, as the proof of the alleged contingency rested on unattested memoranda written subsequently to the execution of the will. A testator

cannot authorize a will to be destroyed after his death. *Stockwell v. Ritherdon*, 1 Robert. 661.

The Prerogative Court refused probate to a will of a *feme covert*, made in pursuance of a power, because it was, upon the face of it, not executed according to the requisites of the power:—Held, on appeal, by the Judicial Committee of the Privy Council, reversing such sentence, that such will was entitled to probate, the ecclesiastical courts having no jurisdiction to inquire as to the due execution of the power, but simply to grant probate, leaving it to a court of equity to determine the question of the due execution of the power. *Barnes v. Vincent*, 5 Moore, P.C. 201.

Principles upon which a Court of Probate proceeds with respect to the admission of testamentary papers of persons of alleged incapacity, from age or infirmity.

Testatrix being of the age of eighty-six, and, as alleged, of feeble and impaired mind, having no near relations, by her will and two codicils gave to her medical attendant (who was a stranger to her in blood, but in whose house she resided) the bulk of her property, appointing him sole executor and residuary legatee. The will was executed in his house, and prepared by his attorney, and was at variance with her previous testamentary dispositions, which were in favour of her distant relatives. The Prerogative Court being satisfied of the testamentary capacity of the testatrix upon the balance of evidence negating the alleged fraud, admitted the will and codicils to proof. On appeal, the sentence, so far as it related to the will and first codicil, was affirmed by the Judicial Committee of the Privy Council; but a further allegation, pleading facts, *noviter ad notitiam perventa*, being brought in, the second codicil was pronounced against, and the sentence of the Prerogative Court to that extent reversed. *Jones v. Godrich*, 5 Moore, P.C. 16.

An allegation, propounding a paper containing a specific bequest, and an appointment of executors written below the testatrix's signature, and interposed between the signatures of the attesting witnesses, rejected. *Topham v. Topham*, 2 Robert. 189.

A party, propounding a paper as testamentary, containing on the face of it various memoranda of the property attested by witnesses, is not bound to examine more than those witnesses who attest that portion of the paper which is testamentary. A paragraph in a paper in the following words,—“the above-named bonds were restored by A, and are placed in the hands of B in trust for the use of C, after my decease,” held to be testamentary, notwithstanding a delivery of the bonds had taken place, and in the donor's last illness. *Tapley v. Kent*, 1 Robert. 400.

Administration with a will annexed, dated October 1837, which was unattested and unsigned by the testatrix, whose name in no part appeared, granted on proof of handwriting and safe custody, and on a proxy of consent. *In the goods of Cosser, deceased*, 1 Robert. 633.

A part of a testimonium clause, in which mention was made of executors, stood under the signature of a testator. That part was held not to contain an appointment of executors, but to be descriptive only of the attesting witnesses, and administration with the will annexed, together with the words under the

testator's signature, was granted to a legatee. *In the goods of Cotton, deceased*, 1 Robert. 658.

A will, having an additional bequest to a legatee inserted, by which the sense of the paragraph, as that bequest stood, was interrupted, held to be entitled to probate, with such additional bequest, as the attesting witnesses knew not whether the same was or was not written previously to the execution.

It is not the duty of a Court of Probate to raise obstacles, and make the Wills Act more difficult of compliance than it is. *In the goods of Swindin, deceased*, 2 Robert. 192.

When a doubt may exist whether debts, under peculiar circumstances, constitute *bona notabilia*, the Court will decide in favour of their being *bona notabilia*. *Nicholl v. Thomas*, 2 Robert. 157.

A will proved by the attorney of an executor is the same thing as if actually proved by himself. *In the goods of Bayard, deceased*, 1 Robert. 770.

A chain of representation is not broken by a surviving executor, who afterwards died leaving executors, having taken a grant of administration with the will annexed *de bonis non* by his attorneys alone, and not having himself proved the will. Such administration refused to one of the residuary legatees substituted. *In the goods of Bayard, deceased*, 1 Robert. 768.

Payment to personal representatives under a Genevese probate refused. *Lasseur v. Tyrconnel*, 10 Beav. 28.

Libellous passages, unconnected with the testamentary dispositions in a will, on a stranger allowed to be omitted in the probate copy. *In the goods of Wartnaby, deceased*, 1 Robert. 423.

An executor, in an act on petition, objected to a co-executor, appointed in the same will, being joined with him in the grant of probate, on the ground of incapacity. The act on petition was opposed and directed to be reformed. On the affidavits adduced in support of the pleadings of each party, the Court held the incapacity was not established, and overruled the petition. *Evans v. Tyler*, 2 Robert. 128.

An executor having taken probate of a will, dated the 24th of August, 1849, was cited at the instance of legatees under a former will to bring in the probate, and shew cause why the same should not be revoked. Probate was brought in, and his proctor was authorized to propound, &c. On motion, the Court dismissed the executor, who was a witness to the will, from the suit, in order to his being examined as a witness, without requiring him to renounce his office. *Bryan v. White*, 2 Robert. 137.

(b) Jurisdiction in Matters of.

The Court of Chancery has no jurisdiction to determine on the validity of a will of personal estate; and in all cases in which parties apply to that Court for its construction of a will, or payment of legacies under a will, the Court proceeds only on the foundation of a will proved in a court of competent jurisdiction. The Court, however, will interfere for the protection of property *pendente lite* for probate and letters of administration, and it exercises with great caution and sparingly some jurisdiction in certain cases of fraud practised in obtaining probate, and in the spoliation of wills.

The absence of a remedy for a supposed wrong in another place, is not by itself any reason for this

Court assuming jurisdiction on the subject. The will of a sovereign of the realm (although he has not therein appointed an executor, and grant of probate or administration thereof has been refused by the ecclesiastical courts) forms no exception to the rule of the Court.

Semble.—The only and proper course to be pursued by the claimant of a legacy under the will of a deceased sovereign is by petition of right to the grace and favour of the reigning sovereign. *Ryves v. Wellington (Duke of)*, 15 Law J. Rep. (n.s.) Chanc. 461; 9 Beav. 579.

A testator by his will and codicils gave R A large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will and all the codicils having been admitted to probate, after litigation as to the last codicil in the ecclesiastical court, R A filed a bill in Chancery alleging that the testator had executed the last codicil under undue influence of the residuary legatee, and false representations made at her instance respecting R A's character; and that he had not been permitted in the ecclesiastical court to take any objections to that codicil, except such as affected the validity of the whole instrument; the bill therefore prayed that the executors or residuary legatee might be declared trustees or trustee for R A to the amount of the revoked bequests.

Held, on demurrer, that the Court of Chancery had no jurisdiction in the matter; *dissentientibus Lord Cottenham (Chancellor) and Lord Langdale (M.R.)*; and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the ecclesiastical court. *Allen v. M'Pherson*, 1 H.L. Cas. 191.

(G) PROBATE DUTY.

On the death of A, who had mortgaged an estate in fee, to secure money lent him by the trustees of his settlement, his daughter became entitled to the equity of redemption as his heir, and to the mortgage-money under his marriage settlement. The trustees conveyed the estate to her subject to the equity of redemption, and did not release her father's covenant for repayment of the money. She afterwards granted an annuity to M, and as a security conveyed the estate, and assigned the money to a trustee. By her will she devised the estate, but did not dispose of her personal estate:—Held, that the money was subject to probate and legacy duty. *Swabey v. Swabey*, 15 Sim. 502.

Personal estate was bequeathed to several persons successively for life, with remainder as one of them, who was a married woman, should appoint, and in default of appointment, "unto and for the benefit of her executors or administrators." The lady having died without making any appointment,—Held, that the trust fund formed part of her estate; and that her husband having survived her, and become entitled to it, it was liable to probate duty and legacy duty, as forming part of his estate, as well as to probate duty, as forming part of the estate of the wife. *Attorney General v. Malkin*, 16 Law J. Rep. (n.s.) Chanc. 99; 2 Ph. 64.

The profits arising from duties received under a grant of a light-house, to be maintained in a specified place, savour of the realty, and are not liable to pro-

bate or legacy duty. *Attorney General v. Jones*, 19 Law J. Rep. (n.s.) Chanc. 266; 1 Mac. & G. 574; 1 Hall & Tw. 493.

(H) ELECTION UNDER.

A testator, by his will, devised and bequeathed all his real and personal estate to trustees, upon trust to pay his debts, &c.; and, subject thereto, out of the rents, issues, and profits thereof, to raise an annuity of 100*l.*, and to pay the same to his wife during her widowhood; and, subject thereto, the trustees were to stand possessed of the trust premises in trust for the testator's daughter for life, with remainders over; and he empowered his trustees, during the continuance of the trusts, to continue and carry on all or any of the farms or other concerns in which he might be engaged at the time of his death; and also to demise, sell, or mortgage the same. The testator died seized of freehold and copyhold estates, which he farmed at the time of his death:—Held, that the widow must elect between her dower and free bench, and the benefits given to her by the will. *Loves v. Loves*, 15 Law J. Rep. (n.s.) Chanc. 369; 5 Hare, 501.

A testator devised his estates to trustees, and directed them to pay his wife an annuity of 1,800*l.* clear of all taxes and deductions whatsoever. He also directed his trustees to invest 18,000*l.* in the funds, and pay the interest to his daughter for life, for her separate use, and afterwards to her children, and directed that as his daughter would be entitled to a sum of 12,000*l.* and upwards under his marriage settlement, the said sum of 18,000*l.* was to be abated and reduced to such an amount as she should receive under such settlement,—it not being his intention that she should be entitled to her portion under the settlement as well as to the 18,000*l.* The daughter married, and no settlement was made upon her marriage. The questions raised were, whether the daughter could elect to take either under the settlement or the will—whether she was entitled to interest upon the legacy immediately from the death of the testator, and whether the widow was entitled to her annuity of 1,800*l.* clear of income tax:—Held, that the interest of the daughter being a chose in action in remainder, which was incapable of being given up *in presenti*, an election by the daughter could not be decreed against the dissent of the husband, in a suit where the husband and wife were co-defendants.

Held, also, that interest upon the legacy was not payable for the first year after the testator's death; and that the widow's annuity would not be clear of income tax. *Wall v. Wall*, 16 Law J. Rep. (n.s.) Chanc. 305; 15 Sim. 513.

A B, an heir, elected to take against the will, and required the executors to complete a contract entered into by the testator for the purchase of a freehold estate, and it was conveyed to him. He nevertheless received great benefits under the will:—Held, that the parties disappointed by the election had no lien on the estate for the amount received; but that they were entitled to prove against the estate of A B for the whole amount received by him under the will. *Greenwood v. Penny*, 12 Beav. 403.

A testator being entitled to an undivided moiety in two freehold houses U and N (the other undivided moieties belonging to M B, his niece and heiress-at-

law, subject to the interest of her father, as tenant by the curtesy) and also to a leasehold house, devised to S P "all my freehold house U," and bequeathed to M B "all my moiety of and in a leasehold in house at," &c., and directed that the rents should accumulate during the minority of M B, and be paid to her at her full age. The testator died in 1812. The father of M B received the rents of the leasehold house until the expiration of the lease in 1819, and on M B coming of age in 1831, he accounted with her for these rents, and paid over to her a balance of 49*l.* in respect thereof. In 1832 M B made a mortgage in fee of her moiety of U, and the entirety of B, and on her marriage in 1833 settled the same to the use of herself and her intended husband and the issue of the marriage. Afterwards S P, the trustees of the settlement, and the father of M B, joined in granting a lease for years of the freehold house U. In 1847 S P filed his bill:—Held, upon appeal, that the testator, by his devise of "all my freehold house," intended to pass the entirety, and that M B was bound to elect whether she would take under the will or as heiress-at-law; but that the receipt of the rents of the leasehold house by her father, and her acceptance of the balance of 49*l.*, did not, under the circumstances, amount to a declaration of election, and that M B electing at the hearing to take against the will, must account to the plaintiff for the rents of the leasehold house. *Padbury v. Clarke*, 19 Law J. Rep. (n.s.) Chanc. 533; 2 Mac. & G. 298; 2 Hall & Tw. 341.

A testator made a specific devise of real estate, and then devised all the residue of his real and personal estate to trustees, upon trust, to pay R G, his wife, an annuity of 20*l.*, and then upon the trusts therein mentioned. He then empowered his trustees to lease any lands which they might hold on the trusts of his will. The testator was at his death entitled to freehold estates, which had been conveyed to uses to bar dower in his favour, and some copyhold estates:—Held, that the widow was put to her election between the annuity and her free bench out of the copyhold estates. *Grayson v. Deakin*, 18 Law J. Rep. (n.s.) Chanc. 114; 3 De Gex & S. 298.

WITNESS.

[See EVIDENCE—PRACTICE, IN EQUITY.]

(A) COMPETENCY.

- (a) Generally.
- (b) When competent by Statute.
- (c) Objection to, when to be made.

(B) ATTESTING WITNESS.

(C) COMMISSION AND ORDER TO EXAMINE.

(D) EXAMINATION.

- (a) In general.
- (b) Contradicting.
- (c) Refusal to answer.

(E) ATTACHMENT AGAINST.

(A) COMPETENCY.

(a) Generally.

A suit having become defective by the insolvency of a sole plaintiff who had obtained a protecting order under the 7 & 8 Vict. c. 96, his assignees

adopted the suit and filed a supplemental bill. An answer was put in, not disputing the insolvency, replication was filed, and issue joined. The assignees then moved for leave to examine the insolvent plaintiff in the original suit as a witness in the cause. The motion was refused. *Fisher v. Fisher*, 16 Law J. Rep. (n.s.) Chanc. 320; 2 Ph. 286; 6 Hare, 628.

In a suit for contribution in respect of loss sustained in a joint mercantile adventure, by one partner against other partners and the executors of a deceased alleged partner, it is competent for the plaintiff to examine as a witness, on his behalf, one of the partners, a defendant, who had been settled with and released by the plaintiff, and had also disclaimed all demand against the plaintiff and the other defendants. *Hills v. Nash*, 16 Law J. Rep. (n.s.) Chanc. 238; 10 Beav. 308.

A plaintiff filed a bill, on behalf of himself and all other the shareholders of a company, except the defendants, against the defendants, alleging certain improper dealings by them with the funds of the company, and praying relief:—Held, that it was not competent for the plaintiff to examine a shareholder, not a defendant, in support of the case made by the bill. *Fyler v. Newcomb*, 19 Law J. Rep. (n.s.) Chanc. 278.

Two co-defendants were examined on behalf of defendants, whose interests were not identical with their own:—Held, that their testimony was admissible in evidence. *Daniell v. Daniell*, 3 De Gex & S. 337.

To render a person incompetent in the Scotch court to be a witness, he must have a direct and immediate interest in the result of the suit in which he is called to give evidence, or he must be able to give the verdict in that suit in evidence in his own favour in another proceeding.

An interest in the result of a suit, which is to render a person incompetent to be a witness, must be an interest of a substantial nature, and it must be the direct and necessary result of the suit.

The law was the same in England and Scotland upon this point previous to the passing of the 6 & 7 Vict. c. 85. *Willox v. Farrell*, 1 H.L. Cas. 93.

Two persons against whom a cause was carried on *in penam* not having appeared to a citation, held to be a party in that cause, and that their evidence could not be received till they were dismissed from the cause.

The 6 & 7 Vict. c. 85, probably applies to the ecclesiastical courts. *Sanders v. Wigston*, 1 Robert. 460.

One of two defendants in an action of tort, suffered judgment by default, and it was sought to call him at the trial to give evidence for his co-defendant:—Held, that the proposed witness was inadmissible; and that being a party to the record, interested in the event of the suit, he was not within the privilege of the 6 & 7 Vict. c. 85. *Thorpe v. Barber*, 17 Law J. Rep. (n.s.) C.P. 113; 5 Com. B. Rep. 675.

A and B were indicted for stealing, C for receiving. B pleaded guilty, and was tendered as a witness against A and C. He was objected to by the counsel for the prisoner as inadmissible:—Held, an admissible witness at common law. *Regina v. Hinks*, 1 Den. C.C. 84.

(b) *When competent by Statute.*

Under the 6 & 7 Vict. c. 85, one defendant in a suit in equity is a competent witness on behalf of another defendant in the same cause, and it is not a just exception to his evidence that the title of the plaintiff to sustain the suit against both defendants depends on the same issue; that fact can only be considered as affecting or tending to affect the credit of the witness. *Wood v. Rowcliffe*, 6 Hare, 183.

In a suit instituted against one of the guardians of a parish to establish certain defalcations in the accounts, it was determined that *vivâ voce* examinations should take place before the Master. The Master objected to examine E S as a witness, he having been one of the guardians at the commencement of the suit, although he had since ceased to be such guardian, on the ground that as he had concurred in directing the proceedings, he might be made liable to the costs of the suit if it should turn out to have been improper:—Held, that E S had no further interest in the suit than any other ratepayer, and was enabled as such to become a witness under the 3 & 4 Vict. c. 26. *Pascall v. Scott*, 16 Law J. Rep. (n.s.) Chanc. 327; 15 Sim. 559; affirmed, 2 Ph. 390; 17 Law J. Rep. (n.s.) Chanc. 53.

A and B, defendants in a suit, had exactly the same case. A examined B as a witness on behalf of A:—Held, at the hearing of the cause, that, notwithstanding the 6 & 7 Vict. c. 85, the evidence of B was not admissible. *Monday v. Guyer*, 16 Law J. Rep. (n.s.) Chanc. 246; 1 De Gex & S. 182.

A having brought trover against B for two promissory notes, B pleaded that they were the property of M, from whom they had been fraudulently obtained, (of which A had notice), and justified the detention as agent of M. M had not indemnified the plaintiff, and had not been consulted about the action:—Held, that M was admissible as a witness, both by virtue of the 3 & 4 Will. 4. c. 42, and the 6 & 7 Vict. c. 85. *Hearne v. Turner*, 15 Law J. Rep. (n.s.) C.P. 105; 2 Com. B. Rep. 535.

A witness who stated that he had agreed to pay half the defendant's costs, and that he defended the action jointly with him, is a competent witness for the defendant, since the 6 & 7 Vict. c. 85, not being a person "in whose immediate and individual behalf" the action is defended either wholly or in part; and, *semble*, he would be competent, before the passing of that act, by virtue of the 3 & 4 Will. 4. c. 42. s. 26. *Sage v. Robinson*, 18 Law J. Rep. (n.s.) Exch. 31; 3 Exch. Rep. 142.

A person under whom title is made in one of several avowries in replevin is inadmissible as a witness in support of the other avowries, under the 6 & 7 Vict. c. 85. *Walker v. Giles*, 18 Law J. Rep. (n.s.) C.P. 323; 6 Com. B. Rep. 662.

On the trial of an ejectment between devisees claiming under different wills of the same testator, a person to whom a legacy (charged upon the land the subject of the action) had been given by the will under which the defendant claims is a competent witness for the defendant under the 6 & 7 Vict. c. 85, as he is not a person in whose immediate and individual behalf the action is defended. *Doe d. Bengo or Wingrove v. Nicholls*, 18 Law J. Rep. (n.s.) Q.B. 81; 13 Q.B. Rep. 126.

The plaintiff's next friend on the record is a competent witness, and not within the exception in section 1. of the 6 & 7 Vict. c. 85. *Melhuish v. Collier*, 19 Law J. Rep. (n.s.) Q.B. 493.

(c) *Objection to, when to be made.*

An order for leave to examine a co-defendant as a witness may be obtained *ex parte* as well after as before decree; and the question, whether the proposed witness is or is not interested, can only be raised upon objections to the reception of the evidence. *Steed v. Oliver*, 16 Law J. Rep. (n.s.) Chanc. 336; 5 Hare, 492.

(B) ATTESTING WITNESS.

Where an attesting witness to a deed has become blind,—Held, not sufficient to prove his handwriting, but that he must be examined. *Rees v. Williams*, 1 De Gex & S. 314.

(C) COMMISSION AND ORDER TO EXAMINE.

The Court granted, on the application of the defendant, and without imposing any terms upon him, a commission to examine witnesses abroad, although the affidavit in support of the application did not shew that the evidence of the witnesses would be admissible in the cause, and although the witnesses resided at a great distance, and considerable delay would be occasioned by the commission being granted. *Dye v. Bennett*, 1 L. M. & P. 92.

In an information by the Attorney General, on behalf of her Majesty's Customs, the Court has no power, either by virtue of its general jurisdiction at common law, or under the 1 Will. 4. c. 22, at the defendant's instance, to direct a commission for the examination of witnesses.

It will not use its power of postponing the trial for the purpose of compelling the Crown to consent to such commission. *Attorney General v. Bovet*, 15 Law J. Rep. (n.s.) Exch. 155; 15 Mee. & W. 60; 3 Dowl. & L. P.C. 492.

The Court of Chancery, by a decree in a suit, directed an issue at law to be tried in this court, when the plaintiff had a verdict. A new trial of the issue was subsequently directed, and a commission granted, by the Court of Chancery, to the defendants to examine a witness residing in France. On application to this Court to instruct the Chancery commission to allow the plaintiff to cross-examine such witness before them *vivâ voce*, or for the appointment of a commission by this Court to take such cross-examination,—Held, that the Court would not interfere in any way to alter the powers and duties of Commissioners appointed by the Court of Chancery. *Hargrave v. Hargrave*, 16 Law J. Rep. (n.s.) C.P. 271; 5 Dowl. & L. P.C. 151; 4 Com. B. Rep. 648.

Where a commission to examine witnesses abroad issues under the 1 Will. 4. c. 22. s. 4, the names of the commissioners and the place at which it is to be executed must be specified in the order authorizing the commission, or in some subsequent order.

A commission authorized the swearing of an interpreter on the examination of French witnesses. The return shewed that the interpreter had been sworn, but did not state that he interpreted the evidence of any of the witnesses:—Held, unnecessary.

The commission directed the witnesses to be examined apart.

Quere—Whether the return must expressly state they were so examined. *Greville v. Stulz*, 17 Law J. Rep. (N.S.) Q.B. 14; 11 Q.B. Rep. 997.

A criminal information is not an action depending within the 1 Will. 4. c. 22; and an order for the examination of a witness on interrogatories will not be made in such a matter. *Regina v. Inhabitants of Upton St. Leonard's*, 17 Law J. Rep. (N.S.) M.C. 13; 10 Q.B. Rep. 827.

A Judge's order for a commission to examine witnesses need not contain the names of the commissioners, as they are to be ascertained by subsequent arrangement between the parties.

Such a commission is not a writ, nor has it the incidents of one, and therefore it need not be tested in term time. *Nichol or Nicol v. Alison*, 17 Law J. Rep. (N.S.) Q.B. 355; 11 Q.B. Rep. 1006.

A Judge's order directed a commission to issue for the examination of witnesses at Newfoundland. The commission directed the Commissioners to summon the witnesses at a certain place, to be appointed by them for that purpose, in Newfoundland, and then and there examine them apart, *vivâ voce*, and directed the commission and depositions to be returned sealed up. It was proved that papers, in the handwriting of the Commissioners, and sealed up, purporting to be a return of the commission, were delivered at the Master's office, but no evidence was given by whom they were brought, or that they were in the same state as when delivered by the Commissioners. The commission returned was identified as that issued. The examinations of the witnesses did not on the face of them purport to be taken apart:—Held, first, that the commission sufficiently provided for the time, place, and manner of examining the witnesses. Secondly, that there was due proof of the return. Thirdly, that it must be presumed that the witnesses were examined apart. *Simms v. Henderson, Henderson v. Henderson*, 17 Law J. Rep. (N.S.) Q.B. 209; 11 Q.B. Rep. 1015.

An order to examine witnesses upon interrogatories under the 1 Will. 4. c. 32, cannot be granted before issue joined, although an undertaking not to examine until after issue joined be offered. *Clutterbuck v. Jones*, 18 Law J. Rep. (N.S.) Q.B. 11; 6 Dowl. & L. P.C. 251.

An order for a mandamus to issue for the examination of witnesses, under the 43 Geo. 3. c. 63. s. 44, must be made by the Court, and cannot be made by a Judge at chambers. *Clarke v. East India Co.*, 18 Law J. Rep. (N.S.) Q.B. 23; 6 Dowl. & L. P.C. 278.

(D) EXAMINATION.

(a) In general.

The rule of public policy, which prevents a witness being asked such questions as will disclose the informer, if he be a third person, applies equally to questions which will disclose whether or not the witness himself was the informer.

Therefore, in an information by the Attorney General for a breach of the revenue laws, the Court decided that a witness for the Crown could not be asked this question, "Did you give the informa-

tion?" *Attorney General v. Briant*, 15 Law J. Rep. (N.S.) Exch. 265; 15 Mee. & W. 169.

A witness may be asked whether he has agreed to sell goods on commission, although the terms of such agreement have been reduced to writing. *Whitfield v. Brand*, 16 Law J. Rep. (N.S.) Exch. 103; 16 Mee. & W. 282.

Trover by A against the assignees of one H for seizing goods of A. The plaintiff gave evidence that prior to the bankruptcy the person in possession, and apparently the owner, had assigned them to C, who had for valuable consideration assigned them to the plaintiff. The plaintiff had put a person in possession of the goods, but C continued to carry on the business in the house where they were. On the part of the defendants, it was suggested, that the transaction was colourable, and that the goods belonged to the bankrupt H. Before any evidence was offered of any connexion between the plaintiff and H, one of the witnesses for the defence was asked "whether he remembered C making a claim to the goods after the bankruptcy." The question was disallowed:—Held, that the question ought to have been allowed. *Ford v. Elliott*, 18 Law J. Rep. (N.S.) Exch. 447; 4 Exch. Rep. 78.

Quere—Whether a notary may be asked as to the general course of business among notaries in London. *Lysaght v. Bryant*, 2 Car. & K. 1016.

The mere fact of counsel, whilst cross-examining a witness, putting a document into the witness's hand, and asking him whether it is in his handwriting, does not entitle the opposite counsel to see such document. But the opposite counsel has a right to see the document, before the cross-examining counsel proceeds to found any question on the document itself. *Cope v. Thames Haven Dock Co.* 2 Car. & K. 757.

On the trial of a prisoner, his counsel may ask a witness for the prosecution, whether he did not make a certain statement whilst under cross-examination before the magistrates, although the depositions contain no note of such cross-examination. *Regina v. Curtis*, 2 Car. & K. 763.

The Judges have laid down a rule, that a prosecutor is not bound to call witnesses merely because their names are on the back of the indictment; but the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose; if, however, they are called for the defence, the person calling them makes them his own witnesses. *Regina v. Woodhead*, 2 Car. & K. 520.

(b) Contradicting.

Where A was called by the defendant to prove conversations between the plaintiff and the agents of the defendant; and after the defendant's case had closed, it was proposed to call B on the part of the plaintiff, to contradict A:—Held, that, notwithstanding the course of cross-examination pursued by the defendant's counsel had been such as to give notice of the defendant's case, B might be called to contradict A as to what took place between the plaintiff and the agents of the defendant, on any occasion on which A had admitted in his evidence that B was present. *Cope v. Thames Haven Dock Co.*, 2 Car. & K. 758.

In an information against the defendant, for using a cistern, in the making of malt, without making an entry thereof, as required by the act of Parliament, a witness was asked by the defendant's counsel if he had not stated to one C that the Excise officers had offered him 20*l.* to say the cistern had been used; the witness having denied the alleged statement,—Held, that evidence could not be given to shew that he had in fact made the statement.

Where a witness is asked if he has made a certain statement, which is material to the issue and at variance with other parts of his evidence, and he denies that he has made such statement, evidence may be given to shew that he did in fact make the statement.

Where a witness is examined as to a fact, with a view to shew that he is biased as to the cause, and he denies the fact, evidence may be offered in contradiction to prove the fact. *Attorney General v. Hitchcock*, 16 Law J. Rep. (n.s.) Exch. 259; 1 Exch. Rep. 91.

A witness, who upon the trial of a cause gives evidence adverse to the party calling him, may be asked whether he had not given a different account of the same matter before the trial. But, *per Patteson, J. and Coleridge, J.*, in the event of a denial by the witness, another witness cannot be called to contradict him in that respect.

The party calling a witness may, afterwards, examine other witnesses as to the truth of statements made by such witness, tending to throw discredit upon them, for the purpose of setting up their credit.

The plaintiff, in an action for an assault, being under age, sued by her father as her next friend. A witness, on behalf of the plaintiff, gave evidence which went to disprove the cause of action, and stated that the plaintiff's father had tampered with her before the trial as to the evidence she was to give; and on her cross-examination, that the plaintiff had told her, that her brother and she went to romp in the cellar, and she fell over a barrel and so hurt herself:—Held, that the father of the plaintiff might be called to contradict the statement as to his having tampered with the witness, and the plaintiff's brother to contradict his ever having romped with the plaintiff, such statements being relevant to the matter at issue. *Melhuish v. Collier*, 19 Law J. Rep. (n.s.) Q.B. 493.

(c) Refusal to answer.

An attorney who prepared a testamentary paper, at the instance of the party benefited by it, is not privileged, on the ground of professional confidence, to withhold from the Court, facts relating to contemporaneous acts, upon which he founded his opinion of the testamentary capacity of the party making the will. *Jones v. Godrich*, 5 Moore, P.C. 16.

Where a witness declines answering on the ground of its tending to criminate him, he is entitled to claim protection from answering at any period of his examination; and, if compelled to answer after such claim, what he says is to be deemed under compulsion, and inadmissible against him. *Per nine Judges, contra sicc.* *Regina v. Garbett*, 1 Den. C.C. 236; 2 Car. & K. 474.

DIGEST, 1845—1850.

(E) ATTACHMENT AGAINST.

In support of an application for an attachment for not obeying a Crown Office subpoena, it was sworn that "application was made, on behalf of the overseers of the parish of S," to three Justices, &c., to inquire into the place of the last legal settlement of A, B, &c., and to make an order for their removal:—Held, insufficient, for not shewing such a complaint by the overseer as to give the Justices jurisdiction. *Regina v. Vickery*, 16 Law J. Rep. (n.s.) M.C. 69.

WOMEN.

An act to protect women from fraudulent practices for procuring their defilement. 12 & 13 Vict. c. 76; 27 Law J. Stat. App. i.

WORK AND LABOUR.

In an action for work and labour, where there had been a breach of contract on the part of the plaintiff,—Held, that, under the common counts, he could not recover a *quantum meruit*, nor prove that his breach of contract arose from the defendant's default. *Kewley v. Stokes*, 2 Car. & K. 435.

A working engineer was employed by the patentee of a buoy to invent and make a machine for air-tubes. He made a working-drawing, and ultimately manufactured a ring which was effectual for this purpose. The patentee never accepted the ring, and an action was brought against him for work, labour and materials:—Held, that the plaintiff in that action was entitled to recover a remuneration for his skill and labour employed in the invention and design of the machine. *Grafton v. Armitage*, 15 Law J. Rep. (n.s.) C.P. 20; 2 Com. B. Rep. 336.

In an action for work and labour, the plaintiff, who was an attorney, proved that he had rendered professional services for the defendant, as his agent, at a contested election for a seat in parliament. It also appeared on the plaintiff's evidence that the plaintiff had voted at the election for the defendant, although by law a paid agent is forbidden to vote. The defendant gave evidence to shew that the plaintiff agreed to render his services gratuitously. The Judge directed the jury that the plaintiff was entitled to a verdict, unless the defendant made out to their satisfaction that the services were to be gratuitous:—Held, a misdirection, and that the true question for the jury should have been, whether, taking all the evidence together, the plaintiff had made out that he was to be paid for his services. *Hingeston v. Kelly*, 18 Law J. Rep. (n.s.) Exch. 360.

WRECK.

The laws relating to wreck and salvage consolidated by the 9 & 10 Vict. c. 99; 24 Law J. Stat. 250.

A vessel which had stranded within low-water

mark and which was taken possession of by the bailiff and the lord of the manor, not at low water, but when the tide was in to the extent of some feet, condemned as droits of Admiralty. Claim of the lord of the manor to the proceeds of the sale thereof as *wreckum maris* overruled. *Semble*, the jurisdiction of the Admiralty subsists at the time when the shore is covered with water; the jurisdiction of the common law when the land is left dry. *The Pauline*, 2 Rob. 358.

WRITS.

- (A) WRIT OF RIGHT.
- (B) WRIT OF REBELLION.
- (C) WRIT OF TRIAL.

(A) WRIT OF RIGHT.

[*Hatton v. Macready*, 5 Law J. Dig. 830; 2 Dowl. & L. P.C. 5.]

(B) WRIT OF REBELLION.

A commission of rebellion is not a criminal or supposed criminal matter within the provisions of the 31 Car. 2. c. 2. (Habeas Corpus Act), that statute relating to persons in custody for misdemeanours, for which they may be tried. *Cobbett v. Slouman*, 19 Law J. Rep. (N.S.) Exch. 268; 4 Exch. Rep. 747.

(C) WRIT OF TRIAL.

Where there are several issues joined in a cause, and a writ of trial directs a jury to be summoned to try "the issue," this is an irregularity which is waived by the defendant's appearance at the trial. *Towers v. Turner*, 15 Law J. Rep. (N.S.) C.P. 249; 4 Dowl. & L. P.C. 177.

Where, on the trial of a cause under a writ of trial, a verdict was taken by consent for the plaintiff, subject to a reference to an arbitrator, and in consequence of the arbitration not being proceeded with, the plaintiff, without getting rid of the first

verdict, gave a fresh notice of trial, and obtained a verdict in the absence of the defendant, who did not appear at the trial, the second verdict, and all proceedings since the first trial, were set aside for irregularity. *Harrison v. Greenwood*, 15 Law J. Rep. (N.S.) Q.B. 92; 3 Dowl. & L. P.C. 353.

The defendant, appearing and consenting to an order for a writ to try the issue (two issues being joined), was held to be estopped from moving to set aside the writ, which directed the sheriff to try "the issues," although he objected, at the trial, that the writ was not warranted by the order. *Humblestone v. Welham*, 5 Com. B. Rep. 195.

The plaintiff having obtained a verdict in a writ of trial, a Judge at chambers, instead of staying the execution of the writ, made an order on the 6th of July 1846, for setting aside the verdict, on the ground of the irregularity of the notice of trial:—Held, that this was not a nullity, but an irregularity; and that an application to rescind the order made on the last day of Trinity term 1847 was too late. *Orgill v. Bell*, 17 Law J. Rep. (N.S.) Exch. 52; 1 Exch. Rep. 466; 5 Dowl. & L. P.C. 217.

A writ of trial may be tested in vacation. *Collett v. Curling*, 17 Law J. Rep. (N.S.) Q.B. 216; 5 Dowl. & L. P.C. 605.

The party who ultimately succeeds in obtaining the verdict under a writ of trial, is afterwards entitled to have the writ of trial delivered up to him by the sheriff, in order that he may make the proper entry of the verdict thereupon; and this, although he be the co-defendant of a party who has suffered judgment by default, and as against whom damages have been improperly assessed under the same writ of trial.

In such a case, a rule calling upon the sheriff and the plaintiff to shew cause why the sheriff should not deliver up the writ of trial is the proper form of application. *Parker v. Clarke*, 18 Law J. Rep. (N.S.) Q.B. 252; 7 Dowl. & L. P.C. 1.

Under a writ of trial, a motion for a new trial may be made within four days of the return day of the writ, although more than four days have elapsed since the trial. *Lewis v. Parry*, 19 Law J. Rep. (N.S.) Exch. 192.

ADDENDA.

The following Cases have been accidentally omitted under their proper titles.

ATTORNEY AND SOLICITOR.

LIEN FOR COSTS.

A firm of two solicitors transacted business for a client till November 1843, after which time the firm joined with them another partner, and the firm of three then transacted further business for their client:—Held, that the partnership of three had no lien upon papers which came, for the first time, into their possession, for costs due in respect of business done by the original firm of two. *In re*

Forshaw, 17 Law J. Rep. (N.S.) Chanc. 61; 16 Sim. 121.

BARON AND FEME.

SEPARATE ESTATE.

By a marriage settlement the trustees were during the wife's life to receive the income of the settled property when it should become due, and to pay it to such person as she might from time to time ap-

point, or to permit her to receive it for her separate use; and it was declared that her receipts, or those of any person to whom she might appoint the same *after it should become due*, should be valid discharges:—Held, that she was restrained from anticipating the income provided for her. *Field v. Evans*, 15 Sim. 375.

CERTIORARI.

MATTERS OF PRACTICE.

A *certiorari* having issued to the Justices at Quarter Sessions requiring them to return a conviction by A and B, two Justices assigned to hear and determine divers felonies, &c., of T T on the 22nd of September 1846, for certain trespasses and contempts against the 7 & 8 Vict. c. 112; the Sessions returned the conviction which had been filed, and which appeared to have been made by A and B, two Justices of the borough of N, for a single act of harbouring seamen under that statute, and did not set out the evidence on which it proceeded. On November the 25th, a rule for a *concilium* was obtained, and the case set down for argument, and the points delivered on the 16th of January. On that day a rule to quash the *certiorari*, and have the conviction taken off the file and returned to the Justices for the purpose of amending it by inserting the evidence taken, was obtained. The Court, in its discretion, discharged the rule.

The real conviction having been returned by the Sessions, the variance between it and the statement in the *certiorari* was held to be immaterial. *Regina v. Turk*, 16 Law J. Rep. (N.S.) M.C. 114; 10 Q.B. Rep. 540.

CONTRACT.

CONSTRUCTION OF.

The plaintiff agreed, in writing, to erect hustings for the defendant, "as before, with alterations, for 19l. 10s., by receiving the wood back again, and to find labour," &c. The hustings were destroyed by the mob as soon as the election was over:—Held, that the defendant was liable for not returning the

wood, and that evidence was not admissible to shew that on former occasions those who put the hustings up took them away. *Fuller v. Patrick*, 18 Law J. Rep. (N.S.) Q.B. 237.

DESCENT.

Upon a claim to the inheritance of a Zemindary, situate in Midnapore, which had been in possession, for a long period anterior to the institution of the suit, by a family of Sutgop Brahmins, who had migrated from Bengal to Midnapore, but had retained their laws and and performed their religious ceremonies, according to the Daya-bhaga and other authorities in force in Bengal:—It was held, by the Judicial Committee, affirming the judgment of the Sudder Court, that the Daya-bhaga Sastras must govern the descent, and not the Mitacshara, which prevailed in Midnapore.

A deed of gift of the Zemindary, to a stranger, by the widow of the Zemindar last seised, who died without issue, which gift was made with the confirmation of the Bandhus, the mother's brother's sons, the heirs:—Held, to be valid by the Daya-bhaga Sastras, as against a party claiming the succession according to the Mitacshara, as being descended, in the seventh remove, in the male line, from the common ancestor. *Rany Sfrimuty Dibeah v. Rany Koond Luta*, 4 Moore, In. App. 292.

The title to land in Poornea being in dispute, upon the question, whether the Mythila or Nuddea law was to regulate the succession, the test to be applied is, the form and character of the religious rites and ceremonies, and the usages of the family.

Where, therefore, a family of Bengali Soodra Sutgops, who had migrated, at a remote period, from the south-west of Bengal, where the Nuddea law prevailed, to the district of Poornea, where the Mythila law was in force, and had adopted and performed their religious rites and ceremonies, according to the law of Mythila,—it was held, by the Judicial Committee, affirming the decree of the Sudder Court, that the Mythila law, in such case, must govern the right of succession. *Rany Pudnavati v. Baboo Doolar Sing*, 4 Moore, In. App. 259.

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